



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 1302 of 1999

JANET K. MUHALI AND JIMMY M. ALUSA

(Suing as the legal Representative

Of the Estate of Silas Alusa) PLAINTIFF/RESPONDENTS

Versus

JOSEPH MBUGUA KIBUYWA 1ST DEFENDANT

SALAMA ROAD CONSTRUCTION 2ND DEFENDANT

KABURU OKELO AND PARTNERS CONSULTING

ENGINEERS LTD 3RD DEFENDANT/APPLICANT

RULING

Leave to appeal:

Whether an aggrieved person can
appeal against an order granting or
refusing a stay of execution alleged
pending hearing and determination
of another appeal.

On the 16th May, 2008 I dismissed the 3rd Defendant's Notice of Motion dated 27th March, 2008 seeking stay of execution of the decree dated 17th October, 2004 pending the hearing and determination of the Applicant's Civil Appeal No. 183 of 2003 in the Court of Appeal.

The Notice of Motion dated 22nd May, 2008 now before me, filed by 3rd Defendant, who is the Judgment debtor, seeks leave of this court to appeal against my said ruling dated 16th May, 2008. That is in prayer number 3.

Prayer number 2 asked for an interim order staying further proceedings in this suit pending hearing and determination of this application. The learned Duty Judge who certified the Notice of Motion urgent did not say anything about that prayer.

In prayer number 4 the 3rd Defendant/Applicant wants a stay of further proceedings in this suit pending the hearing and determination of the intended appeal.

Prayer number 5, the last prayer, is for costs asked to be in the cause. Prayer number 1 was for certificate of urgency.

Looking at prayers number 2 and number 4, there is no dispute that the “**Further proceedings**” the Applicant is talking about in this suit are “**execution proceedings.**” Those are the proceedings the Applicant seeks to stay in this Notice of Motion dated 22nd May, 2008.

But those are the very same proceedings the Applicant sought to stay in his earlier Notice of Motion dated 27th March, 2008 which I refused to grant on 16th May, 2008.

The Applicant must therefore be a shrewd person deciding in the instant Notice of Motion to use the words “further proceedings” instead of using the word “**execution,**” as in the previous Notice of Motion dated 27th March, 2008, in order to get in this Notice of Motion dated 22nd May, 2008 what he failed to get in the Notice of Motion dated 27th March, 2008.

The Applicant goes on to tell the court that once he gets, in this Notice of Motion dated 22nd May, 2008, a stay of “further proceedings” (stay of execution), he will appeal against my refusal, dated 16th May, 2008, to grant him “stay of execution.”

Unless that is a game of “merry – go-round” by a shrewd person, who other person would understand what the Applicant is doing? What will he be appealing for after having got what he wanted to get, namely, “a stay of execution”?

Surprisingly the Applicant is doing that relying on Order XLI Rule 4(1) of the Civil Procedure Rules even though he also mentions Sections 3A and 75 (1) of the Civil Procedure Act.

Order XLI Rule 4(1) of the Civil Procedure Rules which is the most important provision among the Provisions the Applicant has mentioned, tells the Applicant in very clear and precise terms that where an application for a stay of execution is dismissed by the Court from which the appeal is preferred the person aggrieved by such decision has no problem simply walking to the appellate court to apply for the stay. In other words, there is no question of an appeal as even in the opposite situation where a stay has been granted, the aggrieved party simply walks to the appellate court to have such stay set aside. In each situation that is done by a mere application and not through an appeal, so that the aggrieved party does not have to worry about the existence of section 3A and/or section 75 (1) of the Civil Procedure Act – because he needs file no appeal to get his grievance addressed.

This is what Order XLI Rule 4 (1) of the Civil Procedure Rules says:

“(1) No appeal or second appeal shall operate as stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the Court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”

I was dealing with the Notice of Motion dated 27th March 2008 because the Applicant was claiming there was an appeal in the Court of Appeal to be determined first. The Applicant should therefore have

no difficulty going to the Court of Appeal to make another application for stay of execution in terms of order XLI Rule 4 (1) above.

If on the other hand the Applicant has no appeal pending in the Court of Appeal for order XLI Rule 4(1) to apply, then even sections 3A and 75(1) of the Civil Procedure Act cannot help him out because he cannot in law have an appeal where an appeal should not be, as in the instant proceedings emanating from the Notice of Motion dated 27th March, 2008.

To my mind therefore, if this Notice of Motion dated 22nd May, 2008 is not filed because of sheer shrewdness, then the said Notice of Motion is misconceived. In either case, the Notice of Motion has no merits and the same is hereby dismissed in its entirety with costs to the Respondent

Dated and delivered at Nairobi this 30th day of May, 2008.

J.M. KHAMONI

JUDGE

Present:

Mr. Mutubwa for the Respondent.

Mr. Muturi Court Clerk