



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Appeal 499 of 2009**

**CHARLES MUTHAMIA GIKUNDI..... 1<sup>ST</sup> APPELLANT**

**MARY GIKUNDI.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**HELENA WANGECI NJOROGE.....RESPONDENT**

**RULING**

1. Charles Muthamia Gikundi and Mary Gikundi, hereinafter referred to as the applicants have appealed against the ruling delivered against them in CMCC No. 1991 of 2008 Milimani. The applicants have now moved this Court for an order of stay of execution pending the hearing and determination of the appeal.

2. The application is anchored on the following grounds:

(a) The applicants have instituted an appeal against the ruling of the Honourable E.N. Maina (Miss) delivered on 10<sup>th</sup> August, 2009 in Milimani CMCC No.1991 of 2008 wherein their defence was struck out in a claim for Kshs.34,925/=.

(b) The applicants are aggrieved by the said ruling and have instituted an arguable appeal with high chances of success.

(c) No prejudice will be occasioned to the respondent should the order of stay be granted.

(d) The applicants are ready and/or willing to comply with any terms and/or conditions that this Honourable Court may deem fit to impose.

(e) The appeal will be rendered nugatory should stay of execution not be granted.

3. Charles Muthamia Gikundi has also sworn an affidavit in support of the application. Gikundi depones *inter alia*, that the trial Magistrate failed to give any serious considerations to the replying affidavit which the applicants filed in the lower Court in response to the application to strike out their defence. The applicants maintain that they will suffer

substantial loss unless the orders sought are issued.

4. I have carefully considered this application. Under Order XLI Rule 4(2) of the Civil Procedure Rules, an order for stay of execution pending appeal can only be granted 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.

5. The ruling sought to be stayed was issued on the 10<sup>th</sup> August, 2009. Although the Notice of Motion for stay of execution pending appeal is dated 9<sup>th</sup> September, 2009, the same was not filed until 22<sup>nd</sup> September, 2009, which is about 6 weeks after delivery of the ruling sought to be stayed. The applicants have not explained this delay in filing their application.

6. Secondly, the ruling of the trial Magistrate was a ruling, striking out the applicants' defence. That order is not one capable of execution. The striking out of the defence could only effectively have been stayed by an order staying the proceedings of the lower Court pending the hearing of their appeal. Nevertheless that is not the order that the applicants have sought.

7. Thirdly, the claim as per a copy of the plaint which has been annexed to the applicants' supporting affidavit is a claim for Kshs.34,925/=. Although the applicants claim that they will suffer substantial loss unless the orders of stay of execution are granted, the applicants have not demonstrated this. I fail to understand how payment of Kshs.34,925/= can cause substantial loss. Moreover, the applicants have not alleged or demonstrated that the respondent will not be able to refund the sum of Kshs.34,925/= if the applicant's appeal is successful.

8. For the above reasons, I find that the applicants have failed to satisfy the conditions upon which an order of stay of execution pending appeal can be granted. The application dated 9<sup>th</sup> September, 2009 is accordingly dismissed with costs.

**Dated and delivered at Nairobi this 27<sup>th</sup> day of October, 2009.**

**H.M. OKWENGU**

**JUDGE**

In the presence of:

Mbegi for the appellant/applicant

Githinji for the respondent

Eric, court clerk

