

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Appeal 581 of 2008

BERNARD NGARI WAWERU.....1ST APPELLANT

ESTHER WAMBUI NGARI.....2ND APPELLANT

VERSUS

CAPT. P.M. KANYAGIA.....RESPONDENT

R U L I N G

By a memorandum of appeal filed on 28th October, 2008, Bernard Waweru Ngari and Esther Wambui Ngari (hereinafter referred to as the 1st and 2nd appellants), appealed against an order delivered by Honourable Kiarie in Milimani CMCC No.13445 of 2004 on the 17th October, 2005 on the following grounds: -

- (1) That the learned magistrate erred in law and fact in committing the 2nd appellant to civil jail without considering her means and without regard to her showing cause.
- (2) That the learned magistrate erred in law and fact in committing the 2nd appellant to civil jail without considering her means and without regard to the application to liquidate the money in installments.
- (3) That the learned magistrate erred in law and fact in committing the 2nd appellant to civil jail without considering her application to pay the decree in installments and deciding and dismissing the oral application to pay the installment *in limine*.
- (4) That the learned magistrate erred in law and fact in arriving at a finding that is manifestly oppressive to the appellant without hearing the appellants herein.

Filed simultaneously with the memorandum of appeal, is a chamber summons dated 28th October, 2008 brought under Order XX Rule 11, Order XXI Rule 22(1) of the Civil Procedure Rules, Section 3A and 63(e) of the Civil Procedure Act seeking *inter alia*, an order of stay of execution of the decree and all consequential orders including the order of committal to civil jail “pending *inter parte* hearing of the application”. The appellants also seek an order that they be heard on their application dated 21st October, 2008 “seeking to be allowed to pay the decretal amount *inter partes*.”

The appellants contend that an order committing them to civil jail was made on 17th October, 2008 and if the same is executed it will cause irreparable damage and the substratum of the application will be defeated. Each of the appellants have sworn supporting affidavit explaining that they have paid a sum of Kshs.50,000/= and they should be allowed to liquidate the decretal sum by installments of Kshs.10,000/=.

The respondent Capt. P.M. Kanyagia has filed grounds of opposition contending *inter alia* that the appeal is incompetent, and that the appellants are withholding information as they have not disclosed that the decretal amount currently stands at Kshs.400,000/=. It is further contended that the decree was passed way back on 27th February, 2006 and that the appellants had been served with notices to show cause and have repeatedly promised to make offers for payment which promises have not borne any fruit.

I have considered this application. It would appear that the parties are essentially arguing the appeal. It is

however, premature at this stage to consider the merits of the appeal. Prayer No.3 of the application is therefore not available as the same can only be granted after the appeal is heard. With regard to prayers No.1 & 2, this court as an appellate court can only grant orders of stay of execution pending appeal under Order XLI Rule 4 of the Civil Procedure Rules. The appellants are however not seeking orders for stay of execution pending appeal but are seeking orders for stay of execution under Order XXI Rule 22 of the Civil Procedure Rules. That rule only applies where the court to which the decree has been sent for execution is requested to stay the execution of the decree to enable the judgment debtor apply to the court by which the decree was passed or to any court having appellate jurisdiction for an order to stay the execution of the decree. The rule cannot therefore apply to this court in exercise of its appellate jurisdiction. The appellants have also moved the court under Order XX Rule 11 of the Civil Procedure Rules. This rule empowers the court for any sufficient reason at the time of passing the decree to order that payment of the amount decreed shall be postponed or paid by installments; or for the court after passing the decree on the application of the judgment debtor for sufficient reason to order that the payment be postponed or made by installments. Thus, such orders can only be made by the court which passed the decree. The appellants cannot take refuge under Section 3A and 63e of the Civil Procedure Act to invoke the inherent jurisdiction of the court as there are clear provisions provided for applications for stay of execution pending appeal. I find therefore that the application before me must fail as the same is incompetent. It is accordingly dismissed with costs.

Dated and delivered this 2nd day of December, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Advocate for the appellant absent

Miss Nthuku H/B for Kamaara for the respondent