



GITHARA CHUCHU & 473 OTHERS.....APPLICANT

VERSUS

BADUR NASA.....RESPONDENT

R U L I N G

The Notice of Motion, dated 28/9/06, under Order 41 Rule 4 of the Civil Procedure Rules, seeks the following orders:

1. **Already spent**
2. **Already spent**
3. **Execution of the order made against the 2nd Defendant on 12/7/06 be stayed until the determination of the appeal therefrom the appeal against the order made herein on the 17/2/06.**
4. **Costs of the application be provided for.**

The application is on the grounds that

1. The 2nd Defendant has good arguable appeal with good prospects of success because:
 - a. The court ordered the 2nd Defendant to pay money to the Plaintiff, yet there is no dispute that the money was paid to the 1st Defendant who has said it is ready and willing to show that it has already paid the Plaintiffs.
 - b. The order was made on a mention without jurisdiction.
 - c. If stay is not granted the appeal will be rendered nugatory since the plaintiffs have no means to repay the 2nd Defendant the sum awarded if the 2nd Defendant's appeal succeeds.
 - d. It will be in the interest of justice to stay execution until the appeal is heard and determined.
 - e. The 2nd Defendant is ready to give security as the court may order.
 - f. The application has been presented towards the end of the court term and may not be heard during the vacation without an order of the court.

The application is supported by the affidavit of Peter Njuguna Kimani.

In opposition, the Respondent avers that:

- 1. The application is defective in law and is unsustainable and is only meant to ridicule the judicial system and the administration of justice.**
- 2. The application is bad in law, based on mischief and calculated to defeat justice.**
- 3. The application is an embarrassment meant to delay this case.**

The above grounds are in the Grounds of opposition dated 8/8/06.

I have carefully perused the pleadings and the submissions by learned counsel for both sides, and I have reached the following findings and conclusions.

An application for stay of execution, as the one herein, dated 28/7/06, has to comply with the tenets of order 41 rule 4 of the Civil Procedure Rules, which include showing that substantial loss would be suffered by the applicant unless the stay order is granted; that the application is made without unreasonable delay; that applicant has offered security for the due performance of such decree or order as may ultimately be binding on him, and finally, that the applicant has an arguable appeal with high chances of success.

Looking at the application, it is clear that the 2nd Defendant/applicant has met the tenets of the requisite rules, above.

However, to get into that presupposes that there is a valid application for stay. What an application of this nature, as in current application, must show is that there exists a valid decree or order whose execution is sought to be stayed pending the appeal.

Put differently, without a decree, there is nothing to be stayed, and meeting all the conditions of Order 41 rule 4 is an exercise in futility.

In the application before me, it is common ground that when the application was made on 28/7/06, there was no valid decree extracted, and that such decree was not settled until 8/3/07. That means that the application for stay predated the existence of the decree, the very thing to be stayed. This court cannot, and should not, make orders in vain. The court cannot purport to stay the execution of a non-existent Decree.

It follows that the application was premature and legally defective as it lacked the **sino quo non**- the Decree whose execution is sought to be stayed.

Accordingly, and for the above reasons, the application is dismissed for incompetence. The applicant is ordered to pay the costs of the application to the Respondent.

DATED and delivered in Nairobi this 30th Day of May, 2007.

O.K. MUTUNGI

JUDGE