



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MACHAKOS**

**Civil Appeal 69 of 2008**

**JEREMIAH MSAKU KINYUMU ..... 1<sup>ST</sup> APPELLANT**

**ABDULHAIN AHMED SALIM ..... 2<sup>ND</sup> APPELLANT**

**VERSUS**

**ONESMUS MUSYOKA MUATHA ..... RESPONDENT**

**RULING**

1. The Appellants/Applicants herein by their Notice of Motion dated 28/5/2008 are seeking orders under Order XLI Rule 4 and Order L Rule 2 of the Civil Procedure Rules that the decree in Mwingi SRMCC 6/1998 be stayed pending the hearing and determination of the Appellant's Appeal.
2. The grounds in support are:
  - a. The appeal has merit.
  - b. If a stay of execution is not granted, the Appellants will suffer substantial loss in the event that the Respondent proceeds with the execution.
  - c. That this application has been made without unreasonable delay.
  - d. That the Appellants are ready and willing to abide by any order as to security as the court may issue for the due performance of such order as may be ultimately binding on them.
3. In the Supporting Affidavit sworn on 28/5/2008 by Patricia Njuguna and in submissions by Mr Wambua holding brief for M/S Hamilton, Harrison & Mathews Advocates for the Appellants, it is urged that judgment was delivered by the Mwingi SRM'S Court on 12/3/2008 and the Respondent awarded Kshs.602,600/= plus costs. The present Appeal was filed on 11/4/2008 and inspite of undertakings by the Respondent's advocates that there would be no execution of the decree, in fact on 27/5/2008, there was an attempt at execution hence this Application filed a day later. That the Respondent is a cess clerk and there is real fear that if the stay is not granted, the Appellants stand to suffer substantial loss. The information about the Respondent's day job was obtained from a copy of the Amended Plaintiff filed on 6/4/2001 by Ms Njuguna, so she deponed.
4. In his Replying Affidavit sworn on 19/6/2008 the Respondent deponed that the Application is a mere

attempt at delaying the realization of the fruits of a judgment properly obtained. Further, that no substantial loss would be suffered if the order of stay is not granted as he is able to repay the decretal sum because although he is a cess clerk, he is not a man of straw as he has wholesale shop at Nuu market and also owns land, and over 300 heads of cattle.

5. I have heard submissions by Mr W Kilonzo for the Respondent and I have perused the authorities cited so far as they are relevant to the issue before me. I agree therefore that generally and in line with Order XLIV Rule 4 (2) the discretion to grant an order for stay of execution is fettered but a party seeking that order must first prove substantial loss to be suffered. Platt J.A. in Kenya Shell Ltd vs Kibiru & Ano. (1986) KLR 410 at 416 stated as follows:-

**“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss of the applicant it would be a rare case when an appeal can be rendered nugatory. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money.”**

6. In the same case, Gachuhi Ag. J.A. was emphatic that the loss to be suffered must be clearly shown otherwise the Application will fail.

7. I have considered the Application in light of the above principle and in the circumstances of this case, I am inclined to grant the order for stay on conditions. I say so because although I am doubtful whether Patricia Njuguna, a Manager at Heritage Insurance Company Limited can, with authority state what substantial loss the Appellants will suffer, the Respondent has admitted that he is a cess clerk and in spite of his claim that he has a number of substantial assets, I am also of the view that the sum at stake is itself substantial and there is the risk that the Respondent may not be able to repay it if the Appeal succeeds. This case also has certain unique features because the suit before the lower court is being attacked in the Memorandum of Appeal as having been barred by limitation, a serious matter that may well have a strong bearing on the outcome of the Appeal.

8. Since no delay in the filing of the Application has been alleged, and I see none, I should only consider the issue of security for the due performance of the order for stay. I am alive to the fact that the Applicant has a lawful judgment and I see no prejudice caused if the following order is made;

Let a stay of execution pending appeal be granted pending hearing and determination of the Appeal on condition that the Appellant deposits the entire decretal amount in a joint interest earning account in the names of the advocates for the parties within 45 days of today's date. If there is failure to do so then execution to issue.

9. Costs of the Application shall abide the appeal.

10. Orders accordingly.

Dated and delivered at Machakos this **29<sup>th</sup>** day of **September** 2008.

ISAAC LENAOLA

JUDGE

In presence of: **Mr Kamolo holding brief for Mr Kilonzo for**

**Respondent**

**N/A for Applicant**

ISAAC LENAOLA

JUDGE