

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT EMBU

Civil Appeal 1 of 2006

WILLIAM WACHIRAAPPELLANT

VERSUS

JOSPHAT MUGO NDONGI.....RESPONDENT

RULING

This appeal is filed challenging the Ruling of P.T. Nditika dated and delivered on 28/12/2005 in *Kerugoya Senior Resident Magistrate Civil Case No. 72 of 2004*. In that ruling the Trial Magistrate dismissed the application by defendant to set aside Judgment already entered against the Defendant. That Judgment is still standing and valid. No appeal has been made against that Judgment. This Appeal is against the dismissal of the application to set aside that Judgment and unless the appeal is determined with success to the applicant, the Judgment shall be executed against the Applicant.

For this reason the Applicant applied for stay in the lower court and was granted conditional stay. The condition was that the Applicant do deposit Shs. 319,000/- into an interest earning joint account by the both advocates within 21 days from the date of ruling which was 8/3/2006. On 23.3.2006 the Applicant made another application seeking review of the order made on 8.3.2006 so as to allow the change of security from cash deposit ordered to depositing title Deed of a certain parcel of land named on account that the Applicant earns very little income as a teacher. This application was rejected by the lower court after lengthy argument by both parties. The applicant filed this appeal on 6/1/2006. Stay of Execution of Decree is governed by Order 41 rule 4 which provides that no appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except as in so far as the court appealed from may order, but the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court which such appeal is preferred shall be at liberty on application being made to consider such application and to make such order thereon as many to it seem just. Any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside. The issue of the application being *res judicata* is not applicable. The appellate court has jurisdiction to hear and decide on the matter again. Both parties were satisfied in the order of stay granted, it is only the issue of payment of deposit which appears to have become onerous to the Applicant. An application for execution by way of committal to civil jail (see Exhibit WW5) was made and he said if he is committed to jail, he would lose his employment as a teacher. He has property the piece of land he is offering to deposit Title Deed. The value of the land is disclosed as 750,000/-. He is not in a position to deposit cash ordered by court. The requirement for security on granting stay is contained under Order 41 rule 4 (2) "such decree or order as may ultimately binding on him has been given by the applicant. The order does not specify what security may be demanded. It is quite clear that a security other than cash may be taken so long as it is of adequate value.

Finally the appeal filed if successful would result in setting aside judgment entered against the applicant in this case. It is clear that if the execution was allowed the appeal would be rendered nugatory and as it was admitted by the Counsel of Respondent the Decree holder would not be able to repay if appeal was successful. The judicial process is not to be used to pass money from one pocket to another unless truly justified.

I therefore reject the P. O raised with costs to the Applicant.

Dated this 12th February, 2007.

J. N. KHAMINWA

JUDGE

12.2.2007

Khaminwa – Judge

Njue – Clerk

Mr. Kariuki Advocate

Ruling read in open court.

J. N. KHAMINWA

JUDGE