

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Misc Appli 685 of 2006

FELISTA WANJIRU NYINGI
APPICANT

V E R S U S

SAMUEL CHEGE GACHIE (t/a BRACE ELECTRICALS & HARDWARE).....RESPONDENT

R U L I N G

The main reliefs sought in this application (notice of motion dated 12th October, 2006) are, leave to file a supplementary affidavit in support of the Applicant's application by notice of motion dated 29th August, 2006, or in the alternative, the supplementary affidavit filed on 25th September, 2006 be deemed to be duly filed (prayer No. 2), and stay of execution of the decree of the lower court dated 13th February, 2006 pending hearing and determination of the said motion (prayer No. 5). The main prayers in the motion dated 29th August, 2006 are for leave to file appeal against the order of the lower court dated 13th April, 2006, and for an order of stay of execution of the decree of the lower court pending hearing and determination of the intended appeal.

All the grounds of the application as they appear on the face thereof are with regard to the supplementary affidavit. There are no grounds set out with regard to interim stay of execution as sought in prayer number 5. There is a good reason for this. That reason is, that interim stay of execution was sought in the notice of motion dated 29th August, 2006. To seek interim stay of execution again in the present application amounts to abuse of the process of the court.

It is also to be noted that on 7th September, 2006 the Applicant was granted temporary stay of execution until *inter partes* hearing of the application dated 29th August, 2006. That order was extended from time to time until 11th October, 2006 when Aluoch J. declined to extend it. Two days later, that is on 13th October, 2006, the Applicant went before the Duty Judge *ex parte* with the present application and obtained another stay of execution. The Respondent has not taken kindly to this turn of events. He has good reason to be aggrieved. The Applicant should not have been granted *ex parte* any further stay of execution after Aluoch J. declined to extend the earlier temporary stay. Worse still, the Applicant went before the Duty Judge, again *ex parte*, on the 19th October, 2006 and obtained a variation of one of the conditions of the interim stay of execution granted on 13th October, 2006, to the effect that instead of the depositing in court KShs. 602,921.80 she would now deposit only KShs. 273,933.00. It is not surprising that when the matter was next placed before Aluoch J. on 30th October, 2006 she declined to deal with it any more.

The interim stay granted on 13th October, 2006 lapsed on 30th October, 2006. Again the Applicant appeared before the Duty Judge *ex parte* on 31st October, 2006 with yet another application by notice of motion dated 31st October, 2006. She was granted a fresh temporary order of stay. That order has been extended from time to time until now.

I have duly considered the submissions of the learned counsels. As can be seen above, I have perused

the court record. I will deal with the issue of supplementary affidavit first. It is always prudent and just to allow parties to place before the court all the materials that they may wish to so that the court can fully and finally adjudicate the matter in controversy between them. In the present case, the purpose of the supplementary affidavit is merely to place before the court the ruling of the lower court giving rise to the order and decree sought to be appealed against. I cannot see how this can possibly prejudice the Respondent. I will therefore allow prayer No. 2 of the application. The applicant may file and serve a supplementary affidavit in support of the notice of motion dated 29th August, 2006 within 7 days of today.

Regarding prayer No. 5, as I have already observed, temporary or interim stay of execution was sought in the notice of motion dated 29th August, 2006 pending hearing and determination of the application (prayer No. 2 thereof). Again, as already observed, that prayer was granted on 7th September, 2006. It is that temporary stay of execution that Aluoch J. declined to extend on 11th October 2006, though the order had not been granted *ex parte* as Aluoch J. stated. We have already seen that subsequently the Applicant appeared *ex parte* on various occasions before the Duty Judge and was granted further stay of execution. In my view, prayer No. 2 of the notice of motion dated 29th August, 2006 having been granted on 7th September, 2006 and subsequently the order of stay having lapsed, the Applicant's subsequent applications for temporary stay of execution, including the present one, amounted to abuse of the process of the court and should not have been, and should not be, entertained. I must therefore decline prayer No. 5 of the application.

I must also observe that the decree of the lower court was passed over a year ago. There is as yet no appeal before the court against that decree. The court will have jurisdiction to order stay of execution under Order 41, rule 4 of the Civil Procedure Rules only where there is an appeal properly before it. In the circumstances of the present case it would be unjust to keep the Respondent from the fruits of his litigation any longer.

In the event, only prayer No. 2 of the application by notice of motion dated 12th October, 2006 is allowed. Prayer No. 5 of the application is hereby dismissed. Naturally the interim or temporary stay of execution granted on 31st October, 2006 is hereby lifted. The Respondent shall have the costs of this application. Those will be the orders of the court.

DATED AT NAIROBI THIS 21ST DAY OF JUNE 2007

H. P. G. WAWERU

J U D G E

DELIVERED THIS 22ND DAY OF JUNE 2007