REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO.3 of 2007

KENNETH BUNDI KUBUTE …….....….. 1ST APPELLANT

JULIUS GIKUNDA RUKARIA ……..….....…… 2ND APPELLANT

LYDIAH K.GIKUNDA(ALIAS LYDIA KATHAMBI GIKUNDA …..... 3RD APPELLANT

VERSUS

DANIEL NJAGI DAVID ……....…….....…….... RESPONDENT

RULING

By a notice of motion dated 9th January, 2006 (I believe 2007) the applicants have come to court seeking a stay of execution of the decree in SRM's Court Civil Suit No.394 of 2005 at Meru pending the hearing and determination of the appeal herein.

The grounds of this application are that the lower court awarded to the respondent the sum of Kshs.414,970/=(less 10% contribution) as general and special damages in the above case.

That the applicants are aggrieved by the decision and has preferred an appeal to this court against it. It is further deposed by the 1st applicant that he is apprehensive that the respondent may commence execution anytime. If the decretal sum is paid over to the respondent the latter will not be able to refund the same in the event the appeal which has high chances of success, succeeds, thereby rendering the appeal nugatory and causing substantial loss to the applicants. Finally the applicants are ready and willing to offer security as may be directed.

The application is opposed and the respondent in his replying affidavit avers that this being a money decree, the appeal cannot be rendered nugatory merely by payment of the decretal sum to the respondent as the same can be recovered if the appeal succeeds. That the applicants have failed to demonstrate that they will suffer substantial loss. It was also submitted that the appeal has no chances of success and finally that the application must fail as the decree in question has not been extracted and exhibited.

I have given duly consideration to these submissions and the authorities cited by learned counsel for the respondent. The application is expressed to be brought under Order 41 Rule 4 of the Civil Procedure Rules, Section 3(1) of the Judicature Act, Section 3A of the Civil Procedure Act and the High Court (Practice & Procedure) Rules. The last provision has been cited as the application was filed during the court vacation. Issue has been taken over this by counsel for respondent who has argued that leave was not sought and obtained to be heard during vacation and if the application was to be perused after vacation, the applicants ought to have withdrawn it and filed a fresh one. That since the applicants having failed to do so, the application is defective.

Counsel for the applicants explained that the application was drawn during the court vacation but was not heard. That subsequently the court certified the application urgent. The order sought to be stayed was delivered on 11th December, 2006, a few days before the commencement of the court vacation. The application was filed on 11th January,2007 while the court was still on vacation. It was not heard until the first day of the term on 15th January, 2007.

Clearly the prayer for hearing during the court vacation was spent. That did not affect the other prayers in the same application. It was not necessary for the applicant to file a fresh application. Having said so I wish only to add that it is improper to bring an application under the High Court (Practice and Procedure) Rules for leave to be heard during court vacation in the same application for substantive orders.

The rules aforesaid provide that such an application be made by way of Chamber Summons supported by an affidavit giving the grounds of urgency. It is therefore inappropriate to combine that application, for instance with one seeking stay of execution which must be brought by way of Notice of Motion.

I turn to the substantive prayer, namely, stay of execution pending appeal. It is now settled beyond any doubt that for such application to succeed the following three strictures must be satisfied, namely, that substantial loss may result to the applicant if the stay sought is not granted; that the application has been made without unreasonable delay; and finally that such security as the court may order for the due performance has been given by the applicant.

These are the only conditions in an application for stay before the High Court. It must be stressed right away that this court in considering an application for stay of execution it does so in accordance with the above rule and within the above parameters. It must also be noted that the consideration by the Court of Appeal for a similar application is governed by different rules and conditions by dint of its own jurisprudence under Rule 5(2) of the Court of Appeal Rules. Listening to the learned counsel for the respondent I got the impression that he misapprehended the distinct jurisdictions of the two courts in matters of stay of execution. For instance it is not a condition that the High Court be satisfied that the intended appeal must be arguable. That is only a requirement for the Court of Appeal. This distinction has been the subject of a number of decisions such as International Laboratories for Research or Animal Diseases(ILRAD) Vs- Kinyua(1990) KLR ,403, Halali, & Another –V- Thornton & Turpin (1963) Ltd(1990),KLR 365, among others. I have already stated that the decision sought to be stayed was delivered on 11th December, 2006 while this application and the Memorandum of Appeal were simultaneously filed on 10th January, 2007 – a period of one month. One month, taking into consideration the fact that the part of it fell within court vacation, in my view, can not constitute unreasonable delay.

Regarding substantial loss, the applicant avers that should the decretal sum be paid to the respondent the former will find it difficult to recover the same in the event the appeal succeeds. Although the burden is upon the applicant to show that the respondent is unlikely to make restitution, it becomes imperative upon the respondent to rebut the allegation of his impecunity.

The reasoning being that should money be paid over to a respondent whose financial resources are unknown, the applicant's fears and apprehension will be justified that the likelihood of recovering the money in case the appeal succeeds will be remote and the appeal will be rendered nugatory. Yet this is what the court must ensure does not happen.

In the *ILRAD* case(*Supra)* the court of Appeal stated this position thus:

"However, we must observe that the onus was on the respondent

to rebut by evidence the claim that the intended appeal if successful would be rendered nugatory on account of his(respondent's) alleged impecunity".

The respondent's replying affidavit is silent on his financial status, confirming the unlikelihood of

restitution. The applicants have deposed on their willingness and readiness to comply with any orders as to security.

The award was Kshs.400,000/=, costs 44,440 and specials 14,970 less 10% contribution, amount due is Kshs.413,469/=. This is what the applicants will deposit in an interest earning account with a reputable bank in the joint names of counsel for the respondent and their counsel to secure stay of execution of the decree. This must be done within the next twenty one (21) days from the date hereof otherwise the stay will automatically lapse.

The applicant to bear the costs of this application.

Dated and delivered in at Meru this 20th day of February,2007.

W. OUKO

JUDGE

20.2.2007

Coram:

W. Ouko,J

Mr. Ringera for Applicant

Mr. Nyaga – absent

c/clerk Marangu

Ruling delivered.

W. OUKO

JUDGE