



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT MERU**

**Civil Appeal 16 of 2008**

**KENYA DAIRY BOARD ..... 1<sup>ST</sup> PLAINTIFF**

**WYCLIFFE SIFUNA WALUKYA ..... 2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**ERIC MUTUMA (A minor suing thro' his mother as next friend)**

**EMILY NCABIRA RITHAA ..... PLAINTIFF/RESPONDENT**

**RULING**

The applicant herein was dissatisfied with the decision of the trial court in which the respondent was awarded general damages of Kshs. 600,000/= and special damages of Kshs. 3,000/=, less 10% contribution leaving a balance of Kshs. 542,700/=. The applicant has challenged the award in this appeal. He has brought the instant application seeking that those orders be stayed pending the determination of this appeal.

The application is premised on the grounds that the execution is imminent; that should the execution proceed the applicant stands to suffer substantial loss as its operation shall be prejudiced and the appeal rendered nugatory; that the respondent, being a secondary school student, has no means to refund the decretal sum in the event that the appeal succeeds; that the applicant is ready and willing to furnish such security as the court may order.

In his replying affidavit the respondent has averred that the matter being a money decree no stay is available to the applicant; that the applicant has not demonstrated that it will suffer loss; that this application is both *res judicata* and also amounts to abuse of the court process as a similar application was made and granted by the trial court; that no leave was obtained before this application was brought.

I have duly considered these averments as well as oral submissions based on them. I have also taken into consideration the authorities cited, some of which I must point out, did not have the full facts while others related to the Court of Appeal's jurisdiction under Rule 5(2) (b) of that court's Rules. The principles applicable under those rules are slightly different from those applicable in this court under order 41 Rule 4 of the Civil Procedure Rules.

In either case (Rule 5(2) (b) of the Court of Appeal Rules and the latter provision) the court's main concern is to ensure that the applicant who is entitled to appeal against an order with which he is aggrieved is not denied that right.

The court must also ensure that loss to the applicant is avoided. At the same time the court must not deprive, without reasonable cause, the respondent who has obtained judgment, of the fruits of that judgment. In other words the court must balance the parallel interests of the parties.

Under Order 41 Rule 4 aforesaid a stay will be granted where the following conditions are met, namely-

- (i) if the court is satisfied that substantial loss may result to the applicant unless stay is granted
- (ii) the application is made without unreasonable delay and
- (iii) the applicant has undertaken to provide security

It may also be noted that under rule 4(1) of Order 41 aforesaid, the court whose decision is being challenged may, for sufficient cause, order stay of execution of its decree or order. But whether the trial court grants or rejects the application for stay, the court to which the appeal is preferred shall have jurisdiction to entertain an application for stay.

At the same time either the applicant or respondent who may be aggrieved by the order of the trial court, rejecting or allowing an application for stay may apply for the appellate court to have the order of the trial court set aside. The filing of an application of stay of execution to this court after the lower court had granted the same does not in terms of the above provision, amount to an abuse of the court process or *res judicata*. What loss does the applicant stand to suffer?

It must be demonstrated that the loss the applicant stands to suffer is substantial. The decretal sum is Kshs. 542,700/=. The applicant has averred that if it paid that sum to the respondent who is only a student its operations may be prejudiced and further that should the appeal succeed the respondent has no means of refunding the same. It is doubtful if the operations of the applicant, Kenya Dairy Board, stands to be adversely affected by payment of Kshs. 542,700/=.

It will, however, amount to substantial loss to the applicant if the amount was to be paid to the respondent and subsequently the appeal was to succeed and the respondent found to have spent the whole amount without any assets to be able to make restitution. It was therefore incumbent upon the respondent to rebut the applicant's allegation that being a student he has no means to make good the decretal sum if paid over to him and the appeal is subsequently allowed. The respondent has failed to discharge this burden. I therefore find that the applicant's apprehension is justified.

For that reason I shall allow this application and order that there will be a stay of execution as prayed in the application pending the hearing and determination of this appeal on condition that the applicant deposits the decretal sum within twenty-one (21) days from the date of this order in the joint names of both counsel herein in an interest earning account with a reputable bank failing which execution shall proceed without further orders.

Costs to be costs in the appeal.

Dated and delivered at Meru this 6<sup>th</sup> day of June 2008.

**W. OUKO**

**JUDGE**