



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Appeal 44 OF 2008**

**UNIVERSITY OF NAIROBI**

**DANIEL KIARIE GICHANGA.....APPELLANTS**

**VERSUS**

**PETER KIPLANGAT TUM.....RESPONDENT**

**R U L I N G**

By Notice of Motion filed on 26<sup>th</sup> February, 2008, the Appellants, University of Nairobi & Peter Kiarie Gichanga, seek an order for stay of execution of the decree arising from the Judgment entered against them in NRB. CMCC 6788/03 by Resident Magistrate, A. Ireri on 9<sup>th</sup> January, 2008.

The appellants are dissatisfied by that judgment and have filed a memorandum of appeal in which several grounds have been raised.

The appellants contend that they have an arguable appeal and that they will suffer substantial loss if an order for stay of execution is not granted.

A supporting affidavit has been sworn by Prof. Peter M.F. Mbithi, Deputy Vice Chancellor of University of Nairobi. As per orders issued by Hon. Kihara Kariuki J. on 26<sup>th</sup> of February, 2008, the Appellants have provided security by way of a guarantee from Barclays Bank of Kenya for Kshs.250,780/= being the decretal sum.

Relying on the case of **Baiba Dhidha Mjidho vs Van Leer East Africa Ltd Msa. HCCC No.159 of 2003** and the case of **Gathenge Engineers & Electrical Ltd vs Postal Corporation of Kenya Nrb. HCCC No.1830 of 2001**, Counsel for the Appellants submitted that the first appellant is an institute of higher learning with substantial assets and that having shown that it was in position to pay the decretal sum by providing security the burden was now on the Respondent to show the court that he can repay the decretal sum if required to do so.

The Respondent, Peter Kiplangat Tum, opposed the application through a replying affidavit sworn by Jared Muga Onuonga, the Assistant Claims Manager with Geminia Insurance Company Limited. It was contended that the suit in the lower court was instituted by Geminia Insurance Company Limited in the name of the Respondent under its rights of subrogation.

It was contended that Geminia Insurance Company Limited was the ultimate beneficiary of the decretal

amount, and that being an Insurance Company with an annual turnover in excess of Kshs.600,000,000/= in premiums, it would have no difficulty in reimbursing the decretal sum if required to do so.

Counsel for the Respondent submitted that the Appellants have not applied for an order for stay of execution pending appeal and the court cannot therefore grant what has not been sought.

It was submitted that Appellants had not shown that they were likely to suffer substantial loss. In this regard the case of **Lalji Bhimji Sanghani Builders & Contractors vs Nairobi Golf Hotels Kenya Limited, HCCC No.1900/95** was relied upon. It was maintained that the onus rests on the applicant to prove that the Respondent is a man of straw and is unable to pay back the money if the appeal is unsuccessful.

The court was urged to take judicial notice of the fact that it is Geminia Insurance Company Ltd which is liable to pay the decretal amount and that it would not be unable to repay that amount. The cases cited by Appellant's Advocates were distinguished on the ground that in one case there was no valuation of the property whilst and in the other, the property was a motor vehicle which was diminishing in value.

In response, Counsel for the Appellants noted that the Respondent had not personally sworn any affidavit. He urged the court to disregard the affidavit sworn by Jared Muga Onuonga claiming he was a stranger to the suit.

Order XLI Rule 4(2) of Civil Procedure Rules, is very explicit as to the matters the court should take into account when considering an application for stay of execution pending appeal.

First, the court must be satisfied that there is sufficient cause for orders of stay of execution of the decree. Ordinarily this is established by the presence of an arguable appeal. Secondly, the court must be satisfied of the following: -

- a) That the applicant may suffer substantial loss unless the order is made,***
- b) That the application has been made without unreasonable delay,***
- c) That such security as the court may order for the due performance of the decree or order has been given by the Applicant.***

In this case, it is evident that the Appellants are dissatisfied with the decree and have filed an appropriate memorandum of appeal which raises several arguable issues. Although it was submitted on behalf of the Respondent that the suit was brought by Geminia Insurance Company in the name of the Respondent, under right of subrogation, that is not evident on the face of the application and there is really no connection between the Appellants and Geminia Insurance Company Limited. The Appellants have already provided an appropriate security for the payment of decretal sum in the form of a guarantee. The Appellants also brought the application for stay of execution without undue delay.

Further, since the means of the Respondent are not known, there is a possibility that the Appellants may suffer substantial loss if the stay of execution is not granted, as the Respondent may not be in a position to make a full restitution to the Appellant should the Appellant succeed on appeal.

In my view the provisions of Order XLI Rule 4 (1) & (2) of the Civil Procedure Rules have been complied with and it is therefore appropriate that the order for stay of execution of the decree pending appeal be issued.

I have noted the Respondent's objection with regard to the drafting of the application and the prayers. I concur that the drafting is wanting. It is however clear from the body of the application and the rules under which it is brought that the order sought is for a stay of execution pending appeal.

Accordingly, I grant the application and order that there shall be a stay of execution of the decree arising

from the judgment dated 9<sup>th</sup> January, 2008 in NRB CMCC 6788/03 pending the hearing and determination of this appeal.

Cost of application shall be on the Appellants.

Orders accordingly.

**Dated, signed and delivered this 25<sup>th</sup> day of April, 2008**

**H. M. OKWENGU**

**JUDGE**