



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**  
**Civil Appeal 185 of 2006**

**KENNEDY NYAMAI ..... APPELLANT**

**VERSUS**

**KIOKO NGONE ..... RESPONDENT**

*(Being an application for stay of execution in CMCC No. 372 of 2004 pending hearing  
and determination of appeal.)*

**RULING OF THE COURT**

1. The appellant/applicant seeks an order of this court staying proceedings and/or execution in Mks CMCC No. 374 of 2004 pending inter-parte hearing of this application. The Notice of Motion, brought under Order 41 Rule 4 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act was filed under Certificate of Urgency and is premised on five grounds on the face thereof, namely that:-

- a. **The** Respondent filed CMCC No. 374 of 2004(sic) against the applicant seeking damages arising out of a Road Traffic Accident.
- b. **The** Applicant filed an application on 2<sup>nd</sup> October 2006 seeking leave to issue a third party notice.
- c. **That** on 3<sup>rd</sup> October 2006 the Applicant sought to have the said application heard before hearing of the main suit in a bid to have all issues determined which application was disallowed and the suit proceeded.
- d. **The** applicant filed the current appeal against the order of 3<sup>rd</sup> October 2006 on 3<sup>rd</sup> November 2006 which appeal is yet to be heard.
- e. **The** Respondent has caused a warrant of arrest to be issued against the applicant towards execution.

2. The affidavit in support of the application was sworn by KENNEDY NYAMAI who has deponed that the ex-parte judgment was set aside by consent on 29/05/2006 and defence filed on 13/06/2006. That by the said defence liability for the accident was attributed to the 3<sup>rd</sup> party. He has also deponed that on 2/10/2006, his advocate filed an application for leave to issue a 3<sup>rd</sup> party notice as per annexure "KN2", but that when the matter came up for hearing on 3/10/2006, the applicant's advocate, Mr Mbindyo sought to adjourn the main suit pending the hearing and determination of the 3<sup>rd</sup> Party Notice application. The deponent also says that the application for adjournment was refused and the suit ordered to proceed. He also says that the present appeal is against the order of 3/10/2006 refusing the application for adjournment; that the said dismissal order denied the applicant his right to be heard on the issues in dispute. That as a consequence of the said orders, the respondent now wants the applicant arrested in

execution of the decree in CMCC No. 372 of 2004 although the appeal is still pending.

3. At the hearing of the application, Mr Wambua for the respondent reiterated the contents of the Replying Affidavit and gave a synopsis of what transpired before the order of dismissal dated 3/10/2006 was issued by the court. In that Replying Affidavit sworn by KIOKO NGONE, the respondent, it is deponed that the appellant/applicant has conducted himself in a manner that is prejudicial to the administration of justice and that as such he does not deserve the orders sought; that on 15/07/2005, the respondent obtained *ex parte* judgment and though he later consented to its being set aside, it became clear to him that all that the appellant/applicant wanted was to obstruct the respondent from enjoying the fruits of that judgment. That on 13/07/2006, the suit was adjourned and stood over generally at the request of the applicant who intimated to the court that he (applicant) wanted to take out a 3<sup>rd</sup> Party Notice; that the suit was later set down for hearing on 3/10/2006 and the appellant/applicant was duly notified on 21/08/2006; that despite the said hearing notice, the applicant only filed his 3<sup>rd</sup> Party Notice application on 2/10/2006 and that on 3/10/2007, the applicant's advocate could not give any reason for the delay in filing the 3<sup>rd</sup> Party Notice application and that consequently, the court rejected the applicant's application for adjournment on account of seeking time to hear and determine the 3<sup>rd</sup> Party Notice application.

4. The respondent has also deponed that after the applicant's application for adjournment was refused, Mr Mbindyo who appeared for the applicant walked out of the court thus paving the way for the case against the applicant to proceed *ex parte*. The respondent further says that though he got judgment against the applicant, he has been unable to enjoy the fruits of the same as the applicant continues to threaten him that he (respondent) will get nowhere with the case. The respondent urges this court not to grant the applicant the orders sought because the applicant has been indolent in pursuing his rights. The respondent is apprehensive that the applicant might make his threats come true because he (applicant) is a police officer. On this point, the court would like to say that whether one is a police officer or not, all persons are equal before the law and that this application shall be decided in accordance with the law.

5. It is to be noted that no Supplementary Affidavit was filed by the applicant in answer to the averments of the Replying Affidavit, but Mr Makau who appeared for the applicant replied that it was not true that Mr Mbindyo advocate walked out of court when he (Mbindyo) failed to persuade the court to grant him an adjournment of the main suit. Mr Makau also replied that the allegations against the applicant that by virtue of his (applicant's) position, he would frustrate the respondent's efforts to realize the fruits of his judgment are not true. Mr Makau finally submitted that if the stay order is not granted, the applicant will have been condemned unheard.

6. This application is premised on Order 41 Rule 4 (2) of the Civil Procedure Rules which provides that an application for stay of execution shall not be granted 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.

7. The issue that arises for determination is whether the applicant has fulfilled all the above conditions so as to land benefit from the discretion of this court. In my considered view, I do not think that the applicant has done so. Starting with the last condition touching on furnishing of security, it is to be noted that the applicant has not even mentioned anything to do with security. All that the applicant has said is that he fears to be arrested and that his appeal has overwhelming chances of success. In applications of this nature, the court applies the provisions of Order 41 Rule 4 (2) of the Civil Procedure Rules remembering always that an applicant should not be denied his right to appeal. This court also considers the loss likely to be suffered by the applicant, the timeliness of filing the application and the offer for security. As the applicant has made no offer for security his application must fail.

8. Did the applicant file his present application without undue delay? It is not in dispute that the dismissal order which is the subject matter of the appeal herein was made on 3/10/2006. It is also not in

dispute that the present application was drawn on 11/07/2007 and filed in court on 12/07/2007. In my considered view, I do not think that the applicant can be said to have brought the application without undue delay. As stated by the respondent, the applicant was indolent and since equity does not aid the indolent, the applicant has deprived himself of the benefit of the discretion of this honourable court. In any event, the applicant has not explained why it took him 10 months to bring the present application. For this reason, the application must fail.

9. Finally, I am not persuaded that the applicant will suffer any substantial loss if the order of stay is not granted. I find and hold that the applicant has the opportunity to pursue any 3<sup>rd</sup> Party through other avenues should the respondent execute against him. The applicant's application did not clearly specify whether the stay order sought was to remain in force until hearing of the application or until hearing of the application or until the hearing of the appeal. It would seem to me that the application was brought to court as an afterthought and the court accordingly rejects the same.

10. In the result, the whole of the applicant's application dated 11/07/2007 and filed in court on the same day fails and it is dismissed in its entirety with costs to the respondent.

11. It is so ordered.

Dated and delivered at Machakos this 29<sup>th</sup> day of January, 2008.

**R.N. SITATI**

**JUDGE**