



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**Civil Appeal 122 of of 2006**

**DANIEL MAORE M'BIRITHI ..... PLAINTIFF**

**VERSUS**

**MIRITI M'IKANATHA ..... DEFENDANT**

**RULING**

This ruling relates to an application brought on 29<sup>th</sup> November, 2006 by way of notice of motion seeking one substantive order, that is, a stay of proceedings in Maua PMCC No.142 of 2006 and order issued on 22<sup>nd</sup> November, 2006 pending hearing and determination of the appeal herein.

The application is based on the grounds that the court at Maua dismissed the applicant's application against the respondent, seeking to temporarily restrain the latter from plucking miraa from parcel of land No.Mwobaituana/1590 pending the hearing and determination of the main suit.

Being unhappy with that order dismissing his application, the applicant preferred an appeal against the ruling on 29<sup>th</sup> November, 2006. that the lower court is arriving at its decision granted orders not sought.

That pending the hearing of the main suit, the applicant seeks to stay the proceedings before the court below as well as the order dismissing his application for interlocutory injunction.

In his replying affidavit the respondent avers that the applicant leased to him the miraa in question at a consideration of Kshs.50,000/- for 20 plucking periods. At the time of filing this suit, the respondent states, he has only plucked miraa five times. That the application seeking to restrain the respondent by the applicant was dismissed for lack of merit.

It is also contended that by granting this application the court would be granting the orders sought in the

subordinate court without hearing the suit. Finally it is argued that the applicant has not demonstrated the loss he stands to suffer.

To these averments the applicant filed a supplementary affidavit in which he denied leasing the miraa to the respondent.

I have duly considered these arguments and take the following view of the matter. The application is expressed to be brought under Order 41 Rule 4(1) of the Civil Procedure Rules, which provides as follows:-

*“4(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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 to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and 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”*

(2) No order for stay of execution shall be made under subrule(1) unless:-

a. *The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and*

b. *Such security as the court orders due performance of such decree or order may ultimately be binding on him as been given by the applicant”*

I have deliberately set out the above provision to show how it applies to the application before me. From a textual analysis it appears clearly that the court has a discretion to order stay of proceedings pending appeal and such discretion is unfettered. The usual structures that sufficient cause be shown, substantial loss, bringing of the application without undue delay and provision of security are, from the plain reading of the rule applicable only to applications for stay of execution only.

From the submissions by counsel for the applicant and on the basis of the grounds of this application it is clear that the applicant is mainly interested in stay of proceedings before the court below. If stay of proceedings is granted, it follows that execution of any order from those proceedings will in effect be similarly stayed. I therefore propose to consider the application only on the prayer for stay of proceedings.

Having noted that in such application the court has unfettered discretion, submissions by both counsel

based on the structures for the grant of stay of execution are therefore inapplicable. This court has unlimited discretion subject only to the same being exercised rationally and not capriciously. The only consideration is whether it is in the interest of justice to order a stay of proceedings and in what terms. The court in doing so must consider the merits and demerits for ordering or not ordering a stay of proceedings.

It must bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal and whether the application has been brought timeously.

Looking at this application from the foregoing perspective it cannot be doubted that the same has been brought without undue delay. The order in question was made on 22<sup>nd</sup> November, 2006, the memorandum of appeal and this application filed on 29<sup>th</sup> November, 2006.

I say no more on this point. Next, I consider what would happen if a stay is not granted and the applicant proceeds to prosecute the appeal while at the same time the suit in the court below proceeds. If that was to happen the respondent will continue to harvest the disputed miraa until either the appeal is heard and determined or the suit is heard and finalized .

That is a time frame that is not easy to determine. The applicant is therefore bound to suffer serious prejudice. He has disputed the existence of an agreement leasing the miraa to the respondent. The courts must strive to ensure that where a party is exercising his right of appeal, the outcome of such appeal must not be rendered nugatory by not allowing the appeal and the proceedings the subject of the appeal to proceed simultaneously.

Such a scenerario is likely to cause delay and waste judicial time. In the interest of justice, it is ordered that there shall be a stay of proceedings in Maua PMCC No.142 of 2006 pending hearing and determination of this appeal. It is further ordered that the appeal be prosecuted expeditiously and the same be mentioned within one month from the date of this ruling. Costs to be in the cause

Dated and delivered at Meru this 2 day of March, 2007

W. OUKO

JUDGE.

