



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

Civil Appeal 218 of 2009

JAPHETH KAKAI KUTELI..... APPELLANT/APPLICANT

VERSUS

KENYA PLANTERS

CO-OPERATIVE UNION.....RESPONDENT

R U L I N G

1. By a Notice of Motion dated 13th June 2009 the applicant Japheth Kakai Kuteli, has moved the Court for an order of stay of execution of the decree in Milimani CMCC No. 11790 of 2003, pending the hearing and determination of the appeal which the applicant has lodged in this Court against the judgment of the lower Court subject of the decree.
2. The application is supported by an affidavit sworn by Lydia W. Gutu an advocate with the Kenya Alliance Insurance Ltd. who are alleged to be the insurers of the applicant's motor vehicle, KAL 979 B which was involved in an accident with motor vehicle KAE 499Y. The accident was the subject of the suit in the lower Court in which judgment was issued in favour of the respondent, Kenya Planters Co-operative Union for sum of KShs.1,924,323/= plus costs and interests. The applicants are dissatisfied with that judgment and have filed an appeal.
3. Lydia Gutu deponed that the only fair way of protecting the interests of the parties is to have the decretal sum deposited in the joint interest earning account in a reputable bank in Nairobi in the joint names of the parties' advocates. She swears that it may be extremely difficult to recover money from the respondents or its insurers if the money is paid out.
4. The respondent has filed grounds of opposition contending *inter alia* that the application lacks merits, is fatally defective, is frivolous and vexatious, made in bad taste, and ought to be struck off. The respondents further contend that the applicant has not come to this Court with clean hands and that he is guilty of inordinate delay and laches. Pursuant to orders made by the Court on the 18th June, 2009 the applicant has deposited a sum of Kshs.2,500,000/= in Court as security.
5. Mr. Masinde who appeared for the applicant submitted that the applicant had complied with all the conditions for granting the orders sought. He maintained that the respondent's financial status was not steady and urged the Court to grant the orders sought. Mr. Masinde relied on *HCCA No. 135 of 2007, Peter Wambugu Kariuki vs. Savings and Loans (K) Ltd. & Another.*

6. Mr. Munge who appeared for the respondent urged the Court to find the affidavit of Lydia W. Gutu sworn in support of the application incompetent, as she had not stated that she had authority to swear the affidavit. Mr. Munge maintained that the applicant had not shown in which way he will be exposed to financial loss. Mr. Munge relied on several authorities availed to the Court. He made special reference to ***HCCC 1735 of 2000 Commercial Bank Ltd. vs. Paradison Court Limited & Others.***

7. I have carefully considered the application, the affidavit in support and in reply, the annexures and all the submissions made by counsel. Noting that the applicant has already deposited the sum of Kshs.2,500,000/= in Court as security, the interests of the respondents have been taken care of. It is therefore, only fair and just that the Court balances the scales of justice by issuing an order of stay of execution pending appeal to protect the interests of the applicant.

8. Accordingly, I will issue an order for stay of execution pending appeal on the following conditions:

(i) That the sum of Kshs.2,500,000/= deposited in Court by the applicant shall be deposited into an interest earning account with the joint names of the parties' counsel within 10 days from the date of release of the money from the Court.

(ii) That the applicant shall file and serve a record of appeal within 90 days from the date hereof.

(iii) That the applicant shall take all necessary action to facilitate speedy disposal of this appeal.

(iv) In the event that the applicant fails to comply with conditions (i) or (ii) above, the order for stay of execution shall be discharged.

(v) If the appeal is not disposed of within 12 months from today, the order for stay of execution pending appeal shall be discharged unless otherwise extended by the Court.

Those shall be the orders of this Court.

Dated and delivered this 14th day of July, 2009.

H.M. OKWENGU

JUDGE

In the presence of:

Masinde for appellant/applicant

Anyoka holding brief for Munge for the respondent