



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS**

Civil Appeal 62 of 2008

MUTUA KILONZO APPELLANT/APPLICANT

VERSUS

KIOKO DAVID RESPONDENT

RULING

1. A party seeking any orders under Order XLI Rule 4 of the Civil Procedure Rules, such as the Applicant herein, must establish that;

- i. substantial loss will be occasioned unless the order is granted;
- ii. the application was filed without undue delay;
- iii. he is prepared to furnish such security as the court may order.

2. The Applicant's case is that he has met the test because in Lillian Munyiri's Supporting Affidavit sworn on 31/3/2008 it is deponed at paragraph 9 thereof that the Respondent is "a man of very little financial means, as gleaned from his evidence at trial case above-mentioned and will not make restitution in the event that the intended appeal succeeds." Further that the award of Kshs.180,000/= is too high for the injuries sustained by the Respondent. Lastly, that the Application was brought without inordinate delay.

3. The Respondent sees no merit in the Application and argues that in fact execution has already taken place and there is nothing to stay. That in any event, he is a man of means and can repay the decretal sum should the Appeal succeed.

4. I have taken into account the submissions by both Mr Chahenza and Mr Mutua for the Applicant and Respondent respectively and I have perused the following authorities relevant to the subject at hand;

i. Caneland Ltd & Others vs Delphis Bank Ltd C.A. Nai 344/1999 where the issue was whether execution will render an appeal nugatory.

ii. Lalji Bhimji Sanghani Builders & Contractors Ltd vs Nairobi Golf Hotels (K) Ltd. H.C.C.C.C 1900/1995 (Nairobi) where Ringera J held that the Applicant ought to persuade the court, that the Respondent is a man of straw and cannot repay the decretal sum.

iii. Peter Kihuna & Another vs Teresia Mutheu Muete H.C.C.C 67/2008 (Machakos) where this court granted an order of stay on certain conditions.

5. To my mind, the Applicant has failed to establish what loss he will suffer if the decree is executed. I say this with respect because Lillian Munyiri aforesaid is an officer at Gateway Insurance Company Ltd and has not stated that she personally knows the means of the Respondent. She merely states that from evidence at the trial he is a man of straw. How that conclusion is reached and based on what evidence, I cannot tell. It is now a catchphrase that every Respondent in an application for stay of execution is called a man of no means. That is all fine if there is evidence to back up that position. If for example, the job done or other means of living are clearly deponed to, then it is easy to fathom what means the Respondent has. Ringera J in Lalji Bhimji put it succinctly when he stated thus;

“...he (the applicant) must persuade the court that the decree holder is a man of straw from whom it will be nigh to impossible or at least very difficult to obtain back the decretal amount in the event the intended appeal succeeding. Such persuasion must spring from affidavits or evidence on record.”

6. I agree but in this case where is that evidence both on record and on affidavits? Sadly, I see none. Without the Applicant failing to prove substantial loss by showing the frugality of the Respondent's environment, I see no reason to find that there is merit in the Application.

7. I say this because it matters not that the matter before me was brought without delay or the decretal sum has been deposited. The Applicant has failed the most crucial test and for that reason the Application must fail.

8. Let this also be a warning that so far as possible, executives in Insurance Companies and advocates for the parties should unless absolutely necessary or clearly from the record desist from swearing affidavits on contested matters and for which they have no personal knowledge.

9. In any event, the Applications for stay of execution in H.C.C.A 60/2008, H.C.C.A 61/2008 and H.C.C.A 62/2008 which are intertwined with this one, are all dismissed with costs to the Respondent.

10. Orders accordingly.

Dated and delivered at Machakos this 11th day of November 2008.

ISAAC LENAOLA

JUDGE

In presence of: Mr Musyoka h/b for Mr A.K. Mutua for Respondent

N/A for Applicant

ISAAC LENAOLA

JUDGE