



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI  
MILMANI LAW COURTS

Civil Appeal 325 of 2008

THOMAS KIMANI KABUTE..... APPELLANT

VERSUS

ISAAC MWANGI KAMAU.....RESPONDENT

**R U L I N G**

Thomas Kimani Kabute (hereinafter referred to as the appellant), has moved this court by way of notice of motion, brought under Order XLI Rule 4(1) of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act. The appellant seeks orders of stay of execution of the judgment in Githunguri SRMCC No. 97 of 2007 delivered on 22<sup>nd</sup> May, 2008. The appellant maintains that he has filed an appeal against the said judgment, which raises several matters of merit. He fears that the respondent will execute the judgment whilst the appeal is pending. He contends that should that happen he will be placed in great difficulties and unnecessary costs in recovering the same from the respondent.

Grounds of opposition have been filed on behalf of the respondent Isaac Mwangi Kamau. It is contended that the application has no merit as the appellant has not shown what substantial loss he will suffer if the order for stay of execution is not granted. It is further contended that the appeal has no merit, the appellant having admitted during the trial that he was convicted on charges of careless driving and the award made by the lower court not being so high as to warrant interference by this court.

Counsel for the appellant has relied on the case of ***Nancy Kahoya Amadwa vs Expert Credit & Another HCCC Milimani No. 1803 of 1999***. Counsel for the appellant also cited the case of ***Akiba Bank Ltd vs Rekha Chandidas & Another HCCC Milimani No. 22 of 2004***, in support of his submission that the affidavit filed in support of the application was proper as the advocate only swore to matters which were within his knowledge and which were not contentious. Counsel further relied on the case of ***Mohamed & Muigai Advocates vs Francis Kamau Macharia HCCC Milimani No.1198 of 2002***.

For the respondent it was maintained that the appellant has not satisfied the court that substantial loss will result if the order of stay of execution is granted. It was further maintained that the facts deponed to by the appellant's counsel were contentious issues as grounds of opposition had been filed.

The conditions upon which an order for stay of execution can be granted are clearly provided

under Order XLI Rule 4(1) and (2) of the Civil Procedure Rules. Essentially the conditions are three i.e:

1. That the court is satisfied that the substantial loss will result to the applicant if the order for stay execution is not granted.
2. That the application has been made without unreasonable delay.
3. That such security as may be required for the performance of the decree or order has been provided by the applicant.

In this case, the judgment subject of the decree was delivered on 22<sup>nd</sup> May, 2008. The appeal was filed on 20<sup>th</sup> June, 2008 and the application for stay of execution filed 5 days later on 25<sup>th</sup> June, 2008. It is evident therefore, that the application was brought without undue delay. Secondly, pursuant to orders made by Visram J. on 26<sup>th</sup> June, 2008 the appellant has deposited the decretal amount into court as security. The appellant has therefore complied with the first and second conditions set out above.

The question is whether the appellant has satisfied this court that substantial loss will result if the order for stay of execution is not granted. In this regard, the averments made by the appellant's advocate in paragraph 8 of the supporting affidavit, is that the appellant will be placed in great difficulties and unnecessary costs in recovering the decretal amount from the respondent. There is no explanation as to why the appellant will be placed in difficulty. There is no averment or evidence that the respondent will not be in a position to refund the decretal sum if paid. The appellant has therefore failed to demonstrate the substantial loss that it is likely to suffer. The respondent has a judgment in his favour and he can only be denied the fruits of that judgment for a good cause. A mere allegation that the appellant will have difficulties recovering the money is not sufficient. I find that the appellant has failed to satisfy Order XLI Rule 4(2) of the Civil Procedure Rules. Accordingly, his application must fail. It is accordingly dismissed with costs.

The circumstances of the application dated 24<sup>th</sup> June, 2008 in Civil Appeal No. 326 of 2008, being similar to this application, and the parties having agreed to adopt the arguments and consequent ruling in this application, the notice of motion dated 24<sup>th</sup> June, 2008 in Civil Appeal No. 326 of 2008 is for reasons stated herein dismissed with costs.

Those shall be the orders of this court.

**Dated and delivered this 31<sup>st</sup> day of July, 2008**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Kerongo H/B for the appellant

Advocate for the respondent absent