REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

Civil Appeal 92 of 2006

JULIUS GITUMA MBOROKI ……...……. APPELLANT

VERSUS

MWENDA M'MUGWIKA ……..…….. RESPONDENT

RULING

This is an application for stay of execution pending appeal. What is sought to be stayed is an order made on 5th September, 2006 in Tigania RMCC No.96 of 2006.

The application is premised on the grounds that the respondent obtained injunctive orders to restrain the applicant from operating a posho mill at Ruiri Market. That the poshomill is the applicant's source of livelihood. The applicant being aggrieved by the interim orders of the lower court filed a memorandum of appeal to this court and at the same time brought this application. The application is opposed by the respondent who has sworn a replying affidavit, in which he urges the court to dismiss the application as it is frivolous and an abuse of the process of the court.

These are the arguments in this application. Of course there are others which I have deliberately left out as they relate to matters not relevant in the consideration of this application, namely the merits or weaknesses of the intended appeal.

Although the motion of notice does not specify under what provisions of the law it is brought, from the prayers sought it is safe to assume that it is premised on Order 41 Rule 4 of the Civil Procedure Rules, which provides for these conditions to be fulfilled before an Order of stay can be granted. That is to say:-

(i) The court must be satisfied that substantial loss may result to the applicants if the stay is not granted

(ii) That the application has been made without unreasonable delay

(iii) That such security as the court orders for the due performance of such decree or order has been given by the applicant.

These are the only known conditions. There is no requirement that the applicant's appeal must be arguable. It must be pointed out that this court in considering an application for stay of execution it does so in accordance with the above rule and on the above three strictures, while the court of Appeal does so by dint of its own jurisprudence under Rule 5(2) (b) of the Court of Appeal Rules.

The distinction has been the subject of various decisions such as International Laboratiories for Research on Animal Diseases(ILRAD) V-Kinyua(1990) KLR 403, Halah & Another V.Thornton & Turpin(1963) Ltd(1990) KLR 365 ABN AMRO Bank N.V.V.Le Monde Foods Ltd, Civil Application No.Nai 15 of 2002(UR), and Kenya Shell Ltd V Kibiru,(1986) KLR 410 among others.

In the latter case the court stated as follows:-

"….. there is no requirement under Rule 5, that the applicant for a stay shall give security for the due performance of the decree, as Order 41 Rule 4(1) provides. All that is required as a pre-condition for the exercise of our discretion under Rule 5 is that a notice of Appeal has been filed".

It follows therefore that in the case of the Court of Appeal, under Rule 5(2) (b) of that Court's rules, the only condition provided is that a notice of appeal be lodged in accordance with Rule 74 of those rules.

This donates to the court of Appeal an unfettered discretion to grant a stay provided it is just to do so. Reuben & 9 others V.Nderitu & Another, (1989) KLR 459 laid down principles by which the Court of Appeal is guided in exercising its discretion. They include a requirement that the applicant must show that the intended appeal is not frivolous or that he has an arguable appeal or that the appeal, if successful, would be rendered nugatory.

I have been constrained to set out the above jurisdictional distinction in detail, as it was apparent that Counsel's submissions appear to have been on the mistaken assumption that this court, in considering application for stay of execution can go beyond Order 41 rule 4(1) of the Civil Procedure Rules.

The applicant herein was aggrieved with the interim orders issued by the court below. He has preferred an appeal to challenge those restraining orders. He avers that if the orders are not stayed he will suffer substantial loss as his livelihood and that of his family depends on the posho mill, which he has operated since 2003. The respondent, although a neighbour of the applicant has not challenged this statement. If it is true, therefore, that the posho mill is the applicant's only means of livelihood and financial support for himself and his family, then the likelihood of him and his family suffering substantial loss should the posho mill be shut at this stage cannot be gainsaid or debated.

The interim orders in issue were made on 5th September, 2006. This application was brought on 8th November, 2006 a period of about three months. This in my view does not constitute unreasonable delay. Emphasis must be on the word" unreasonable".

As I have observed Learned Counsel concerned himself more with the merits of the appeal and forgot to address the court on the issue of security. At this stage, all he was expected to confirm is the readiness and willingness of the applicant to abide by any orders as to security.

However, my interpretation of sub-rule(2)(b) of Order 41 rule 4 is that where the court is satisfied that the applicant may suffer loss and that the application has been brought timeously, it will grant stay only subject to the applicant giving security as may be ordered by the court. To insist that the applicant must give security before the court orders for the same is to put the cart before the horse and also tantamount to taking the court for granted.

It is the court to determine the nature and extent of security and order the applicant to comply. Normally the court will grant stay subject to the applicant giving security. In this case, having found that the applicant may suffer substantial loss and that the application was filed without unreasonable day, I grant stay of execution of the order of injunction issued on 5th September, 2006 pending the hearing of the appeal subject to the applicant securing the sum of Kshs.20,000/- or such security to the satisfaction of the Deputy Registrar within one month from the date of this order for the costs of the appeal .

In conclusion a final point was raised that the application is fatally defective for failing to indicate the provision of the law under which it is brought. The application as I indicated at the beginning of this ruling is completely silent as to the provisions under which it is brought. That obviously is not a serious

point. No law was cited that makes it mandatory that the provisions must be cited in the application. It is now established beyond peradventure that irregularity as to form which do not go to the jurisdiction and which do not cause prejudice to the other side are not sufficient to vitiate proceedings before the court. That point lacks merit.

The foregoing are the orders of this court. Costs to be borne by the applicant.

Dated and delivered at Meru this 2nd Day of March, 2007

WILLIAM OUKO

JUDGE

2.3.2007

Coram:

W.Ouko,J

Mr. Karoti – applicant

Mr. Ondari – for Mr. Mokua

C/Clerk Marangu

Ruling delivered

WILLIAM OUKO

JUDGE