

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU Civil Appeal 8 of 2009

LYDIA KANANU JOSHUA.....APPELLANT

VERSUS

PRISCILLA MIKUARIRESPONDENT

RULING

The appellant has filed a notice of motion dated 9th February 2001. By that application, she seeks an order of stay of execution of the decree in Meru CMCC No. 333 of 2008 pending the hearing and determination of this appeal. In the affidavit in support of that application, she stated that the respondent claim against her is Kshs. 48,480/=. Further, she stated that she would suffer substantial loss if the execution of that decree was not stayed. She offered security for the due performance of that decree. The appellant deponed that the respondent is a lady of straw and would therefore not be able to refund the decretal amount if the appeal did succeed. The appellant did not attach the pleadings of the lower court nor the decree. It therefore was rather a surprise to read the respondents replying affidavit where it was stated that the amount being claimed from the appellant is in respect of the costs of the lower court case being Kshs. 6,625/=. To that end, the respondent attached a certificate of costs of the lower court of the very case the subject of this appeal. The respondent refuted the claim that she would be unable to refund the amount of Kshs. 6,625/= if the appeal was successful. The appellant stated that she would suffer substantial loss if stay was not granted because the respondent would not be able to refund the decretal amount if the appeal was successful. The appellant did not respond to the contradictory amount stated by the respondent as decretal amount. The Court of Appeal in the case of Civil Application No. Nai. 238 of 2005 **National Industrial Credit Bank Ltd and Aquina Francis Wasike and another** stated:-

“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge see for example Section 112 of the Evidence Act chapter 80 Laws of Kenya.”

But does the evidential burden fall on the respondent? I have considered the application by the appellant. There is doubt in my mind the amount of the decretal sum due at the lower court. Further, the appellant in failing to attach pleadings of the lower court left this court unable to determine the probable success of her appeal. The appellant in view failed to shift the burden of proof on to respondent. Order XLI Rule 4 (2) of the Civil Procedure Rules provides the conditions upon which the court should consider stay of execution pending appeal. That rule is in the following terms:-

“4(2). No order for stay of execution shall be made under subrule (1) unless:-

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

The appellant argued that she would suffer substantial loss if stay was not granted and her appeal did succeed. There is as stated before a discrepancy in respect of the amount payable by the appellant. The appellant stated in her affidavit that the amount she is supposed to pay is Kshs. 48,480/=. The respondent

contradicted that statement by saying that the amount payable is in respect of costs awarded to her being Kshs. 6,625/=. The appellant did not respond to that replying affidavit. And because the respondent annexed a certificate of costs, her figure is more reliable and believable than that one of the appellant. The respondent having said that she is capable of refunding the decretal amount if the appeal does succeed I can find no basis to grant a stay of execution for such a paltry sum. In any case what the appellant seems to be seeking is stay in respect of costs. It seems to be the case that the respondent was awarded costs when the appellant's case in the lower court was dismissed. The Court of Appeal in the case of **Francis Kabaa Vrs. Nancy Wambui & Ano.** Civil Application No. 298 of 1996 (113/96 UR) in respect of an application for stay relating to costs had this to say:-

“In any case, even if that were so, the appellant, if he succeeds in his appeal, would be refunded his costs. Furthermore, we do not think that stay can be granted in respect of costs.”

The respondent having been brought to court by the lower court's action of the appellant and having successfully defended that case cannot be stopped from claiming the costs of such a suit. In my view it would not be just. The amount being claimed in any case can in my view be refunded if the appeal is successful. I therefore hereby dismiss the appellant's application dated 9th February 2009 with costs of the application being awarded to the respondent. The order of stay previously granted in this matter is hereby vacated.

Dated and delivered at Meru this 29th day of October 2009.

MARY KASANGO

JUDGE