



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

Civil Appeal 206 of 2007

1. SAMUEL MANYUNZA

2. BENARD MANYUNZA APPELLANTS

VERSUS

NASON KIMONDIU RESPONDENT

RULING

1. The applicants in this matter, by their Notice of Motion dated 21/12/008 seek orders that the execution of the judgment and decree in Machakos **SPMCC No. 1038/2001** be stayed pending the hearing and determination of the Appeal herein. The application is premised on Order XLI Rule 4 of the Civil Procedure Rules and is based on the following grounds:-

- a. **THAT** the Applicants'/Appellants' through their Advocates herein filed a Memorandum of Appeal on 28/11/2007 in the High court of Kenya at Machakos as against the whole of the judgment delivered by the Resident Magistrate on 5/11/2007 in SPMCC 1038 OF 2001.
- b. **THAT** the respondents have through Whitestone Auctioneers moved to proclaim the Applicant's goods on 21/1/2008 despite a pending appeal and if attachment ensues the appellants will suffer irreparably and their appeal will be rendered nugatory.
- c. **THAT** the Appellants/Applicants have an arguable Appeal with a high probability of success.
- d. **THAT** if the said stay of execution is not granted, the object of this application and of the intended appeal will be defeated and rendered nugatory.
- e. **THAT** unless this application is granted, the Respondent threatens to levy execution against the Applicants.
- f. **THAT** the applicants'/Appellants' filed an application for stay of execution in the Resident Magistrate's court which delivered judgment but the same was dismissed with costs.
- g. **THAT** the Appellant/Applicant are ready and willing to furnish such reasonable security as this Honourable Court may deem fit to order to be so deposited in a joint escrow account to the order of both the Applicants' and the Respondent's Advocates.
- h. **THAT** this application has been made without any unreasonable delay.

i. **THAT** this application will not occasion any prejudice to the Respondent.

j. **THAT** this application sought, be granted in the interests of justice and fairness.

2. In the Supporting Affidavit of Bernard Muteti Manyunza sworn on 21/1/2008, it is deponed that judgment was entered in favour of the Respondent, Wason Kimondiu on 5/11/2007 and the Applicants being aggrieved filed their Appeal on 22/11/2007 and when execution was threatened, instituted the present Application. It is further deponed that execution would render the Appeal nugatory and that the Applicants will suffer substantial loss. Further, that the Application was brought forth expeditiously and no delay was exhibited at all.

3. The Respondent through counsel filed grounds of opposition on 25/1/2008 and the simple point raised in them is that the Application is frivolous and that the Applicant has failed to meet the conditions set out in Order XLI Rule 4 of the Civil Procedure Rules. Counsel for the Respondent relies on the case of Jethwa vs Shah t/a Supreme Styles (1984) KLR 198 to advance the point that where no evidence is given to the Respondent's impecunious nature, the issue would not affect the court's final decision on the stay of execution.

4. I note that the present Application was only filed on 22/1/2008 whereas judgment was delivered on 8/11/2007. The reason for doing so, it is explained is because there was pending before the lower court a Ruling in stay of execution and the same was only delivered on 14/1/2008. The Applicant on being denied these orders in the lower court then moved to this court on 22/1/2008 some 8 days later. I agree that since the Appeal was indeed filed 2 weeks after the judgment the Applicants cannot be said to have been indolent.

5. Regarding substantial loss to be suffered if the stay of execution is not granted, the Applicants have merely deponed at paragraph 9 of the Supporting Affidavit that "...in the event the said orders are not granted, the Applicants would suffer irreparable and irredeemable loss." What loss? Neither in the Affidavit nor in submissions by counsel have been shown or pointed towards the alleged losses. I say this with respect because Order XLI Rule 4 (2) of the Civil Procedure Rules provides as follows:-

(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.

6. The Rule is clear that no order of stay of execution can be issued unless the party so applying satisfies the court that substantial loss may result if the order is not given. Not one word has been uttered nor a statement made to indicate what substantial loss may be occasioned to the Applicants. It is not enough to quote the words and fail to prove it. Whether or not the Appeal would be rendered nugatory is a different matter altogether because that by itself cannot amount to substantial loss.

7. Having so said however, the Applicants have clearly offered to abide by any conditions that the court may order. I note that the suit in the lower court was based on an accident claim and I have seen the challenge made to the entire judgment. On the other hand is the Respondent's claim to a judgment lawfully given? Each party has a right to be heard again.

8. In spite of any misgivings about the Application, discretion would tilt my mind to making the following orders:-

9. Let the Applicants deposit the entire decretal sum in court within the next 48 hours. Failure to do so would mean that the execution would proceed and no further extension of time can be granted.

10. In the meantime, stay of execution is granted for the above period only and to be confirmed pending appeal if there is strict compliance.

11. Costs whichever way, shall abide the appeal.

12. Orders accordingly.

Dated and delivered at Machakos this 20th day of February, 2008

ISAAC LENAOLA

JUDGE