



REPUBLIC OF KENYA
HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL 816 OF 2005

RATILAL SANGANI..... PLAINTIFF

VERSUS

DR. KAMAL S. GIDDIE..... RESPONDENT

R U L I N G

The Notice of Motion herein, dated 31/10/05 seeks the following orders:

1. Already spent.
2. Stay of execution of the order dated 27/9/05 pending hearing and determination of this appeal.
3. Costs to be in the cause.

Brought under Order 41 rule 4 of the Civil Procedure Rules and Section 3A of Cap. 21, Laws of Kenya application is on the grounds, inter alia, that:

- a) The appellant has an arguable appeal, which would be rendered nugatory if execution takes place.
- b) The appellant will suffer substantial loss.

In opposition, the Respondent avers, inter alia, that: the application is mischievous and intended to deny the Respondent the fruits of his judgment; the applicant has offered no security: the applicant has not shown what substantial loss he would suffer given that the Respondent is a medical practitioner and has the capacity to meet any financial obligations in the event the appeal succeeds.

I have carefully perused the pleadings herein, and considered the submissions by learned counsel for both sides, including the authorities cited and relied upon, and I have reached the following findings and conclusions.

For avoidance of doubts or confusion, the application herein had been dismissed for non-attendance, under Order 9B 4(1) of the Civil Procedure Rules, and the application for its reinstatement was determined by consent of the parties, recorded in court on 30/3/06.

Any application for stay of execution, pending appeal, must meet the tenets of the provisions of Order 41 Rule 4 of the Civil Procedure Rules, and as this court has consistently held, all the four conditions, not

one or sum of them, must be met prior to a grant of a stay of execution pending appeal. The conditions include: showing that substantial loss may result to the appellant/applicant unless the order is granted; that the application has been made without unreasonable delay; offer of security by the applicant/appellant; and that the appeal has high chances of success.

For emphasis, all the four tenet must be met prior to any grant of stay of execution pending appeal.

From the pleadings before me, the applicant/appellant herein has not discharged the obligations stated in order 41 rule 4. There is no offer of security, and there is no evidence/material to show that if the execution proceeded prior to the finalization of the appeal, and the appeal succeeded, the Respondent would not be able to refund the decretal sum paid to him as per the judgment of the lower court. If anything, the evidence before me is that the Respondent is a medical practitioner, capable of refunding whatever sums that may be paid to him as per the decree in the lower court. Besides, other than general allegations, the applicant/appellant has not shown that the Respondent is a person of straws.

Accordingly, I find and hold that the appellant/applicant has not satisfied the tenets of Order 41 Rule 4 (2) of the Civil Procedure Rules. To that this application has no merit and if granted it would be an affront to the rights of the Respondent herein.

As was held in KENYA SHELL LIMITED VS. KIBIRU & ANOTHER [1986] KLR 410 “**In applications for stay the court should balance two parallel propositions; first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause; and secondly, that execution would render the proposed appeal nugatory.**”

All in all, and for the foregoing reasons, the application herein fails, and is dismissed with costs to the Respondent and against the applicant.

It is so ordered.

DATED and delivered in Nairobi, this 26th Day of July 2007.

O.K. MUTUNGI

JUDGE