



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU**

Civil Suit 8 of 2007

GEORGE MURERWA 1ST APPELLANT

JOHN MUTEGI M'ARIMI 2ND APPELLANT

VERSUS

AMENDEO KOBIA NTONGAI RESPONDENT

RULING

Judgment against the applicant was entered on 19th December, 2006 in Tigania SRMCC No.82/2006 in the sum of Kshs.103,000/= as general damages plus costs and interest.

Execution has began and infact the applicants goods have been proclaimed. He has brought, as expected in such cases, this application to stay further execution of the decree, arguing that he was aggrieved by the decree and has filed an appeal.

That the appeal has high chances of success. It is further his contention that the respondent has no regular source of income and that should the decretal sum, which, according to him is substantial, be paid over to him (the respondent), he is not capable of making restitution if the appeal succeeds.

That would render the appeal nugatory. In his replying affidavit considering an application for stay of execution pending appeal is not required to consider the merit or otherwise of the appeal even in its appellate jurisdiction.

Both counsel have argued either that the appeal has high chances of success or that it does not. Those arguments are not relevant. The arguments must be confined within the clear provisions if the respondent refutes the claim that the appeal has high chances of success.

That this being a money decree there will be no loss if the decretal sum is paid to the respondent as he will be able to refund it, in the unlikely event of the appeal succeeding.

These are, briefly the rival arguments in this application. It has been stated time without number both by the Court of Appeal and this court that this court in Order 41 Rule 4 of the Civil Procedure Rules, namely;

(i) *that substantial loss may result to the applicant unless the stay is granted; and*

- (ii) *that the application has been made without unreasonable delay; and*
- (iii) *that such security as the court may order has been given by the applicant. Period.*

The most critical question is that of substantial loss. This can occur where the decretal sum is paid to the respondent as the applicant files his appeal. Suppose the appeal is successful and the respondent has squandered the money paid to him, this will not only render the appeal nugatory but also subject the applicant to substantial loss. This is what must be avoided.

In doing this the court must also bear in mind that the respondent has obtained judgment is entitled to enjoy its outcome. In this application the applicant has asserted that Kshs.103,000/= is substantial and that the respondent has no regular income to refund the decretal sum. The respondent on the other hand has maintained that he is a businessman dealing in second hand clothes both in Meru and Timau. He has annexed Municipal Council of Meru receipts to back up these averments.

Where an applicant claims that a respondent in an application such as this is impecunious, a man of straw, the burden of proof that he is a man of means shifts to the respondent.

The Court of Appeal in the case of ILRAD V Kinyua(1990) KLR 403 at Page . explains this position as follows;

“We have considered what Mr.Sehimi has said. However, we must “observe that the onus was upon the respondent to rebut by evidence that the claim that the intended appeal if successful would be rendered nugatory on account of his(respondent’s) alleged impecunity”.

The respondent has not demonstrated how he would refund Kshs.103, 000/= from his second hand clothes business. The three receipts attached for council market fee or amount in total to Kshs.90/=.

The applicant’s apprehension of substantial loss is justified. On the second condition, I am satisfied that this application has been brought timeously considering that the judgment was on 19th December, 2006, and this application filed on 30th January,2007. There was no delay.

Finally the applicants have deposed that they are ready and willing to deposit the decretal sum in an interest earning account. It is ordered, therefore, that there will be a stay of execution of the decree in SRMCC, Tigania No.82 of 2006 pending the hearing and determination of appeal herein, subject to the applicants depositing the decretal sum in an interest-earning account in joint names of their counsel and counsel for the respondent within 30 days from the date of this order.

This stay will lapse in case of failure to comply accordingly.

DATED AND DELIVERED AT MERU THIS 8th DAY OF JUNE, 2007.

W. OUKO

JUDGE