REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Civil Appeal 92 of 2009

ANN WANJIRU WAIGWA ……. 1ST APPELLANT/APPLICANT

DAVID KINYUA MURIUKI ..... 2ND APPELLANT/APPLICANT

VERSUS

JOSEPH KIRAGU KIBARUA …….....RESPONDENT

(Appeal from the Judgment of the Principal Magistrate's Court at Karatina in Civil Case No. 153 of 2005 dated 29th April 2009 by Mrs. Mbugua – P.M.)

R U L I N G

In this application expressed to be made under order XLI rule 4 of the civil procedure rules, section 3A of the Civil Procedure Act and all other enabling provisions of the law, the appellants/applicants seek to stay the execution of the judgment dated 29th April 2009 delivered by the Principal Magistrate, **Mrs. Mbugua** in Principal Magistrate's Court, Karatina in PMCC No. 153 of 2005 pending the hearing and determination of this appeal. By that judgment, the Principal Magistrate ordered the applicants to pay the respondent special damages of Kshs.419,500/=. Since then the applicants have lodged the instant appeal and they are persuaded that it is arguable, meritorious with high chances of success. They are however apprehensive that the respondent may proceed with the execution of the decree which may cause them substantial loss should stay of execution not be granted. They had brought the instant application without unreasonable delay. Finally, the applicants are willing to furnish such suitable security for the due performance of the decree as may be ultimately binding upon them pursuant to the outcome of the appeal.

As expected the application was opposed. Through a replying affidavit dated 24th September 2009, the respondent deponed where relevant that the application had been brought after inordinate delay in that judgment was delivered on 29th April 2009 and this application was filed on 31st July 2009, a delay of about three months. That the appeal is an afterthought and was merely filed to thwart execution proceedings that had been commenced. That should stay be granted then the applicants should undertake to deposit the decretal sum now amounting to Kshs.634,415/= in a joint interest earning account in favour of the respective counsel on record within a limited period as may be ordered by court.

When the application came before me for interpartes hearing, counsels on record agreed that the same be disposed of by way of affidavit evidence on record. I have since carefully read the pleadings herein and authorities cited.

It is trite law that for applicants to succeed in an application of these nature, they must demonstrate to the satisfaction of this court that substantial loss will ensue if the order of stay is not granted, that they have filed this application without undue or inordinate delay; and that they are willing and able to give such security as is ordered by the court for the due performance of the decree. See generally, **Elite Studios Ltd & Another v/s International Hotels Limited (2005) eKLR** and **Tropical Commodities Suppliers Ltd & Others v/s International Credit Bank Ltd (in liquidation) (2004) 2 E.A. 331**. The onus is normally on the applicant to satisfy all the above conditions. Have the applicants done so in the

circumstances of this case? I think so.

The applicants have averred that substantive loss may result if execution proceeds in as much as the appeal would be rendered nugatory in the process. That they stand to suffer substantial loss as they are unaware of the Respondent's financial means and apprehensive that if the decretal amount is paid to him the same may never be recovered if the appeal is eventually successful.

However I need to state as a general proposition that an appeal arising out of a money decree would rarely be rendered nugatory. The applicants' fears are however founded on the fact that the respondent may not be in a position to refund the decretal sum in the event that they are successful in the appeal. That fear is not really unfounded as the respondent had no answer to this bold statement. Had he in his replying affidavit deponed that he was a man of means and would be in a position to refund the decretal sum in the event of the appeal succeeding, I would have perhaps looked at the application rather differently. It is of course the paramount duty of the court to which an application for stay of execution pending an appeal is made to see to it that the appeal, if successful is not rendered nugatory. The court must also consider the fact that a successful litigant should not be kept away from the fruits of his litigation unnecessarily. At the end of the day therefore it is a delicate balancing act.

Nonetheless the applicants' difficulties in recouping their money is only one consideration. The other consideration is whether the loss, if any, arising from those difficulties would be substantial. As correctly observed by **Ogola J** in Tropical Commodity Suppliers Ltd (supra) **"..... Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal....."** Given the fact that the respondent has not come out boldly to proclaim his ability to refund the amount in the event of the appeal succeeding, there can be no doubt that the applicants are likely to suffer substantial loss if execution of the decree is not stayed pending disposal of the appeal. The decretal sum involved is quite substantial and if they are forced to pay the same on the pain of execution and the respondent is unable to refund the same in the event of successful appeal, the loss would not be nominal.

The respondent appreciates this fact and that is what may have informed his decision not to object to a conditional stay. He is prepared to have the stay granted on condition that the entire decretal sum is deposited in a joint interest earning account to be run by their respective counsel on record. That proposal appears to me to be reasonable.

As regards the criterion of delay, I am satisfied that the applicants have been timeous in filing and prosecuting the application. Judgment sought to be impugned in this appeal was delivered on 29th April 2009. On 8th June 2009 the applicants applied for proceedings. Thereafter they sought and obtained from this court leave to file appeal out of time on 20th July 2009. And in the same month filed the appeal and the instant application. That being the scenario one would comfortably say that the application has been made and prosecuted without undue and unreasonable delay.

That being my view of the application, I would allow it on condition however that the applicants shall within the next twenty one (21) days from the date hereof deposit the entire decretal sum in an interest earning account to be operated jointly by the advocates of the applicants and those of the respondents failing which this application shall stand dismissed with costs to the respondent.

Dated and delivered at Nyeri this 29th day of October 2009

M. S. A. MAKHANDIA

JUDGE