

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL 82 OF 2005

RAJAB WAMBIA T/A MUMIAS NDOGO JUGGERY.....APPELLANT

V E R S U S

ANDREW BAKARI OMUSEVE.....RESPONDENT

R U L I N G

In his Chamber Summons application dated 07-02-2007, the appellant, RAJAB WAMBIA trading as MUMIAS NDOGO JUGGERY, sought an order of stay of execution of the decree in Kakamega CMCC NO.287 of 2005 pending the hearing and determination of the appeal herein. The 3rd prayer in the application seeking “stay of execution in lower court file ...” was tautologous, superfluous and unnecessary.

The application was premised on Order 41 Rule 4 (1) of the Civil Procedure Rules and was supported by an affidavit sworn by the Applicant on 7.2.07.

In a nutshell, the said affidavit showed that the Appellant was the Defendant in Kakamega CM.C.C. NO.284 of 2005 in which ANDREW BAKARI OMUSEVE, the Respondent in the appeal herein was the Plaintiff. Exparte judgment was said to have been entered in the suit and the Appellant’s application to set aside the ex-parte judgment was on 25-10-2006 dismissed thereby precipitating the appeal herein. An application for stay of execution made in the lower court was also dismissed. That is what gave rise to the application herein.

An affidavit sworn on 21-2-2007 by Siro Ombaye, an advocate, filed in court on 22-2-2007 shows that the Messrs Akwala & Company, the Advocates for the Respondent, were served on 15-2-2007 with the Appellant’s application for stay but did not file either a statement of grounds of opposition or a replying affidavit and when it came up for inter partes hearing on 28-2-2007, the application proceeded ex-parte.

Mr. Ombaye, learned Counsel for the Appellant, urged the court to allow the application and grant an order for stay of execution of the decree in suit No. 284 of 2005 in the lower court. He pointed out that the lower court had awarded a sum of Shs.1.6 million to the Respondent as damages but he failed to annexe a copy of the decree or the judgment or the pleadings. The appeal by the Appellant is against the lower court order dismissing the Appellant’s application seeking to set aside the ex-parte judgment.

Under Order 41 Rule 4 (1), & (2) of the Civil Procedure Rules, an applicant desirous of obtaining an order of stay must satisfy the court:-

(i) that there is sufficient cause for making the application. To do so, he must show that the appeal is arguable and is not frivolous or a non-starter; and

that substantial loss may result to the applicant unless stay is ordered; and

(ii) that the application for stay was brought without unreasonable delay; and

(iii) that such security will be made as the court may order for the due performance of the order as may

ultimately be binding on him.

The appellant is seeking a reversal of the order dismissing the application to set aside the ex-parte judgment which order denied him leave to defend the suit. The question raised in the appeal, namely, whether the trial court exercised its discretion properly is not frivolous and the appeal cannot be said to be a non-starter or unarguable. I am satisfied that there was sufficient cause for making the application by the Appellant.

The lower court decree relates to money. It cannot be said that if stay is not ordered the Appellant shall not suffer substantial loss. I am cognizant of the fact that the Respondent who is the decree holder in the suit in the lower will be entitled, if the appeal is not successful, to the fruits of his judgment and therefore this does make it necessary for security to be furnished. It is my finding that the application for stay was brought without unreasonable delay. As the Appellant has met the parameters set out in Rule 4 of Order 41, I allow the application which was not in any case opposed and order stay of execution of the decree in the suit No. Kakamega CM.C.C. No.284 of 2005 between the Appellant (as Defendant) and the Respondent (as Plaintiff) until the appeal herein is heard and determined providing that the Appellant furnishes security by remitting into court KShs.400,000/= or in the alternative from a recognized Bank or reputable assurance Company a security Bond for payment of this sum. The costs of the application shall be in the appeal.

Dated at Kakamega this 24th day of May, 2007

G. B. M. KARIUKI

J U D G E