



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Appeal 859 of 2005

SHAILESH CHANDARIA APPELLANT

VERSUS

MONICA KAMAU RESPONDENT

R U L I N G

The Appellant herein essentially seeks stay of execution of the decree of the lower court pending disposal of his appeal. The appeal is against the order of the lower court of 19th October, 2005 by which the Appellants' application dated 31st August, 2005 was struck out. That application had sought the main order that the consent order entered in the lower court on 13th October, 2006 be set aside. By that consent order, the Respondent's further costs of the suit were taxed at KShs. 215,900/00. The Appellant was the defendant/judgement-debtor in the lower court while the Respondent was the plaintiff/decreeholder.

There are further prayers in the application, for stay of execution of the orders of the lower court of 18th January, 2008 and all consequential orders pending disposal of the appeal and for setting aside those orders. The orders of 18th January, 2008 were to facilitate the arrest of the Respondent in execution of the decree of the lower court.

The application is opposed by the Respondent.

I have read the supporting and opposing affidavits. I have also given due consideration to the submissions of the learned counsels appearing. No authorities were cited. Finally, I have perused the court record.

The Respondent obtained judgement against the Appellant in the lower court on 31st May 2000 for the sum of KShs. 198,500/00. Decree was issued on 27th July, 2000. As already seen, on 13th October, 2004 a consent order was recorded taxing the Respondent's further costs at KShs. 215,900/00. These further costs were incurred mainly in various attempts to execute decree that had been resisted by the Appellant. The Appellant filed the present appeal on 1st November, 2005. Again, as already seen, the appeal is against an order that struck out an application to set aside the said consent order.

Soon after filing the appeal, the Appellant sought by notice of motion dated 9th November, 2005 stay of execution of the consent order of 13th October, 2004 and all consequential orders pending disposal of the appeal. Because by then he had paid the principal sum of the decree, what he was in effect seeking stay of execution of was the decree for further costs. A prayer for interim stay **ex parte** was refused on

10th November, 2005.

On 20th March, 2006, by notice of motion of the same date, the Appellant again sought, in effect, stay of execution of the outstanding decree of the lower court pending disposal of the earlier application dated 8th November, 2005. The stay sought was granted **inter partes** on 4th April, 2006.

The application dated 8th November 2005 was subsequently fixed for hearing a number of times. On 3rd October, 2006 it was allowed by consent and stay of execution granted upon the condition that the Appellant deposits KShs. 280,000/00 in a joint interest-earning account in the names of advocates for both parties within 14 days. In default of such deposit, the application was to stand dismissed with liberty to the Respondent to execute the decree. It appears that there was default, and the Respondent moved to execute the decree in the lower court.

The Appellant then filed the present application. He was granted on 26th March, 2008, *ex parte*, a temporary stay of execution for 30 days upon the condition that he deposits in court the sum of KShs. 280,000/00 by 28th March, 2008. That *ex parte* order amounted to a variation of the consent order entered on 3rd October, 2006. This time round the Appellant complied and made the deposit on 28th March, 2008.

It appears that whenever the Appellant was faced with execution of decree in the lower court, he rushed to this court. Largely, he has been lucky here and has obtained, sometimes *ex parte*, the stays that he has sought. This time round, I must agree with the learned counsel for the Respondent that the issue of stay of execution of the further decree for costs is now *res judicata*. It was adjudicated upon in the application by notice of motion dated 8th November, 2005 which was compromised by the consent order recorded on 3rd October, 2006. To permit another application seeking the very same order of stay of execution as the present application now seeks, is to permit abuse of the process of the court. I will not permit that.

Regarding the orders of the lower court of 18th January, 2008, they were consequential orders made in execution of decree. That execution was consequent upon the Appellant being in default of the consent order of 3rd October, 2006. It was the Appellant's own fault that the execution was proceeding. The Appellant was lucky that he was permitted to benefit by his own default in the **ex parte** order he obtained on 26th March, 2008. But the end of the road may well be nigh. In any event, those orders of the lower court cannot be set aside in the present application.

Having considered all matters placed before the court, I find that the application by chamber summons dated 19th March, 2008 is both an abuse of the process of the court and misconceived. In the event that I am wrong on this, I will consider the application on merit. In applications for stay of execution pending appeal, the applicant must establish that he stands to suffer substantial loss unless stay is granted and that the application has been made without unreasonable delay. He must also be prepared to give such security as the court may order for the due performance by him of any order or decree that may ultimately be binding upon him. See **Order 41, rule 4(2)** of the Civil Procedure Rules (the Rules). The Appellant has met this third requirement with the deposit of KShs. 280,000/00 in court on 28th March, 2008.

But, I find that there has been unreasonable delay in bringing the application. Having defaulted the condition laid in the consent order of 3rd October 2006, the least the Appellant could have done was to apply appropriately as soon as the 14 days granted by that order expired. He waited one year and four months to make the present application, and only after the Respondent moved to execute the decree. That delay has not been explained; there has not even been any attempt to explain it.

What about substantial loss? There is not in the supporting affidavit any averment that the Appellant stands to suffer substantial loss; there is no evidence of such loss tendered. There is no allegation, for instance, that the Respondent will not be able to refund the further costs taxed to her in the consent order

of 13th October, 2004 in the event that this appeal succeeds. Considered on merit, the present application lacks merit, and I would dismiss the same.

In the event the application by chamber summons dated 19th March, 2008 is hereby dismissed with costs to the Respondent. It is so ordered.

DATED AT NAIROBI THIS 11TH DAY OF JULY 2008.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 11TH DAY OF JUNE 2008.