REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS
Civil Appeal 65 of 2007

1. MATHENGE MULONZYA

2. KIKAA MULONZYA

3. KASINA MULONZYA

4. JOHN MATHENGE
::APPELLANTS/APPLICANT

VERSUS

TIKU KITHEKA:::RESPONDENT

RULING

1. The Application dated 18.1.2008 seeks orders that the execution of the decree in **SRMCC No.164/2005(Mwingi**) be stayed pending the hearing and determination of the Appeal herein. The grounds in support are that:-

a. That this appeal is not frivolous and has high chances of success.

b. That despite an application for stay having been made in the Mwingi Court, the same Court has proceeded to issue warrants of attachment and therefore deemed to have declined to grant a stay.

c. That costs awarded by the lower court are inordinately high and not supported by any Provisions of the Law.

d. That the Decree to be stayed is not simply a money Decree as the cause of action is grounded on ownership of land, subject matter of **CMCC No. 741 of 2005** at Machakos.

2. In his Supporting Affidavit sworn on 18.1.2008, the Applicant depones that he instituted an application for stay for execution in the lower court soon after summary judgment was entered against him but before the application could be heard and determined, warrants of attachment were issued against him. On 5.9.2006, he instituted another application to vary the decree but after hearing and before Ruling could be delivered, the Respondent moved to apply for fresh warrants of attachment and his livestock was at the risk of sale. That the decree was not primarily a money decree as it arose from a land dispute between the parties. That if the livestock proclaimed are sold, "***great damage"*** to the Appellants and grave injustice would be occasioned to all the Appellants aforesaid.

3. The Respondent in his Replying Affidavit sworn on 25.1.2009 depones that the Application is an abuse of the process of the court and the Applicants have failed to meet the conditions precedent to the grant of an order for stay of execution. That he is a man of means and is capable of repaying the decretal sum should the Appeal succeed. Lastly, that the Application was an afterthought and calculated to frustrate the Respondent's recovery of costs properly awarded.

4. I have considered the submissions by both advocates appearing as well as the authorities submitted by the advocate for the Respondent which were as follows:-

a. **Thugge vs Kenya Commercial Bank[1990] KLR 437**- there must be evidence of substantial loss for an order of stay of execution to issue.

b. ***Lalji Bhimji Sanghani Contractors Ltd vs Nairobi Golf Hotels (K)*** **Ltd Nairobi 1990/1995**- that it is not enough for an Applicant to plead substantial loss without showing what that loss is.

c. **O.M.Costa Luis vs Nova Chemicals Ltd HCCC 31/2001 (Nairobi**) – where there is delay in bringing forth an application for stay for execution, such an order cannot issue.

5. The only response regarding the authorities cited was that although useful, they could be distinguished because the parties in those cases were fully heard and the suits determined on merit which was not the case in the instant situation.

6. My finding on consideration of it, is that I should dismiss the Application before me for the following reasons:-

7. Firstly, it must be understood that Order XLI Rule 4(2) of the Civil Procedure Rules sets out the conditions to be met by a party seeking the discretion of this court, which discretion to that extent is fettered. The Rule commences with the words; "***No order for stay of execution shall be made under sub rule (1) unless…"*** By the insertion of that one line, a party must fully abide by meeting the set conditions which are:-

a. that unless the order is granted, substantial loss will result to the Applicant, and

b. the Application is brought without undue delay, and

c. such security as may be ordered by the court and ultimately binding on the Applicant is deposited.

8. Secondly, of the three conditions, "***substantial loss"*** in the words of Platt J.A. "***in its various forms is the corner stone of best jurisdictions for granting a stay***." If a party fails to show what substantial loss it will suffer, then the Application will fail ab initio. The learned judge made that finding in **Kenya Shell Ltd vs Kibiru [1986] KLR 410** and I am appropriately guided. In the instance case, sadly, no evidence of substantial loss has been shown to me. Granted, it is argued that if the Appellant's livestock is sold, they will suffer "***great damage***." What damage? What loss? The decree, I am informed is for about Kshs. 41,000/= (see annexture "***MMI"*** to the Supporting Affidavit***)*** and it has not been shown that with four (4) Applicants, a pro-rata payment would be so painful as to cause substantial loss to each of them. Further, the Respondent has categorically stated that he is a man of means and is able to repay that sum if the Appeal succeeds. That statement has not been controverted at all and is taken therefore to be truthful. As was held in Thugge (supra), "***there was no justification in holding that there was likelihood that the Plaintiff would not be able to repay the decretal sum in the event of the defendant's appeal succeeding."*** This holding similarly applies word for word to the present situation.

9. Without evidence of substantial loss then as was held in **Halai & Another vs Thornton & Turpin [1963] Ltd [1990] 365**, the courts fettered discretion cannot be exercised in favour of the Applicant.

10. Thirdly, the Application was made ten (10) or so months after the decree was issue. I say so because the decree is dated 21.3.2007 but the instant Application was only made on 31.1.2008 while the Appeal

itself had been preferred on 5.4.2007. It does not help the Applicant to say that he filed a similar application in the lower court which application I gather is still pending and undetermined. To my mind, a delay of close to one year is inordinate and breaches order XLI Rule 4(2) aforesaid.

11. Lastly, in the Supporting Affidavit and in submissions by counsel, the merits of the Appeal are strongly raised. I would only say that these issues, important as they are, are useful in the Appeal proper but at this stage, they would have been useful to show the aspect of substantial loss but sadly, the nexus was not made and in the end, the point was rendered immature.

12. In the end, the Application dated 18.1.2008 is without merit and is best dismissed with costs.

13. Orders accordingly.

Dated and delivered at Machakos this **18th** day of **April** 2008

ISAAC LENAOLA

JUDGE

In the presence of: Mr. Mureithi for Applicant

Mr. Kinyua for Respondent

ISAAC LENAOLA

JUDGE