

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Civil Appeal 132 of 2002

PAUL KRIJNEN.....APPELLANT

VERSUS

JOSEPH WACHIRA MURAKARURESPONDENT

R U L I N G

By a motion taken out pursuant to Order XLI rule 4 of the civil Procedure Rules, Joseph Wachira Murakaru, the Respondent herein, sought to have the order staying execution of the decree pending appeal to be set aside and for a further order directing the release of the deposit to settle the decree. The Respondent swore an affidavit to support the motion. The appellant's Counsel filed grounds of opposition to object to the motion.

It is the submission of Mr. Gathuku advocate for the Respondent that the order of stay should be set aside to enable the Respondent attach the funds deposited in a joint interest earning account to satisfy the decree. The basis of his averment is that the appellant is out of this court's jurisdiction and that as a result it has taken long to prosecute the appeal.

On her part Mrs. Tutui advocate for the appellant is of the view that the motion has no merit because the appellant has not breached any terms of the order of stay. She also stated that the delay to prosecute the appeal is beyond her control because the proceedings have not been supplied to the appellant by the court.

I have considered the arguments for and against the motion. What is clear is that the Respondent is tired of waiting for the appeal to be heard and determined. Mr. Gathuku has complained and alluded that the delay has been caused by the absence of the appellants from Kenya. The record is very explicit that the appellant's advocate has made tremendous efforts to have the proceedings supplied to the appellant but it appears the court has not managed to do so. There is no evidence that proceedings will be supplied only when the appellant is in Kenya. To the best of my understanding, it is not necessary for the appellant to be personally present in Kenya. If well advised, the Respondent can as well seek to have the appeal dismissed for want of prosecution instead of filing such an application. An application like this can only be sustained if there is evidence that the terms of the order for stay of execution have been breached. The Respondent does not allude to that. It is not also said that the stay out was limited to a particular period. I have perused it and it is clear that it was to last until the appeal is heard and finally determined. The appeal can only be determined after hearing or is dismissed for want of prosecution or is settled by compromise.

For the foregoing reasons the application is ordered dismissed with costs to the appellant.

Dated and delivered at Mombasa this 21st Day of February 2007.

J.K. SERGON

J U D G E

In open court and in the presence of Mr. Ouma h/b for Mrs. Tutui for the Appellant. N/A Gathuku for the Respondent.
