



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Civil Appeal 48 of 2008

DANIEL WAMAHIU KIONGO APPELLANT

Versus

MARY WAMBUI MUNENE RESPONDENT

RULING

The applicant filed in this court a Memorandum of Appeal on 17th July 2008. This is an appeal against a ruling delivered by Senior Principal Magistrate Nyeri in CMCC No. 770 of 2006 delivered on 26th June 2008. By a Notice of Motion dated 16th July 2008 the appellant seeks stay of execution of the aforesaid ruling pending appeal. In the affidavit in support of that application the appellant stated that after the delivery of the ruling in the lower court he was granted 30 days of stay. Since then he had been unable to get alternative accommodation due to scarcity of houses within the Nyeri town. That he has two small children who would be traumatized if an eviction was carried out. The appellant deponed that his appeal had high chances of success since the lower court did not have jurisdiction to deal with the suit before it in a summary manner without affording him a hearing. The application was opposed. In opposing the application the respondent argued that the appellant had failed to show that he would suffer substantial loss if stay was not granted. The respondent argued that substantial loss to satisfy order XLI Rule 4 of the Civil Procedure Rules had to be monetary loss. In this regard I disagree with the argument of the respondent. Substantial loss can either be monetary or non monetary loss. That rule simply requires an applicant to show that if stay was not granted he would suffer loss. The respondent further argued that the appellant had not demonstrated that he had a high chance in his appeal. The respondent relied on the case of **JOHN GEOFFREY NGANGA vs RICHARD OTIENO KWACH CIVIL CASE No. 311 of 1996 NAIROBI**. In that case the judge quoted

R.D. AGRAWAL ON COMMENTARY OF THE CIVIL PROCEDURE 2ND ED. 1964 at pp.441 commenting on the Indian Civil Procedure Code 0.41 Rule 5 similar to our 0.41 R. 4 said:-

“The mere fact that there are strong grounds for the appeal does not justify an order of stay. A person is expected to prefer an appeal only when there are strong reason for so doing. AIR PUJAB (1955) punij 47. The use of the “MAY” confers a discretion on the court.”

The respondent further argued that the appellant failed to obtain leave before filing the present appeal. In this regard the respondent argued that the appellant did not have *locus standi* to seek stay because there was no valid appeal before court. That in bringing the application for stay the appellant had not properly invoked the jurisdiction of this court. The respondent relied on the case of **SINGH vs RUNDA COFFEE (1966)E.A**. The lower court in delivering the ruling the subject of this appeal entertained an application brought under Order XXXV Rule 1 of the Civil Procedure Rules. Looking at Order XLII Rule 1(1) it is clear that an appeal related to a matter brought under Order XXXV Rule 1 cannot be filed without the leave of the court. The appellant in argument conceded that leave had not been obtained but

went on to argue that the court cannot uphold that argument of the respondent because it was an argument going to the merit of the appeal which cannot be entertained at this stage. In making that argument in my view the appellant is '**holding the wrong end of the stick**'. The reason I say so is because it is clear under Order XLII Rule 1 (1) that the appellant's right to come before this court for an appeal can only be after leave to appeal has been granted. Essentially filing the appeal without that leave means that there is no valid appeal before court. That being the case the appellant has no right to approach this court seeking stay pending appeal. I uphold the respondent's argument in this regard in respect of the opposition to the appeal. When the lower court delivered its ruling on 26th June 2008 it was clear that the appellant was aware that he needed to obtain leave before filing the appeal. This is obvious from the oral application made by the appellant's advocate before the lower court. The court's proceedings of that day are as follows:-

"MR. NGANGA

I pray the court to order stay under Order 41 rule 4 (5) for 30 days. The suit property is a dwelling house and the respondent stays there with his wife and two children. We will seek leave to the appeal if the respondent claims fit to do so.

L. W. GITARI

SPM

(SIGNED)

MR. MACHARIA

I have no objection.

L. W. GITARI

SPM

(SIGNED)

ORDER

I order that there be 30 days stay of execution.

L. W. GITARI

SPM

(SIGNED)

26.6.08."

The appellant not having sought leave to appeal as it is clear from those proceedings, the application by Notice of Motion dated 16th July 2008 is incompetent and is hereby dismissed with costs being awarded to the respondent.

DATED AND DELIVERED THIS 30TH DAY OF JULY 2008

MARY KASANGO

JUDGE