

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL 135 OF 2007

PETER WAMBUGU KARIUKI.....APPELLANT

VERSUS

SAVINGS AND LOAN (K) LIMITED.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

R U L I N G

On 22nd October, 2008, a notice of motion dated 26th September, 2008, brought under Section 65, Order XLI Rule 4, and Order L Rule 1 of the Civil Procedure Rules was argued before me. The motion sought an order of stay of execution of the judgment and decree in Milimani CMCC No.914 of 2003 which is subject of an appeal pending before this court. Having heard the parties, I on 14th November, 2008 granted the motion and issued an order for stay of execution pending appeal on condition that the appellant deposits ½ the decretal amount together with interest thereon from the date of the judgment to 15th November, 2008 into this court within 10 days. I reserved my reasons for that ruling which reasons I now give as follows.

The notice of motion dated 26th September, 2008 was premised on the grounds stated on the body of the application and the affidavit of Peter Wambugu Kariuki sworn on 26th September, 2008.

In short the appellant obtained an order of stay of execution in the lower court on 3rd May, 2007 on the ground that ½ the decretal amount was to be deposited into an interest earning account within 21 days from 3rd May, 2007. The appellant's counsel forwarded a bankers cheque for Kshs.288,000/= in the joint names of the parties' counsel on 24th May 2007. However, the account could not be opened first because the respondent's firm had changed its name and secondly because of a dispute over amount to be deposited, date of interest and where account was to be opened. Subsequently, an application to the lower court for extension of time for deposit of the money was disallowed.

The applicant maintained that the delay in complying with the order for deposit of the money was caused by the 1st respondent. The applicant maintained that he would suffer irreparable loss if the orders of stay are not granted as the appeal will be rendered nugatory. Relying on the case of ***Kenindia Assurance Company Ltd vs Patrick Muturi***, counsel for the applicant urged the court to exercise its discretion in the applicant's favour.

For the respondent it was submitted that the applicant was granted a conditional order of stay of execution by the trial court but to failed to comply with that order. It was maintained that the applicant had not shown that he will suffer substantial loss if the orders for stay of execution is not granted. It was further contended that the applicant ought to have appealed against the orders of the trial magistrate refusing to allow him extension of time to enable him comply with the order. It was further maintained that there was no delay on the part of the respondent but that the applicant only attempted to deposit the decretal sum outside the given period. Relying on ***Kenya Shell Ltd vs Kibiru & Another (1986) KLR 410*** and ***Manchester Outfitters Ltd vs Kenya Electricity Generating Company Ltd HCCC (Milimani) No. 1140 of 2000***, the court was urged to dismiss the application as lacking merit.

Under order XLI Rule 4(1) of the Civil Procedure Rules, this court as an appellate court has jurisdiction

to grant an order for stay of execution pending appeal notwithstanding the fact that the court appealed from may have refused to grant such an order. Therefore, the fact that the lower court made a conditional order for stay of execution which was not complied with does not fetter the power of this court to consider and grant this application. Further, it is evident that there was a serious attempt to deposit the sum of Kshs.288,000/= as ordered by the trial magistrate but it appears to have been some differences between the parties' advocates which impacted negatively in the applicant's attempt.

For these reasons I am of the considered view that the applicant should be given another opportunity. It is for these reasons that I made the orders for stay of execution on 14th November, 2008.

Dated and delivered this 25th day of November, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Advocate for the appellant absent

Masinde for the respondent