



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Appeal 129 of 2009

IRENE JANET EBIFA.....APPELLANT

VERSUS

RODGERS MUNONIA WANDERA.....RESPONDENT

R U L I N G

1. What is before me is a notice of motion dated 3rd April, 2009, seeking *inter alia*, an order for stay of the decree issued in Milimani CMCC No.11992 of 2003 pending the hearing and determination of the appeal filed by Irene Janet Ebifa, (hereinafter referred to as the applicant). The application is supported by an affidavit sworn by the applicant. The applicant has filed an appeal against the ruling of the lower court dismissing her application for review of the judgment delivered in the respondent's favour on 11th October, 2006 in CMCC No.11992 of 2003.
2. In the meantime, the respondent Rodgers Munonia Wandera, in an effort to execute the decree issued pursuant to the judgment of 11th October, 2006, has obtained a warrant for the arrest of the applicant. The applicant seeks a stay of execution of that warrant and a stay of execution of the decree pending the hearing of the appeal which she has filed in this court. The applicant swears that due to her weak financial position, she is not able to pay the decretal sum. She further contends that her appeal which raises serious legal issues is arguable and has high chances of success. She maintains that unless the orders sought are granted, she will suffer irreparable loss as the warrant will be executed against her and she will be denied her liberty. Her appeal will also be rendered nugatory.
3. The respondent has sworn a replying affidavit in which he maintains that the applicant by an application dated 27th July, 2007, sought an order for stay of execution and setting aside of the decree. The applicant was granted an order for stay of execution on condition that the decretal amount is deposited in court within 45 days. The applicant failed to deposit the required amount but has continued filing vexatious and frivolous applications. The respondent maintains that the applicant has failed to demonstrate any goodwill. He maintains that the appeal filed by the applicant is frivolous and does not raise any arguable grounds.
4. Counsel for the parties agreed to have the appeal disposed off by way of submissions. Each has therefore filed written submissions in favour of his client.
5. For the applicant, it was maintained that the appeal has high chances of success and that the applicant is likely to suffer substantial loss if the orders sought are not granted, as she does not have the decretal

sum. It was submitted that the respondent would not suffer any prejudice if the orders sought are granted. It was therefore in the interest of justice that the orders sought be granted. Counsel argued that the applicant had satisfied all the conditions for granting an order of stay of execution.

6. For the respondent it was submitted that the applicant by her conduct in the lower court had shown that she was not deserving of the orders sought as she had failed to comply with the order for stay of execution that she was given in the lower court. Counsel further submitted that the applicant had brought another application for stay of execution which was dismissed as the previous application had neither been served nor prosecuted. Counsel maintained that the applicant has not provided any evidence to demonstrate her financial position nor has she provided any security to justify the granting of the orders sought.

7. I have carefully considered the application, the affidavit in support, submissions filed by counsel, and the authorities cited. An attempt was made by both parties to delve into the merits of the applicant's appeal. However, at this stage, it would be premature for this court to determine the merits or otherwise of the pending appeal. What is material is that an appeal has been filed.

8. Under Order XLI Rule 4(2) of the Civil Procedure Rules, an order for stay of execution pending appeal can only issue on the following conditions:

- (i) Where the court is satisfied that substantial loss will result to the applicant unless the order of stay of execution is issued;
- (ii) That the application has been made without unreasonable delay;
- (iii) That the applicant has provided or is ready to provide such security as the court may order for the due performance of the decree.

9. In this case, the applicant contends that she will suffer substantial loss unless the orders sought are issued as the warrant of arrest which has already been issued against her will be executed and she will lose her liberty. The applicant explains that she is not able to pay the decretal sum due to her weak financial position.

10. As observed by the respondent's counsel, the applicant has not offered any evidence to demonstrate her financial position. It is not enough merely for a litigant to maintain that he is not able to pay the decretal sum. Indeed, that was an issue which the applicant ought to have taken up before the lower court during the hearing of the notice to show cause before the warrant of arrest was issued.

11. Moreover, the applicant has not shown any willingness to provide any security for the due performance of the decree. She failed to deposit the decretal sum in court as ordered by the lower Court. She has not offered any alternative security to this Court. The applicant has therefore not demonstrated any seriousness on her part to provide any security. The judgment subject of the decree was issued more than 2½ years ago. This court has a responsibility to balance the interests of both parties. There is no reason why this court should continue to delay the respondent from reaping the fruits of his judgment. I find no merit in this application and do therefore dismiss it with costs.

Dated and delivered this 20th day of July, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Murugu for the appellant/applicant

Mrs. Ndungu for the respondent