



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL 69 OF 2005

PATRICK KINYUA 1ST APPELLANT/APPLICANT

KIEGOI TEA FACTORY LTD 2ND APPELLANT/APPLICANT

VERSUS

BERNARD KABERIA(as the administrator of the estate of

DOREEN KAGWIRIA RESPONDENT

(Being an appeal from the judgment and decree of Mr.Morara, Resident Magistrate delivered and issued on 4.8.2005 in Maua PMCC No.36 of 2004).

RULING

On 4th August, 2005, the court below (Morara,Esq) sitting in Maua PMCC No.36 of 2004 delivered a judgment in a road traffic claim in which he ordered the applicants to pay Kshs.250,000/= in damages and costs to the respondent.

Being aggrieved, the applicants applied under Order 41 of the Civil Procedure Rules to the trial court for an order of stay of execution pending the hearing of that application *interpates* and an appeal to this court.

That application was granted on condition that the applicants paid to the respondent half of the decretal sum and deposit the other half in a joint interest earning account.

Still unhappy with this the applicants filed the present application to which this ruling relates seeking stay of execution of the decree pending the hearing and determination of the appeal. The application is based on the grounds that the appeal raises serious issues of law and fact which have high chances of being upheld on appeal. That the conditional order of stay issued by the court below meant paying over to the respondent over Kshs.130,000/= yet the latter is a peasant farmer who may not refund the said sum in the event the appeal succeeds.

This would render the appeal nugatory and the applicant will suffer substantial loss. The applicants have also expressed their readiness and ability to offer such security as may be ordered by the court.

The application is opposed by the respondent who has argued that this application is meant only to delay execution. That there cannot be any substantial loss, this being a money decree which is recoverable should the appeal succeed. He further deposes that execution has began and therefore there is nothing to stay and the application amounts to an abuse of the process of the court. It is argued that the applicants having been granted a conditional stay by the trial court cannot come to this court without satisfying the conditional stay order.

Finally the affidavit in support of this application is challenged as incompetent and defective for having been sworn by an advocate who is not competent to swear it on matters in issue. I have considered these submissions and authorities cited. I propose to deal first with the last point regard the supporting affidavit.

Order 18 Rule (1) of the Civil Procedure Rules provides that;

“Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove; provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the source and grounds thereof”.

It follows from the foregoing that an advocate can swear an affidavit so long as he is able to prove the matters upon which he deposes.

In interlocutory applications or with court’s leave he can swear on matters not within his knowledge so long as he shows the source and grounds of such information.

I have looked at the twenty paragraphs of the supporting affidavit and it is clear to me that the averments are not contentious matters, or matters that counsel cannot prove. They are matters relating to the proceedings before the lower court in which he had the conduct. That is my finding on that point.

I turn to deal with the main application. For the applicants to succeed in this application, they must demonstrate that they stand to suffer substantial loss if the orders sought are not granted. Secondly it must be shown that the application for stay has been brought without unreasonable delay and finally the applicants must indicate their willingness and readiness to comply with such orders as to security as may be ordered by the court.

But before I consider these principles, it was also argued for the respondent that it was irregular for the applicants to seek stay orders yet they have not abided by orders similar to those they are seeking here granted by the trial court.

Order 41 Rule 1 of the Civil Procedure Rules provides as follows;

“9(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 for 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”(emphasis supplied).

An applicant for order of stay of execution can apply to either the trial or appellate court, whether or not the trial court has granted the stay. At the same time he can seek from the appellate court to set aside the orders of stay issued by the trial court. It was, therefore, in order for the applicant to seek stay in this court.

Regarding substantial loss, the applicants have argued that the respondent is a peasant farmer who cannot refund the decretal sum if paid over to him and in the event the appeal succeeds. As was held in the case

of ILRAD V KINYUA(1990) KLR 403 at page 406, once the applicant raises doubt as to the respondent's ability to refund the decretal amount, it becomes incumbent upon the respondent to show that he, indeed, has the means to make restitution should the appeal succeed. The respondent has failed to demonstrate this.

Secondly, I am satisfied that the application for stay to this court was brought without unreasonable delay. The application in the trial court was disposed of on 27th October, 2005 and this application brought on 7th November, 2005. The delay of approximately twelve days has been sufficiently explained. The trial court file went missing immediately the ruling of 27th October, 2005 was delivered. Finally, the applicants have expressed their readiness to provide security.

For the reasons stated above, this application is allowed on condition that the entire decretal sum shall be deposited in a joint interest earning account in the names of counsel for the applicants and respondents within 30 days of the date hereof, failing which the stay of execution shall lapse and execution may proceed.

Costs of this application shall be in the intended appeal.

DATED AND DELIVERED AT MERU THIS 27th DAY OF April, 2007

W. OUKO

JUDGE