



REPUBLIC OF KENYA

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

Civil Appeal 208 of 2008

PATRICK ANALO CHAVANGA ..... APPLICANT

VERSUS

NATIONAL BANK OF KENYA.....RESPONDENT

R U L I N G

Patrick Analo Chavanga (hereinafter referred to as the applicant), has filed an appeal against the judgment of the Senior Resident Magistrate, delivered on 24<sup>th</sup> of April, 2008 in the Chief Magistrate's Court at Milimani in Civil Suit No.EJ.950 of 1998. The applicant has now come to this court by way of a notice of motion brought under Sections 3, 3A and 63(e) of the Civil Procedure Act Cap 21 Laws of Kenya, Order XLI Rule 4 and Order L Rule 1, 2, & 3 of the Civil Procedure Rules, seeking *inter alia* an order for stay of execution of the judgment and decree of the lower court pending the hearing and determination of his appeal.

The application is grounded on the fact that the applicant has lodged an appeal against the judgment and decree of the lower court and the applicant believes that his appeal has overwhelming chances of success. The applicant further contends that unless an order for stay of execution is issued the respondent may execute the decree and this will render the applicant penniless and also occasion him substantial loss.

In support of the application the applicant's advocate has relied on the case of *New Stanley Hotel vs Arcade Tobacconist Ltd (1986) KLR 757*, contending that there are special circumstances justifying the granting of an order for stay of execution as the decree is contentious. The applicant's advocate has also cited the case of *Butt vs Rent Restriction Tribunal (1982) KLR 417*, submitting that strict compliance with Order XLI of the Civil Procedure Rules may not be in the best interest of both parties. Also relied upon was the case of *Nairobi Sports House Limited vs Ngatia Gichonde & Another HCCA No.117 of 2003* (Nyeri) unreported.

In response to the application, grounds of opposition have been filed on behalf of the respondent, National Bank of Kenya Ltd. It is contended that the applicant has not offered any security for the due performance of the decree. It is further contended that the decree being a monetary decree the applicant has not demonstrated how the intended appeal may be rendered nugatory as the respondent which is a reputable and financially sound bank will be in a position to refund the judgment amount if the appeal is successful. It is contended that there is no likelihood of substantial loss being occasioned to the applicant.

Counsel for the respondent has submitted that the applicant has not satisfied the mandatory provisions of order XLI Rule 4 (2) of the Civil Procedure Rules as he has not demonstrated that he will suffer substantial loss nor has he shown a willingness to furnish any security. Counsel for the respondent relied on the case of *Joseph Kahugu Wakari vs Barclays Bank of Kenya Ltd & Another Civil application No. Nai 237 of 1996*, wherein the Court of Appeal held that there was no difference in principle for granting of stay of execution in money or other decrees, and that there must be substantial reasons for granting of stay of execution, and the fact that the applicant would be financially burdened by the execution of the decree was not a substantial reason. Counsel also relied on *Ngware-ini Investment Co. Ltd & 2 Others vs Diamond Trust Bank of Kenya Ltd, Civil Application No. Nai 57 of 2000*, wherein the Court of Appeal refused to grant an order of stay of execution pending appeal maintaining that the respondent was a reputable bank and there was no reason to believe that it will not be able to refund the decretal sum if

paid to it by the applicants. Also relied upon by the counsel for the respondent was the case of **Vishram Ravji Halai & Another vs Thornton & Turpin (1963) Ltd Civil Application No. Nai 15 of 1990**, wherein the Court of Appeal held that the court ought not to place a successful litigant in such a disadvantageous position that should the appeal not be proceeded with, or be withdrawn, or fail, the successful litigant would find it difficult to realize the fruits of its litigation due to the inadequacy of the security offered. Counsel for the respondent distinguished the authorities cited by the applicant's counsel contending that security was in fact ordered in the case of **Butt vs Rent Restriction Tribunal** while in the case of **New Stanley Hotel vs Arcade Tobacconist** (Supra) the court could not order security as the evidence was insufficient to establish what could be ordered as security. It was submitted that in this case, the respondent having established the amount due, the required security was clear.

In response Counsel for the applicant submitted that security is normally based on a decree. He maintained that in this case the judgment is imprecise and no decree can be drawn from that judgment. The required security was therefore unclear.

Under Order XLI Rule 4(2) of the Civil Procedure Rules an order for stay of execution pending appeal can only be made if the court is satisfied that the application has been made without unreasonable delay; and that substantial loss may result to the applicant unless the order is made. Security required by the court for the due performance of the decree must also be provided by the applicant. In this case, the applicant in the supporting affidavit sworn on 5<sup>th</sup> May, 2008, has not demonstrated any substantial loss that he is likely to suffer if an order for stay of execution is not granted. The applicant appears to rely essentially on the fact that he has an arguable appeal with overwhelming chances of success. Nevertheless, that is not a factor for consideration under Order XLI Rule 4(2) of the Civil Procedure Rules. The applicant also appears to contend that he will suffer substantial loss by the execution of the decree as that will render him penniless. It is not clear what the amount of the decree is nor has the applicant revealed to the court his financial status such as to lead to the conclusion that the execution of the decree will render him destitute. Be that as it may, as the Court of Appeal stated in the case of **Joseph Kahugu Wakari vs Barclays Bank of Kenya Ltd** (Supra) it is not enough to say that the applicant will be burdened financially as that is the natural consequence of a judgment entered against him. The applicant has therefore failed to convince this court that he will suffer substantial loss if the order for stay of execution is not granted. I further concur with the respondent's counsel that the respondent is a reputable financial institution which would have no difficulty in refunding the decretal amount should that become necessary. For the above reasons, I find no merit in the application for stay of execution pending appeal. Accordingly, I dismiss the application with costs.

**Dated and delivered this 15<sup>th</sup> day of September, 2008**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Advocate for the applicant absent

Miss Mwema H/B for Wambani for the respondent