



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII**

Civil Appeal 133 of 2007

CLEMENT SAKIRI OPERE..... APPELLANT

VERSUS

MICHAEL WASONGA SINDA RESPONDENT

RULING

By an application dated 26th November 2007, the appellant applied for stay of execution of a decree dated 18th June 2007 issued in **Migori PMCC No.294 of 2000** together with all consequential orders arising there from, pending hearing and determination of this appeal.

The application was supported by the appellant's affidavit. The appellant deposed that following delivery of the judgment and issue of the decree in the aforesaid matter where the court entered judgment in favour of the respondent for Kshs.96,000/=, he had filed an appeal to this court. He further deposed that he was a small-scale trader and/or businessman and the sum of Kshs.96,000/= which he was ordered to pay is substantial. If he had to pay the same before the appeal was heard and determined, he would be forced to close his business. He further stated that the respondent was equally a small-scale trader who had no tangible assets. In his view, if he paid to the respondent the sum Kshs.96,000/= it would not be easy to recover the same from the latter in the event that the appeal was successful. The respondent was said to have commenced execution of the decree and was intending to attach the appellant's plot No.20 at Migori town. The appellant indicated that he was ready to provide such security as he may be ordered by this court.

The respondent filed a replying affidavit to the appellant's affidavit. He set out the background of the dispute that led to the judgment now appealed from. He stated, **inter alia**, that even though the trial court had ordered that he be paid by the appellant a sum of Kshs.96, 000/=, he had suffered a much bigger loss by way of constructing at his own cost the building that was the subject matter of the dispute. The respondent had been evicted by the appellant from said the building and his properties valued at over Kshs.100,000/- confiscated.

The respondent further deposed that by refusing to pay the Kshs.96, 000/= as ordered, and by evicting the respondent from the disputed property, the appellant was reaping twice at the respondent's expense. He added that he was capable of refunding the said sum in the event that the appeal was decided in favour of the appellant.

Mr. Oguttu for the appellant cited the Case of **BUTT VS RENT RESTRICTION TRIBUNAL** [1982] KLR 417. He submitted that the appeal had high chances of success because the lower court case was based on a breach of contract and had been filed outside the six years limitation period. He added that the respondent had not satisfactorily shown that he was financially able to repay the decretal sum if so ordered.

Mr. Kisera for the respondent submitted that the appellant had not attached the decree or judgment appealed against. That was sufficient to defeat his application. In support thereof, he cited the case of **ORUBA MATERNITY AND NURING HOME AND OTHERS VS PURSHOTAM V. PATEL**, Civil application No.133 of 1996. He added that it was not normal to grant stay of execution in monetary decrees. For that proposition he cited the Court of Appeal decision in **UJAGAR SINGH VS RUNDA COFFEE LTD.**

The respondent also filed an application dated 7th December 2007 brought under the provisions of **Order VII rules 4 and 10** of the **Civil Procedure Rules**. He urged the court to summarily dismiss or strike out the amended memorandum of appeal, which was amended on 9th of October 2007 as well the application dated 26th November 2007. The grounds upon which the application was made were that:

(a) Both the application and the amended memorandum of appeal offend the mandatory provisions of Order VII rule 4 of Civil Procedure Rules and the provisions of the Law Reform Act as the appellant had not disclosed his representative capacity as by law required.

(b) The omission aforesaid was fatal and rendered the amended memorandum of appeal and the said application incompetent and incurably defective.

In his affidavit in support of the application, the respondent deposed that the suit herein was anchored upon an agreement that was entered into between himself and Francis Opere Otieno (deceased). The deceased is the father of the appellant and the appellant is the legal representative of the estate of his late father. He was thus substituted in place of his late father in the suit before the trial court. The appellant had failed to disclose his representative capacity as required by law, the respondent deposed. He added that according advice given by his advocate, such omission was fatal to the appellant's appeal.

Mr. Kisera submitted that the appellant's application was founded on an appeal which was fatally defective for reasons aforesaid and urged the court to strike out the amended memorandum of appeal and thereby do away with the application as well.

In reply thereto, Mr. Oguttu conceded that he had not indicated that the appellant was bringing the appeal in a representative capacity. However, in his view, that omission is curable by an amendment. He sought to rely on the provisions of **Order VI rule 12** of the **Civil Procedure Rules** which provides that no technical objection may be raised to any pleading on the ground of any want of form.

I have carefully considered the two applications herein. In **BUTT VS RENT RESTRICTION TRIBUNAL** (Supra), it was held that the power of the court to grant or refuse an application for a stay of execution is a discretionary one. The discretion should be exercised in such away as not to prevent an appeal. In exercising that discretion, the court will consider whether the appeal is likely to be rendered nugatory if stay is not granted. The applicant has to demonstrate that he would suffer substantial loss if stay of execution is not granted. The court will also consider the special circumstances of the case and other unique requirements as may present themselves. It is the court which directs whether the applicant should provide security and the nature thereof.

The applicant need not specifically state the kind of security that he will provide but he must be prepared to do so in the event that the court makes such an order.

In this case, the trial court ordered the appellant to pay to the respondent a sum of Kshs.96,000/= . There is no proof that the respondent will be unable to refund the said sum in the event that the appellant's appeal is successful.

In paragraph 8 of the appellant's supporting affidavit, he demonstrated that the financial base of his business is so weak that it would collapse if he paid the decretal sum. If that is the case, it is doubtful whether the appellant is able to satisfy the judgment sum and the costs that may arise in the event that the appeal is unsuccessful.

On the other hand, the respondent has clearly stated he is in a position to refund the decretal sum if the appeal is decided in favour of the appellant. The respondent is a successful litigant and should not be deprived of the fruits of his judgment except for good cause which must be clearly demonstrated by the appellant. There is nothing to show that the appeal will be rendered nugatory if stay of execution is not granted as prayed by the appellant. I agree with Mr. Kisera that the decree herein being a monetary one, it is not likely that the appeal will be rendered nugatory by refusal of the orders sought by the appellant.

More importantly, the appellant has not demonstrated that he will suffer substantial loss unless stay of execution is ordered. That is a fundamental requirement in an application for stay of execution under **Order XL1 rule 4** of the **Civil Procedure Rules**.

For these reasons, I dismiss the appellant's application dated 26th November 2007. The appellant will bear the costs of the application.

Turning to the respondent's application dated 7th December 2007, I agree with Mr. Kisera that the appellant failed to disclose that he was bringing this appeal in a representative capacity. That omission was readily conceded to by Mr. Oguttu for the appellant. I would agree with Mr. Oguttu that such an omission cannot of itself render the appeal fatal. It is the kind of mistake which is addressed by the provisions of **Order VI rule 12** which I have already quoted.

The same can be remedied by way of an amendment. I dismiss the respondent's application and direct the appellant to amend his memorandum of appeal accordingly.

DATED, SIGNED and DELIVERED at KISII this 28th day of April, 2008.

D. MUSINGA

JUDGE.

Delivered in open court in the presence of:

Mr. Ochwangi for the appellant.

N/A for the respondent.

D. MUSINGA

JUDGE