



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

Civil Appeal 9 of 2008

GABRIEL MAGAIGWA BURURE.....1ST APPELLANT

THOMAS MURUGA.....2ND APPELLANT

VERSUS

GABRIEL MAGAIGWA BURURE RESPONDENT

RULING

By an application dated 11th April 2008 and brought under **Order XL1 rule 4**, the appellant sought stay of execution of the decree in **Kehancha RM CC.No.16 of 2006** pending hearing and determination of this appeal. The application was made on grounds that the appellants had lodged an appeal against the judgment in the said matter, which was delivered on 17th January 2008. As a sign of good faith, the appellants had availed a cheques for the decretal sum, Kshs.340,000/= in the joint names of the Advocates for the two parties and were willing to deposit the same as security pending hearing and determination of the appeal.

The application was supported by an affidavit sworn by Z. K. Yego, an advocate in the firm of Kibichy & Co. Advocates who are on record for the appellants. Counsel deposed that unless stay of execution was granted, the intended appeal would be rendered nugatory. This is because if the decretal sum is paid out to the respondent and the appeal is successful it will not be possible to recover the money from the respondent. He reiterated that the appellants were willing to deposit the decretal sum in an interest earning account in the joint names of the advocates herein. He annexed to his affidavit a photocopy of a cheques for Kshs.340,000/- drawn by Concord Insurance Co. Limited.

The respondent opposed the said application and filed a replying affidavit. She stated that the application had been brought in bad faith because her advocate and the appellants' advocate had discussed and agreed on a settlement at Kshs.250,000/= all-inclusive. She denied that she was a person of straw as alleged by the appellants' advocate. She added that there had been inordinate delay in bringing the application for stay of execution.

Mr. Nyolei for the appellants and Mr. Nyambati for the respondent made brief submissions in support of their respective clients' affidavits.

Mr. Nyambati submitted that the affidavit in support the appellants' application was sworn by an advocate, yet it was partially based on contested matters of fact, for example, the issue regarding the

respondent's financial status. He urged the court to strike out the said affidavit and since the application could not stand on its own, proceed to strike it out as well.

In his view, there was nothing to show that the respondent was not capable of refunding the decretal sum in the event that the appeal was successful.

I have considered the rival arguments made by both parties. In considering an application for stay of execution, the applicant must demonstrate that he will suffer substantial loss unless stay of execution is granted. The court will also consider whether there has been unreasonable delay in making the application and whether the applicant is willing and able to provide such security as the court may order, see **HALAI & ANOTHER VS THORNTON AND TURPIN [1963] LTD** 1990 KLR 365

The appellants have not sufficiently demonstrated that they will suffer substantial loss if the decretal amount is paid to the respondent. The appellants' advocate merely stated in his affidavit that if the decretal sum is paid out to the respondent it would be burdensome and probably futile for the appellant to recover the same. He did not provide the basis upon which he made that assertion. He did not indicate that he was personally aware of the respondent's financial status. I would agree with Mr. Nyambati that the appellant's counsel should not have deposed to the aforesaid issue in the absence of disclosure of his source of information. In **KISYA INVESTMENT LTD AND OTHERS VS KENYA FINANCE CORPORATION LTD** HCCC No.3504 of 1993, it was held that an advocate for a party should not depone to evidentiary facts that are in dispute and which he has no personal knowledge of, except where he had disclosed the source of his information.

In reply to Mr. Nyambati's submissions, Mr. Nyolei stated that when the application for stay of execution was being argued before the trial court, it was conceded that the respondent was not a person of means. There was no indication that her status had changed. This court cannot verify that argument because the proceedings before the trial court were not availed to it.

Taking all the relevant factors into consideration, I am of the view that the appellants should pay half of the decretal sum to the respondent and the balance thereof be deposited in an interest earning account in the joint names of the advocates for the parties herein. I therefore order that the appellants pay to the respondent a sum of Kshs.170,000/= within the next 30 days from the date hereof and the balance of Kshs.170,000/= be deposited with a reputable bank in the joint names of the advocates for the appellants and the respondent. The appellants shall bear the costs of this application.

DATED, SIGNED and DELIVERED at KISII this 30th day of May, 2008.

D. MUSINGA

JUDGE.

Delivered in open court in the presence of:

N/A for the Appellants

Mr. Nyambati for the Respondent.

D. MUSINGA

JUDGE