



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISII

Civil Case 55 of 2008

1. CARILUS MWAI AMUOMO)

2. JOSEPHINE ATIENO AMUOMO)

.....APPLICANTS

VERSUS

GODFREY OKINYI NYAGINDI RESPONDENT

RULING

By an application dated 23rd June, 2008, the applicants prayed for leave to file an appeal out of time. They also prayed for stay of execution pending hearing and determination of the appeal.

In an affidavit sworn by the first applicant in support of the application, he deposed that judgment in Ndhiwa SRM CC No.31 of 2007 was entered against them on 12th March, 2008. They were dissatisfied with the judgment and decided to appeal against the same. The deponent admitted that they did not appeal in time, hence the application for leave. At the time of filing the application herein, proclamation of the judgment debtor's livestock had been done by Homeland Services. The applicants stated that they were likely to suffer "*irreparable damage*" (sic) if the execution was not stayed. The alleged loss was not substantiated.

The respondent filed a replying affidavit and stated that the delay in filing the appeal had not been explained. He added that the application had been overtaken by events because proclamation of the judgment debtor's property having been done on 16th May 2005; four heads of cattle had been attached and sold on 31st May, 2008. He had already been paid part of the decretal sum. A letter dated 3rd June, 2008 sent to the Resident Magistrate's Court, Ndhiwa, by Homeland Services (Auctioneers) showed that the attached animals were sold for Kshs.16,000/= and on 31st May, 2008 the respondent was paid Kshs.6000/=.

It is trite law that an applicant for stay of execution pending appeal under order XL1 rule 4(1) and (2) has to establish.

- (i) sufficient cause for the grant of the order,
- (ii) substantial loss that he is likely to suffer unless the order sought is granted.

- (iii) that the application has been made without undue delay;
- (iv) such security as the court may order for the due performance of the decree or order be given.

The application herein does not satisfy the requirements in (i) (ii) and (iii) herein. The applicants stated that they will suffer irreparable loss if stay of execution is not granted. There is a difference between substantial loss and irreparable loss but it was not shown how the applicants stood suffer substantial loss if the orders sought were not granted. There was also undue delay in filing the application. Execution has already commenced. Attachment and sale of the applicants' property has been undertaken though the entire decretal sum has not yet been realized. The applicants did not demonstrate that the respondent will be incapable of refunding the decretal sum in the event that the appeal is successful.

All in all I am satisfied that this application has no merits and I dismiss the same with costs to the respondent.

DATED, SIGNED and DELIVERED at KISII this 24th day of **July**, 2008.

D. MUSINGA

JUDGE

Delivered in open court in the presence of:

Mr. Ochoki HB for Mr. Kanyangi for the Applicant

Respondent present in person.

D. MUSINGA.

JUDGE.