



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU**

Civil Appeal 97 of 2008

JULIUS MUTHAURA MAGIRI

APPELLANT

VERSUS

BEATRICE NCERI KINOTI RESPONDENT

RULING

The applicant was condemned in Meru CMCC No. 642 of 2002 to pay to the respondent a decretal sum of Kshs. 285,595/=, being general and special damages for injuries sustained by the respondent and caused by the applicant's motor vehicle. Being aggrieved by the award, the applicant has appealed to this court.

In the meantime he approached the court below and sought orders to stay execution of the decree. The court below dismissed that application. The applicant has now come before this court seeking the very relief, namely, a stay of execution. He argues that should execution proceed he stands to suffer substantial loss as the respondent does not have the means to make restitution should the appeal succeed.

He has further averred that the respondent being a penniless lady will not be able to refund Kshs. 285,595/=, which is a substantial sum. The applicant has given his undertaking to comply with any order as to security as may be directed by court. The respondent through her counsel has filed grounds of opposition to the application in which it is deposed that the application is fatally defective and is an abuse of the court process; that no security has been furnished; that the appeal is an afterthought; that the respondent is a business lady with immense means.

I have duly considered the application, the grounds of opposition and submissions by both counsel. An order of stay of execution or proceedings under order 41 rule 4 of the Civil Procedure Rules will be granted on the applicant satisfying three conditions, namely:-

- (i) that there will be substantial loss to him if the order of stay is not made,
- (ii) that the application for stay is made without unreasonable delay, and
- (iii) that the applicant has offered security as may be ordered by the court.

The only grounds raised in opposition are that the applicant made a similar application to the trial court which was dismissed and secondly that the applicant has not furnished security. With regard to the first ground, Order 41 Rule 4(1) of the Civil Procedure Rules allows an applicant whose application for stay has been rejected or even allowed by the trial court to make a similar application to this court.

On the question of security, again, the provisions of rule 2(b) is clear that the applicant must only express his willingness and readiness to abide by any order that may be made by the court as to security. The grounds of opposition, for these reasons do not challenge the averments in the supporting affidavit. On the question whether the application has been brought without unreasonable delay, it was submitted by counsel for the respondent that the decree was issued on 5th March 2008 while the appeal was filed on 24th October 2008, some five (5) months later, according to counsel. But counsel for the applicant explained that the appeal is against the ruling delivered on 15th October 2008. It is clear to me from the pleadings that the appeal challenges the ruling of 15th October 2008. If that be so, and this application was filed on 24th October 2008 while bearing in mind that there was a similar application to the court below which was dismissed, I find that there has been no unreasonable delay.

The fundamental question is that of loss. An application for stay of execution aims at preserving the *status quo* pending the outcome of the appeal. The court must in that regard ensure that the subject matter is not lost before the determination of the appeal.

The applicant is apprehensive that in view of the impecunious status of the respondent, the later will not be able to refund the decretal sum in the event the appeal succeeds. The respondent, on her part argues that she is a business lady with immense means. The respondent ought to have gone further to outline those means. It is settled that in an application of this nature the evidential burden shifts to the respondent, where it is alleged that he/she has no means, to prove, on a balance of probabilities that indeed he/she has assets with which he can realize the decretal sum and refund the same should the appeal succeed.

The applicant's counsel referred to two of my own decisions on this matter, namely, **The Kenya Power & Lighting Co. Ltd V. Barbanas Gathekia Kariuki**, Civil appeal No. 122 of 2007 and **Blue Shields Insurance Co. Ltd V. George Thurania**, Misc. Application No. 3 of 2008.

The respondent has failed to discharge that burden with the result that this application is allowed in the following terms:-

- (i) That the applicant shall within thirty (30) days from the date of this order deposit the decretal sum in an interest earning account with a reputable bank in the names of his counsel and counsel for the respondent.
- (ii) That if the applicant fails to comply with (i) above execution shall proceed without further orders
- (iii) Costs will be costs in the appeal.

Dated and delivered at Meru this 10th day of June 2009.

W. OUKO

JUDGE