REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS

Civil Appeal 105 of 2007

EVANSON MWANGI …….…… APPELLANT/APPLICANT

VERSUS

ERICK NJUE NTHIA ……..... RESPONDENT

RULING

1. The Applicant, Evanson Mwangi filed 3 separate Appeals viz H.C.C.A 105/2007, 106/2007 and 107/2007 seeking orders of stay of execution of decrees in **Machakos CMCC No. 694 of 2006 and CMCC No. 659 of 2006** pending the determination of the three resultant Appeals. The advocates for the parties agreed that a common Ruling be delivered in H.C.C.A 105/2007 as the issues raised in the three applications are similar. I obliged them.

2. The Application in the present Appeal is premised primarily on the provisions of Order XLI Rule 4 of the Civil Procedure Rules and in an Affidavit sworn by Miriam Kamonde, General Manager, Claims at Directline Assurance Co. Ltd, it is deponed that the decretal sums would never be repaid by the Respondents who earn Kshs.9,000/= or thereabouts per month, and the Applicant would suffer substantial loss if the decree is executed as against him. Further, that the Application was brought timeously and the Applicant is willing to deposit any security that the court may order for the due performance of the decree until the Appeal is heard and determined.

3. In the Replying Affidavit sworn by Erick Njue Nthia on 18/9/2007, the said Respondent depones that the Application is made in bad faith and is intended to deny him the enjoyment of the fruits of his judgment. Further, that he is employed and is quite able to repay the decretal sum should the Appeal succeed. He adds that although no substantial loss has been proved by the Applicant should the decree be executed, he is willing to accept Kshs. 120,000/= plus special damages that are not contested by the Applicant.

4. I have noted the concise and useful submissions by Miss Ndumia for the Applicant and Mr Mutua for the Respondent. I have also perused the following authorities submitted:

i. **Kenneth Kubute & others vs Daniel Njagi David, H.C.C.A 3/2007/Meru** where Ouko J, explained the three strictures to be satisfied before an order of stay of execution is made. The learned Judge also clarified the position regarding Order XLI Rule 4 of the Civil Procedure Rules and the powers of the Court of Appeal under Rule 5 (2) of the Court of Appeal Rules.

ii. **Lalji Bhimji Sanghani Builders & Contractors** vs **Nairobi Golf Hotels Kenya Limited H.C.C.C. 1900/1995** where Ringera J, held that a party seeking stay of execution pending appeal must bring evidence to show the substantial loss it may suffer if the order of stay is not granted.

iii. **Kiwanjani Hardware Ltd vs Daniel Ndaka & Another** **H.C.C.A 187/2006** and **188/2006** where Sitati J, held that where the Respondent has shown that he can refund the decretal sum if the appeal succeeds, an order of stay of execution cannot issue.

5. My view is that unlike in the **Kenneth Kubute** case (supra) where the Applicant misapprehended the principles applicable for grant of an order of stay pending appeal, according to Ouko J, the law was properly laid before me in this case. All the authorities are one in stating that a party seeking the fettered discretion under Order XLI Rule 4 (2) must show:-

i. that substantial loss would be occasioned to it if the decree is executed and

ii. that the Application for stay has been brought without undue delay and

iii. the party is willing to pay such security as may be ordered by court.

6. In the instant case, the Respondents have said that they are employed and can repay the decretal sum if the appeal succeeds, a position not tenable according to the Applicant. I am however persuaded that with the Applicants earning Kshs.9,000/=, repayment of the entire decretal sum in each case would be an uphill task and the converse is that the Applicant will suffer substantial loss as he may not recover the decretal sums if the Appeals succeed. As Platt J.A. stated in **Kenya Shell Ltd vs Kibiru (1986) KLR 410,** once substantial loss, the corner stone of any successful application for stay of execution pending appeal has been proved, the applicant has passed the first hurdle in attaining the necessary orders. The Applicant in this case has passed that hurdle.

7. It has not been argued that the Application was brought with undue delay and I see no reason to hold otherwise because the decree, I gather, was stayed in the lower court and when that court declined to grant it upon hearing inter–partes on 4/9/2007, the instant Application was filed on 11/9/2007.

8. Regarding the necessary security to be deposited by the Applicant, parties are unable to agree on the question. I note that in **H.C.C.A 105/2007,** the decretal sum is Kshs. 170,000/= or thereabouts. In **H.C.C.A 106/2007,** the decretal sum is Kshs. 165,000/= or thereabouts while in **H.C.C.A 107/2007,** the decretal sum is Kshs.175,000/= or thereabouts. All the three appeals are limited to the question of quantum only and the Applicant is not denying that the Respondents are entitled to some amount in compensation. To be fair to all parties and in exercise of discretion, I will allow all the three applications for stay pending appeal on the following condition:-

a. Let the Applicant pay to the Respondent Kshs.50,000/= within 15 days of this Ruling. The balance of the decretal sum in each case will be deposited in an interest earning account in the names of the advocates for the parties within 45 days of this Ruling. In default execution to issue.

b. Costs of this Application shall abide the Appeal.

c. Order (a) above as agreed, shall apply in respect of **H.C.C.A 105/2007**, **H.C.C.A 106/1007** and **H.C.C.A 107/2007** and copies of it shall be placed in each file with the orders being the same in each file.

9. Orders accordingly.

Dated and delivered at Machakos this **8th** day of **May** 2008.

ISAAC LENAOLA

JUDGE

In the presence of: **Mr King'ara holding brief Mr Mutua for Respondent**

N/A for Applicant

ISAAC LENAOLA

JUDGE