



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Appeal 1044 of 2007**

**THE TRUSTEES CATHOLIC DIOCESE OF MURANGA.....1<sup>ST</sup> APPELLANT**  
**SELESIAN OF DON BOSCO.....2<sup>ND</sup> APPELLANT**  
**VERSUS**  
**REV. SAMUEL NGUGI.....1<sup>ST</sup> RESPONDENT**  
**GICHERU MBIRIRO.....2<sup>ND</sup> RESPONDENT**

**R U L I N G**

The Trustees of Catholic Diocese of Muranga and Selesian of Don Bosco who are the appellants, have come to this court by way of a chamber summons dated 24<sup>th</sup> June, 2008. They are seeking an order for stay of execution of the judgment delivered in CMCC (Thika) No.804 of 2005 pending the hearing and determination of the appeal which the appellants have filed against the judgment. The application is brought on the grounds that the appeal may be rendered nugatory if an order of stay of execution is not granted. It is further contended that the 1<sup>st</sup> respondent Rev. Samuel Ngugi who is the decree-holder is unemployed, and may not be in a position to reconstitute the decretal amount to the appellants if their appeal is successful.

The application is supported by an affidavit sworn by Rev. Father Mathew Vadakkevettuvazhiyil who claims to be the administrator of the 2<sup>nd</sup> appellant. He depones that the delay in filing the application for stay of execution was caused by the negotiations which were going on between the parties. Fr. Mathew explains that it was only after the appellants received the notice of intention to execute the decree that the appellants filed an application for stay of execution. The appellants maintain that their appeal has high chances of success and the same may be rendered nugatory if an order for stay of execution is not granted as the 1<sup>st</sup> respondent is unemployed and may therefore not be in a position to refund the decretal sum should that become necessary. Pursuant to orders issued by this court on 25<sup>th</sup> June, 2008, the appellants deposited the decretal sum of Kshs.2,553,100/= into this court. In support of the application counsel for the appellants relied on the following authorities: -

- (i) *Board of Trustees of NSSF vs Blantine Achitsa Induli & Another Civil Appeal No.312 of 2007.*
- (ii) *Bamburi Cement Ltd vs Joseph Kamuli Kahindi Civil Appeal 193 of 2007.*

The 1<sup>st</sup> respondents objected to the application through his replying affidavit sworn on 11<sup>th</sup> July, 2008. He maintained that the appellant have been guilty of delay in bring the application for stay of execution. He further deponed that although he is not in formal employment he is a farmer keeping dairy cattle and has a 4.93 hectare farm in Laikipia District with a permanent house. The 1<sup>st</sup> respondent maintains that he is a man of means, employing two workers whom he is paying Kshs.5000/= monthly. The 1<sup>st</sup> respondent further swears that he is a paraplegic resulting from the accident subject of the suit and that it is only fair that he should be allowed to enjoy the fruits of his judgment.

Counsel for the 1<sup>st</sup> respondent submitted that the appellant has not complied with the conditions for granting an order for stay of execution as he has not filed his application without undue delay. In this regard Counsel relied on the case of *Hall Equatorial Ltd vs Olympic fruits processors HCCC No. 5400 of 1991*. Counsel further urged the court to balance the rights of the appellants against that of the respondent who has become a paraplegic as a result of the accident and who should not be made to wait unduly long for the fruits of his judgment. In support of that contention counsel cited *Redland Enterprises Ltd vs Premier Savings & Finance Ltd (2002) 2 KLR 139*. Counsel for the respondent further urged the court to reject the supporting affidavit sworn by Father Mathew for failing to comply with Order III Rule 3 of the Civil Procedure Rules contending that Father Mathew is not an officer of the 1<sup>st</sup> appellant and is therefore not competent to swear the affidavit. In this regard, the following authorities were relied upon: -

- *Microsoft Corporation vs Mitsumi Computer Garage Ltd (2001) 2 EA 460.*
- *Hardial Singh Hunjan & Another vs Glad Ak Finance & Another HCCC (Milimani) 1595 of 2001.*

The court was urged to strike out matters deponed to by the 1<sup>st</sup> appellant which were not within his knowledge.

The 2<sup>nd</sup> respondent did not object to the application.

I have carefully considered the application, the affidavit in support and in reply and the submissions made by counsels. The conditions for granting an order of stay of execution are set out under Order XLI Rule 4(2) of the Civil Procedure Rules. i.e.

- (i) That substantial loss may result to the applicant unless the order is made,
- (ii) That the application has been made without unreasonable delay
- (iii) That security as the court may order for the due performance of the decree has been provided.

In this case, although the judgment subject of the decree sought to be stayed was made on the 19<sup>th</sup> November, 2007, the appellant has explained that they did not apply for an order of stay of execution immediately as there were ongoing negotiations. The facts that there were negotiations has not been denied by the 1<sup>st</sup> respondent, except that the 1<sup>st</sup> respondent explains that the negotiations fell through and that is why the notice of intention to execute was served.

It has not been denied that the appellants applied for an order of stay of execution in the lower court after receiving the notice of intention to execute and that it was only after that application was dismissed on 23<sup>rd</sup> June, 2008 that the applicant moved to this court. Although there has been some delay in bringing this application, I would not say that the delay has been inordinate. Further, the decree is for a sum of about Kshs.2.5 million. Although the 1<sup>st</sup> respondent maintains that he is not a man of straw, a sum of Kshs.2.5 million is a rather substantial amount for an individual and the appellants' fear that they may have difficulties in recovering the amount if paid to the 1<sup>st</sup> respondent is not unfounded. However, the 1<sup>st</sup> respondent who is a paraplegic has a judgment in his favour. The rights of the appellant to appeal must be balanced against the interests of the 1<sup>st</sup> respondent. I will therefore grant the order for stay of execution pending appeal on the following conditions: -

- (i) That a sum of Kshs.1 million out of the decretal amount deposited in court be forthwith released to the 1<sup>st</sup> respondent.
- (ii) That the balance of the decretal sum shall remain in court pending the hearing and final determination of the appeal.
- (iii) That the record of appeal having been duly filed by the appellant, the Deputy Registrar to call for the original record from the lower court and ensure that the appeal is placed before a judge for admission.
- (iv) That the appellant shall take all necessary action to facilitate the speedy disposal of the appeal.

Those shall be the orders of this court.

**Dated and delivered this 27<sup>th</sup> day of October, 2008**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Ibrahim for the appellant

Mrs Mungai for the respondent