

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MERU

Civil Suit 78 of 2006

GATOBU M'IBUTU KAROTHO.....PLAINTIFF

VERSUS

CHRISTOPHER MURITHIDEFENDANT

R U L I N G

This is an application for stay pending appeal. Judgement against the applicant in the sum of Kshs. 450,000/= was passed by the lower court on 19th July 2006. In execution of the decree a notification of sale of the applicant's land No. 691/Nyambene/Antubetwe Njohne has been issued. It is said that the value of that property is approximately Kshs. 5.8m. The applicant is apprehensive that should the property be sold he stands to suffer irreparable loss as he has appealed against the judgement. The applicant further argues that the respondent will not be in a position to refund the decretal sum should the same be paid over to him and in the event the appeal succeeds. The applicant has given an undertaking to provide security in the form of a title deed.

The respondent has filed a replying affidavit in which he contends that the application is frivolous and is an abuse of the process of the court. He maintains that he is capable of refunding the decretal sum since he was able to pay to the applicant Kshs. 150,000/= in the agreement in dispute.

It is now settled that for an applicant to succeed in an application under Order 41 rule 2 of the Civil Procedure Rules he must demonstrate that substantial loss may result to him if the order of stay is not made. He must also show that the application has been brought without undue delay. Finally, the applicant must give an undertaking as to security which the court may order.

The respondent has a money decree. It is also now settled that in certain cases, an appeal against a money decree, if successful, may be rendered nugatory. In such cases the court will grant a stay of execution, balancing two parallel positions, namely, the right of the party with the judgment and that of the party aggrieved by that judgment and has appealed.

The applicant in this application has filed an appeal and argues that if the decretal sum is paid over to the respondent or if the property in question is sold he stands to suffer substantial loss. The respondent on his part has maintained that he will be in a position to refund the decretal sum should the appeal succeed.

What the court is concerned with in an application for stay is to avoid loss by rendering the appeal nugatory. For it to grant a stay of execution it must be satisfied that the respondent will not be able to refund the decretal sum. Where the applicant expresses doubt that the respondent may not be able to refund the decretal sum the burden of proving that the respondent is capable of refunding the same shifts to the respondent. See the case of **ABN AMRO BANK, N.V. V Le Monde Foods Ltd** Civil Application No. NAI 15 of 2002, where it was observed that:-

“In those circumstances, the legal burden still remains on the applicant, but the evidential burden would then have shifted to the respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal were to succeed. This evidential burden would be very easy for a respondent to discharge. He can simply show what assets he has – such as land, cash in the bank and so on.”

See also **Kenya Posts & Telecommunications Corporation V Paul Gachanga Ndurua** Civil Application No. NAI 367 of 2001 (unreported). The respondent herein ought therefore to have adduced evidence of how he would be able to refund the decretal sum if paid over to him and the appeal were to be allowed. He ought to have shown by evidence his means and assets. It was not enough merely to state that since he was able to pay Kshs. 150,000/= that that was evidence of his ability to refund the decretal sum. In other words he has failed to discharge the burden imposed on him.

For the above reasons I will allow this application and grant a stay conditional on the applicant depositing in an interest earning account in the joint names of counsel on record for the parties, Kshs. 150,000/= being the principal sum claimed. The deposit shall be made within 30 days of the date hereof. Upon satisfaction of that condition, execution of the decree herein shall be granted pending the determination of this appeal. However, failing to comply with this order the execution shall proceed without further orders.

Costs this application shall be in the appeal.

Dated and delivered in Meru this 1st day of February...2008.

W. Ouko

JUDGE