



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS

Civil Appeal 93 of 2008

JOHN KINYANJUI MBUGUA 1ST APPELLANT/APPLICANT

SAMUEL KARIUKI 2ND APPELLANT

VERSUS

BENJAMIN NZANGO KIMUYU RESPONDENT

RULING

1. The Application dated 23/5/2008 seeks orders that stay of execution of the judgment and decree in CMCC No. 830/2006 (Machakos) be granted pending the hearing and determination of the Appeal herein.
2. In the Supporting Affidavit sworn on 23/5/2008, John Kinyanjui Mbugua depones that on 14/12/2006, Hon. Okato, SRM issued orders within CMCC No.448/2006 (Machakos) to the effect that all suits emanating from the accident involving M/V KAH 688Y be stayed until the suit in CMCC 448/2006 aforesaid is determined on a test basis. That instead of abiding by that order, the learned magistrate, Hon. J.M. Munguti proceeded to enter a default judgment in CMCC 830/2006. Further, that the 2nd Appellant had died long before the suit was filed and the Respondent was well aware of that fact and since the 1st Appellant was only the driver of the motor-vehicle subject of the suit he would suffer loss if the decree is executed.
3. The Applicant also depones that the Respondent may not be able to refund the decretal sum if the Appeal succeeds and that he is prepared to abide by such terms as to security as this court may order.
4. In his Replying Affidavit sworn on 30/5/2008, the Respondent depones that the Application is an abuse of court process and has no merits because the suit was heard and judgment entered on the merits and that he is unaware of any order staying that suit. That there is in any event no reason to stay the execution of a decree lawfully obtained. He goes further to depone that he is able, ready and willing to refund the decretal sum should there be need to do so.
5. I have taken into account submissions by both Mr Kamanda and Mr Kilonzo and I agree with them that what the Applicant ought to show is that;
 - i. the Application was brought timeously.
 - ii. there is evidence of substantial loss to be suffered if the stay order is not granted.
 - iii. the Applicant is willing to abide by any order as to security which the court may wish to impose.
6. The above matters are expressly expected by Order XLI Rule 4 (21) of the Civil Procedure Rules but as Platt J.A. said **“substantial loss is the corner stone of best jurisdictions for granting a stay”** and that **“without this evidence it is difficult to see why the respondents should be kept out of their money”** – see Kenya Shell Ltd vs Kibiru (1986) KLR 410.
7. In the present case, there is no evidence that the Applicant came to court other than timeously and he has said that he is willing to present any security ordered by this court. The only issue to determine is whether he has made out a case that he will suffer substantial loss if the decree is executed. Having examined the Supporting Affidavit and annexures I think that he has made out such a case. I say so because his case has a unique feature; the order in CMCC No. 448/2006 specifically stayed all and/or future claims which may arise from the accident that occurred on 16th January 2006 along Mombasa Road between motor vehicles registration number KAH 688Y and KAH 192 Z”. CMCC No. 830/2006 was one such claim and once any court is made aware of the prior order, then it must down its tools in respect thereof. Further, the Applicant was the driver of the subject motor-vehicle and his employer has since died. It was obviously an error to proceed with a suit against the latter without notice to his legal representatives and I agree that whichever way one looks at it, substantial loss will result if the execution proceedings are actualized. Lastly, prima facie, this is a fit case to grant the orders sought on certain conditions.

8. The order for stay of execution is granted but the Applicant must deposit half the decretal sum in court within 45 days.
9. Costs thereof shall abide the Appeal.
10. Orders accordingly.

Dated and delivered at Machakos this **14th** day of **October** 2008.

ISAAC LENAOLA

JUDGE

In presence of: **Mr Makau h/b for Mr Kamunda for Applicant**

N/A for Respondent

ISAAC LENAOLA

JUDGE