

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MACHAKOS

Civil Appeal 121 of 2008

JOSEPH MWINZI MUTUTA ::::::::::::::: APPELLANT

VERSUS

JANE WANZA MWANGANGI (suing on behalf of Stephen

Mwangangi Mutiso (deceased)::::::::::::::RESPONDENT

RULING

1. The Notice of Motion on dated 17.9.2008 is brought under Order XLI Rule 4 of the Civil Procedure Rules. The Applicant seeks orders that there be stay of execution of the decree herein pending the hearing of the present Appeal.
2. In his Affidavit sworn on 8.9.2008, the Applicant depones that judgment in Machakos CMCC No. 123/2007 was delivered on 26.6.2007 and an application to stay execution of the decree was dismissed by the Subordinate Court on 17.9.2008. The present Application was then filed on 22.9.2008 and the Applicant therefore states that he brought it to this court without any delay.
3. Further, that he is challenging the judgment of the subordinate court both on liability and quantum and that his Appeal has overwhelming chances of success and he is willing to deposit such security as the court may order. In ground (b) of the grounds in support, the Applicant has stated that he will suffer irreparable loss should the execution of the decree succeed. Further, it is his case at paragraph 9 of the Supporting Affidavit that the Respondent will not be able to repay the decretal amount if the Appeal succeeds.
4. In her Replying Affidavit, the Respondent states that the Application is brought in bad faith and is merely calculated to waste the court's time as a previous application had been heard and dismissed by the subordinate court. That she is a woman of means engaged in crop farming and dairy farming and can easily repay the decretal sum of Kshs. 208,498/=.
5. Both Miss Katunga for the Applicant and Mr. Kamolo for the Respondent cited previous decisions of this court on the subject and I agree with them that as was said in Kenya Shell Ltd vs Kabiru [1986]KLR 410, party, a party seeking a stay of execution must prove what substantial loss it may suffer if the order is not granted. That is the cornerstone of any such application and in the instant case, the only issue raised in that regard is that the Respondent may be unable to pay the decretal sum. Sadly, for the Applicant, once that assertion is made, then proof of her inability to do so must be tendered. It is not enough to merely say so because as Ochieng J. stated in Diamond Trust Bank Kenya Ltd vs Peter Mailanyi & another HCCC 177/2002, there must be ***“sufficient material from which the court could conclude that if no stay was granted, he would suffer substantial loss.”*** The Applicant has clearly failed that test because the basis for the statement that the Respondents is unable to repay the decretal sum is completely lacking. The Respondent has on the other hand countered that she can indeed repay the said sum if called upon to do so. It is not for her to prove her means in any event, but for the Applicant to prove her lack of means and having failed to do so, his Application crumbles. It matters not that he filed

it timeously and he is willing to deposit security. Once the cornerstone is removed, the domino effect sets in.

6. Having so held the Applicant has failed to abide by Order XLI Rule 4(2) of the Civil Procedure Rules and his Application is dismissed with costs.

7. Orders accordingly.

Dated and delivered at Machakos this 27th day of November 2008.

Isaac Lenaola

Judge

In the Presence of: Mr. Kamolo for Respondent

Mr. Mutua Makau h/b for Mr.Ndolo for

Respondent.o

Isaac Lenaola

Judge