



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT 1318 OF 1997

MOSES MBUGUA MWANGI.....DEFENDANT)

) APPLICANTS

**CHRISTINE MITHIRI MBUGUA.....
DEFENDANT)**

VERSUS

**BANK OF
BARODA.....PLAINTIFF/RESPONDENT**

VERSUS

R U L I N G

By a notice of motion filed on 7th December, 2007, Moses Mbugua Mwangi and Christine Mithira Mbugua (hereinafter referred to as the applicants), have come to this court under Order XLI rule 4(1) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking an order for stay of the execution proceedings in this suit pending the determination of their intended appeal against the ruling of the Hon. Justice Khamoni delivered on 4th October, 2000.

The applicants had by a notice of motion dated 8th December, 2006 sought an order of stay of execution proceedings in this suit pending the determination of HCCC No.552 of 2006 Moses Mbugua Mwangi vs Bank of Baroda India. That was the application which was dismissed by Khamoni J. on the 4th October, 2007 in respect of which dismissal the applicants have filed a notice of appeal.

The 1st applicant has filed a supporting affidavit in which he deposes that he has sued the respondent herein in HCCC No.552 of 2006 for damages and strongly believes that he has a good case. The applicant contends that it would be unfair to allow the execution to proceed in this suit before the proceedings in HCCC No.552 of 2006 are finalized. The applicant therefore believes that his intended appeal is arguable and has high chances of success. The applicant further maintains that the decretal sum being a colossal amount, his businesses are likely to be crippled if execution is allowed to proceed.

Bank of Baroda who is the respondent, objects to the application contending that the applicants have not satisfied the conditions set out under Order XLI Rule 4(2) of the Civil Procedure Rules for grant of stay of execution. It is further contended that the applicants will have an opportunity at the hearing of the notice to show cause, to give reasons why execution should not issue. It is also contended that the appeal

has no prospects of success and even if it was to succeed, the respondent is a well established bank capable of refunding the decretal sum to the applicants should that be necessary.

Counsel for the respondent relied on the following authorities: -

(i) *Francis K. Maingi Munyau vs Kisyula & Another, HCCA (Machakos) No.121 of 2000.*

(ii) *Royline Investment Ltd vs Conventional and Exotic Power Generation Ltd & Others HCCC No.1256 of 2000.*

(iii) *Richard Wakutoi vs A.O. Bayusuf & Sons Ltd, HCCC No.29 of 1999 (RD)*

Counsel further urged the court if inclined to exercise its discretion in favour of the applicants, to order the applicants to deposit the decretal sum in an interest earning account.

I have carefully considered this application. Under Order XLI Rule 4 of the Civil Procedure Rules, this court, as the court appealed from, has the powers to issue an order for stay of execution pending the hearing of the appeal, provided there is sufficient cause, and the court is satisfied that substantial loss may result to the applicants unless the order is made, and that such security as the court may order is provided. The application for such orders must of course be made without undue delay. In this case, a notice of appeal has already been filed. It is evident that if the order for stay of the execution proceedings is not granted, execution will proceed. The applicants' appeal against the order dismissing their application for stay of the execution proceedings will thereafter remain a mere academic exercise. The applicants have been served with notices to show cause as to why warrant of arrest and committal to civil jail should not issue against them. This means that if the execution proceedings are allowed to proceed, the applicants are likely to lose their liberty and this is a loss which cannot be quantified. However, it is apparent that the respondent has a judgment against the applicants which judgment was partly recorded by consent. In the circumstances it is necessary for this court to protect the interest of the respondents. For these reasons, I will allow the application to the extent of granting orders for stay of the execution proceedings pending the hearing of the intended appeal, on the following conditions: -

(i) That the applicants shall deposit the full decretal sum into an interest earning account in the joint names of the parties' advocates within 21 days from the date hereof.

(ii) In default of the applicants complying with condition No. (i) above the order for stay of execution shall stand discharged.

Those shall be the orders of this court.

Dated and delivered this 21st day of October, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Kulecho for 2nd & 3rd defendants/applicants

Ms Lubano H/B for the plaintiff/respondent