

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 56 of 2004

DANIEL WAMBUA NDABI.....PLAINTIFF/RESPONDENT

VERSUS

PETER LUKA NDUTU.....DEFENDANT/APPLICANT

RULING

By a notice of motion dated 18th December 2007, made under the provisions of **Order XLI Rule 4** of the **Civil Procedure Rules**, the defendant sought an order of the court staying execution of the decree herein pending the hearing and determination of an appeal that the defendant intends to file to the Court of Appeal. The application is supported by the annexed affidavit of the defendant and grounds stated on the face of the application. The defendant states that his intended appeal had a high chance of success. He further stated that he would suffer substantial loss if stay of execution of the decree is not granted. The defendant stated that he was a ready to offer security as the court may direct.

The application is opposed. The plaintiff filed a notice of preliminary objection and a replying affidavit in opposition to the application. In summary, the plaintiff contends that the application cannot be granted since the same was brought to court after unexplained, inordinate and inexcusable delay. The plaintiff stated that the defendant had failed to show any commitment to respecting the orders of the court as he had failed to pay the judgment debt four years after judgment was entered in favour of the plaintiff. It was the plaintiff's contention that the defendant had not established any substantial loss that he would suffer to entitle this court stay execution of the decree. The plaintiff deponed that he would be prejudiced if stay is granted since the defendant had engaged in activities which impeded him from realizing the fruits of his judgment. He urged the court to dismiss the defendant's application for stay of execution with costs.

At the hearing of the application, I heard rival arguments made by Mr. Musyoki on behalf of the defendant and by Mr. Kimilu on behalf of the plaintiff. The issue for determination by this court is whether the defendant established a case to enable this court grant stay of execution pending the hearing of the appeal. The principles to be considered by this court in determining whether or not to grant stay of execution pending the hearing of an appeal are well settled. In **Butt vs. Rent Restriction Tribunal [1982] KLR 417** at page 419 Madan JA held that:

*"It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in **Wilson vs. Church (No.2) 12 Ch. D [1879] 454** at page 459. In the same case Cotton LJ said at page 458:*

'I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.'"

Order XLI Rule 4 (2) of the **Civil Procedure Rules** requires of an applicant who desires to be granted

stay of execution pending the hearing of an appeal to establish that he would suffer substantial loss if such stay is not granted. Further, such an applicant is required to make such an application for stay of execution without unreasonable delay. The applicant will be required to provide security for the due performance of such decree as the court may direct.

In the present application, Judgment was entered against the defendant on 8th July, 2004 when Kasango J struck out the defence which had been filed by the defendant. Judgment was subsequently entered in favour of the plaintiff as prayed in his plaint. The defendant was aggrieved by the said decision of Kasango J. On 9th July 2004, the defendant made an application before court seeking to set aside the said ruling delivered by the court in which judgment was entered in favour of the plaintiff. The application was dismissed by Anyara Emukule J on 30th September, 2004. The defendant took no action to challenge the said decision until 11th August, 2005 when the defendant filed an application before the Court of Appeal for a grant of extension of time to appeal out of time from the ruling of Emukule J. The defendant did not argue the application. He withdrew it when the application was listed for hearing before Waki JA. The defendant filed yet another application before the Court of Appeal for extension of time to file appeal out of time from the ruling of Kasango J. The said application was dismissed by a single Judge of the Court of Appeal on 17th April, 2008. According to the defendant, he was dissatisfied with the decision of the a single judge of the Court of Appeal and had filed reference to a full bench of the Court of Appeal. The said reference is pending determination before the Court of Appeal.

It was the defendant's contention that since there is still pending a reference to the full bench of the Court of Appeal regarding his application to be granted extension of time to appeal from the decision of this court out of time, the court should grant stay of execution of the decree herein pending the hearing and determination of the said application for extension of time. On the other hand, the plaintiff submitted that since there is no appeal which is pending, this court lacked jurisdiction to stay execution of the decree. It was argued on behalf of the plaintiff that the defendant had been indolent in the prosecution of the application for stay of execution and was thus not entitled to favourable exercise of discretion by this court. The plaintiff was emphatic that the current application was yet another attempt by the defendant to frustrate the plaintiff from enjoying the fruits of his judgment.

I have carefully considered the facts of this case. It has been established that there is no appeal pending before the Court of Appeal that would enable this exercise court jurisdiction to stay execution of the decree pending the hearing of the intended appeal. What is pending before the court of appeal is an application for extension of time to file appeal out of time. This court cannot stay execution of the decree herein in the absence of a competent appeal before the Court of Appeal. Further, the defendant was required under **Order XLI Rule 4 (2)** of the **Civil Procedure Rules** to apply for stay of execution without unreasonable delay. In the circumstances of this case, it was evident that the defendant was aware of the rulings of both Kasango J and Emukule J which were delivered in 2004.

Since the delivery of the said rulings, the defendant took three (3) years before he filed the present application for stay of execution of the decree of this court. The delay is unreasonable and inordinate. The defendant did not give any explanation why he delayed to file the application for stay of execution within a reasonable period. It was evident that the defendant took action only when the plaintiff sought to execute against him. The present application was brought when this court issued notice to show cause to the defendant to show cause why he should not be committed to civil jail for failing to pay the decretal amount due to the plaintiff. The scales of justice must be balanced. In the present application, I hold that the plaintiff established that he would be prejudiced if stay of execution is granted by this court. The plaintiff has been denied the enjoyment of the fruits of his judgment four (4) years after this court entered judgment in his favour. The defendant made no attempt to settle the said decretal sum. Instead, the defendant put all sorts of impediments to frustrate the plaintiff from executing the judgment entered in his favour.

In the circumstances therefore, I find no merit with the application filed by the defendant for stay of execution pending the hearing of the intended appeal. The application dated 18th December, 2007 is hereby dismissed with costs.

DATED at NAIROBI this 11th day of June, 2008.

L. KIMARU

JUDGE