



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS**

Civil Appeal 137 of 2007

PETER MULEI APPELLANT

VERSUS

KIOKO MUSYOKA (Suing through his next Friend)

DAVID MUSYOKA MUKUMBU RESPONDENT

(Being an application for stay of Execution)

RULING OF THE COURT

1. The application before court is the Notice of Motion dated 17/07/2007 and filed in court on 25/07/2007 under Certificate of Urgency of the same date. The reasons for the urgency were that the respondent had obtained judgment against which the appellant had appealed, but that in the meantime, the interim 30 day stay allowed by the lower court was due to expire on 20/07/2007, thus making it highly likely that the respondent would proceed with execution immediately thereafter. That if the respondent were to proceed with execution, the applicant was likely to suffer substantial pecuniary loss and that such an eventuality on the part of the respondent would render the whole appeal process a nullity.

2. The application is expressed to be brought under Order 41 Rule 4, Order 50 Rule 1 of the Civil Procedure Rules (CPR) and Section 3A of the Civil Procedure Act, Cap 21 Laws of Kenya and all the enabling provisions of the law. The application seeks one substantive order namely stay of execution of the judgment of 20/06/2007 in Machakos CMCC No. 459 of 2006 and all consequential orders pending the hearing and determination of the appeal herein. The application is premised on grounds that:-

- a. substantial financial loss will result to the appellant unless the orders sought are granted;
- b. the applicant is ready and willing to furnish security for the performance of the decree as may be ultimately binding on him;
- c. in the event that the stay sought is not granted, the appeal lodged will be rendered nugatory as the Respondent is not in a position to resituate to the appellant, if he succeeds on appeal;
- d. the appeal lodged is meritorious and has high chances of success.

3. The application is also supported by the sworn affidavit of REBECCA C OPATI – JUMA, a legal officer of Lion of Kenya Insurance Co. Ltd, dated 17/07/2007. She says that following the consent judgment in which the defendant/applicant was found 85% liable for the accident and special damages of Kshs.5,300/=, the plaintiff was awarded Kshs.420,000/= as general damages. She says that the defendant

is aggrieved by such an award and has subsequently appealed against it. She further says that on advice from the applicant's advocates, she is aware that the respondent does not have any known means of income from which he could pay back the decretal sum should the respondent be allowed to execute and that in the event that this appeal succeeds then the applicant will be put to great financial loss. Finally, the deponent says that the Lion of Kenya Insurance Co. Ltd is ready and willing to furnish such security as may be ordered by the court for the due performance of the decree.

4. Mrs Juma has annexed to her affidavit a number of documents, among them copies of pleadings in the lower court, and the defendant's submissions in the lower court plus a copy of a letter dated 11/07/2007 by Macharia Mwangi & Njeru Advocates requesting for certified copies of proceedings and judgment.

5. The application is opposed. The Replying Affidavit is sworn by DAVID MUSYOKA MUKUNZU dated 18/08/2007 in which he says that the applicant's application is made in bad faith and is only intended to deny the respondent the fruits of his lawfully obtained judgment. He also says that he is a man of substance and that if the appeal herein succeeds, he is capable of repaying the full decretal sum.

6. On the 26/07/2007, the court certified the application urgent and granted the applicant an interim order of stay pending inter partes hearing. When the application came up for hearing before me, Miss Gutu appeared for the applicant while Mr A.K. Mutua appeared for the respondent. Both counsels made their representations, with Miss Gutu citing the case of BUTT vs RENT RESTRICTION TRIBUNAL (1982) KLR 417 in support of her arguments. In the case, the Court of Appeal set out the factors to be taken into consideration when granting stay of execution and held that:-

- a. The power of the court to grant or refuse an application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
- b. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.
- c. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
- d. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and unique requirements.
- e. The court in exercising its powers under Order XLI Rule 4 (2) (b) of the Civil procedure Rules can order security upon application by either party or on its own motion.

7. Mr Mutua for the respondent thinks that the applicant's application lacks merit and that the applicant has not shown what substantial loss he is likely to suffer should the order sought not be granted. He has also questioned the swearing of the Supporting Affidavit by an officer of the applicant's insurer instead of the applicant himself. He also asked the court to strike out the application as being fatally defective for failure to include footnotes at the bottom thereof. Mr Mutua, cited a number of helpful authorities in support of the respondent's contention that the applicant is not deserving of the order of stay.

8. Regarding the provisions of Order 50 rule 15 (2), Mr Mutua urged the court to find that the applicant's application cannot stand for failure to comply with those provisions. Order 50 Rule 15 (2) reads as follows:-

"15 (2) Every motion and summons shall bear at the foot the words-

"If any party served does not appear at the time and place above mentioned such order will be made and proceedings taken as the court may think just and expedient."

9. Mr Mutua cited the case of MARY MUTSOTSO vs MAWINGO BUS SERVICE – H.C.C.C 378 of 1994 (Kisumu) in which the court struck out the applicant’s application for failing to comply with the above rule, and also on the ground that the affidavit in support of the application was also defective.

10. In reply, Miss Gutu submitted that Order 50 Rule 12 provides an escape valve for the applicant, but in my view this rule is not applicable since the complaint is not that the applicant failed to state the order, rule or other statutory provision under or by virtue of which the application is made, but rather that he failed to comply with Order 50 Rule 15 (2). Perhaps the more relevant rule would be Order 6 Rule 12 which bars the raising of any technical objection to any pleading on the ground of any want of form. Miss Gutu thinks that Order 50 Rule 15 (2) deals with form only and that want of such form does not go to the root of the application.

11. I think I do agree with Miss Gutu on this point and do find and hold that the applicant’s failure to comply with Order 50 Rule 15 (2) of the Civil Procedure Rules is a mere want of form that is excusable under Order 6 Rule 12.

12. I now proceed to consider whether the applicant has demonstrated that he ought to be granted the order of stay. Order 41 Rule 4 (2) provides:-

“4 (2) No order for stay of execution shall be made under sub-rule (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.”

13. The applicant says that if the respondent is paid the whole of Kshs.420,000/= plus specials, the respondent is unlikely to refund the same should the appeal succeed. Though the respondent has not demonstrated by evidence (though I believe he is under no obligation to do so) that he is financially sound, he says he is capable of making a refund. I have considered the pleadings. I have also considered the submissions and it seems to me that the respondent may not be able to refund the decretal sum if this appeal succeeds. To my mind, this may be the only reason why the applicant’s appeal may be rendered nugatory and result into a loss to the applicant if the stay order is not granted. The applicant has offered to provide such security as this court may order. I also note that from the submissions in the lower court, the applicant proposed a sum of Kshs.100,000/= in general damages. In the circumstances, I allow this application upon the following terms:-

a. There shall be a stay of execution of the judgment of 20/06/2007 in Machakos CMCC No. 459 of 2006 and all consequential orders pending the hearing and determination of the appeal herein on condition:-

i. that the applicant pays to the respondent the sum of Kshs. 100,000/= out of the 420,000/= general damages subject to liability within fourteen (14) days from the date of this ruling.

ii. the balance of the decretal sum of Kshs.320,000/= plus the Kshs. 5,300/= (also subject to liability) to be deposited in an interest earning account to be jointly operated in the names of the two firms of advocates representing the parties herein. The deposit to be made within the next fourteen (14) days from today’s date.

b. In default of (a) above, execution to issue.

c. Costs of the application shall be paid to the respondent.

14. Orders accordingly.

Dated and delivered at Machakos this 29th day of January, 2008.

R.N. SITATI

JUDGE