



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Civil Appeal 11 of 2007

SAMWEL KILIUNGU ISAAC 1ST APPELLANT

TERESA KILIUNGU 2ND APPELLANT

VERSUS

DAVID MUTHIAINE RESPONDENT

RULING

This application was argued *ex parte* as neither the respondent nor his counsel attended on the day it was argued even though the respondent's counsel was in attendance when the date was fixed.

The respondent, similarly, has not responded to the application. It is an application for stay of execution of the decree in Maua PMCC No.199 of 2006, pending appeal.

Ex parte judgment was entered against the applicant in the sum of Kshs.434, 904/=. The applicant has preferred this appeal against that judgment. However, before the appeal can be heard, he is apprehensive that the respondents may proceed to execute the decree.

A stay of execution pending appeal will be granted if the court is satisfied that the applicant stands to suffer substantial loss if it is not granted. Secondly, the court must be satisfied that the application has been brought without unreasonable delay-and finally it will be granted if the applicant undertakes as to security.

Two affidavits have been filed in support of the application. One is filed by the applicant and the other by the applicant's counsel. The affidavits are silent on the nature of substantial loss the applicant stands to suffer if an order of stay of execution is not granted. The two affidavits are preoccupied with the events leading to the entry of interlocutory judgment and the merit of the appeal. Apart from an averment that the lower court entered judgment in the sum of Kshs.434,904, there is no evidence that the respondents will not be able to refund the same in the event this appeal succeeds.

Both the English Supreme Court Annual Practice, 1965, Page 1284 and Halsbury's Laws of England 3rd Edition at Page 35 paragraph 51 stress that as a rule a stay will be granted only if there are special circumstances which must be deponed to in affidavit unless the application is made orally at the hearing.

This was the situation in Kenya Shell Ltd V Kibiru and Another(1986) KLR 410 where Platt,Ag JA(as he

then was) observed that;

“ I am bound to say that the respondents are right, on the basis of Order XLI Rule 4 of the Civil Procedure Rules. There was no evidence of substantial loss, and such loss cannot be inferred in this case”.

He went on to say that:

“It is not normal in money decree for the appeal to be rendered nugatory, if payment is made. The affidavit in support has not set out any information to show that the appeal will be nugatory. It is loud in its claim that the appeal will fail. But no reasons are given why the appeal will be rendered nugatory”.

The applicant has not discharged the burden to show how the appeal will be rendered nugatory and what substantial loss he will suffer if this application is not granted.

In the result this application fails and is dismissed with no orders as to costs.

DATED AND DELIVERED AT MERU THIS 22ND DAY OF JUNE 2007

W. OUKO

JUDGE