

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL APPEAL 16 OF 2005

MUIRURI WAWERUAPPELLANT

V E R S U S

1. PENINA WAITHERA KAMAU

2. BETH WANJIRU KAMAURESPONDENTS

R U L I N G

This application (chamber summons dated 20th March, 2006) seeks stay of execution of orders of the lower court of 2nd December, 2004 and all consequential orders pending hearing and determination of the appeal herein, or until the further orders of the court. The appeal itself is against the same orders. By those orders, the Appellant herein was made a party in the suit before the lower court after judgment had been delivered. The suit was in fact at execution of decree stage. Stood surety for the Defendant/Judgment-Debtor.

The application is opposed by the Respondent. He filed grounds of opposition on the 18th of September, 2006 but at the hearing of the application there was no appearance for him.

I have considered the submissions of the learned counsel for the Appellant. I have also read the supporting affidavit as well as the grounds of opposition. The application is brought under order 41, rule 4 (1) of the Civil Procedure Rules (the Rules). The Appellant must therefore show, under sub-rule (2) of the same rule, that he stands to suffer substantial loss if stay is not granted and that he has brought the application without unreasonable delay. He must also be prepared to give such security as the court might order for the due performance of his obligations under the decree as may ultimately be binding on him.

Section 92 of the Civil Procedure Act (the Act) makes provision for enforcement of liability upon a decree against a surety to the extent to which he had rendered himself personally liable. I have perused the typed proceedings of the lower court which are now before me. The judgment-debtor applied to the lower court for stay of execution of decree pending appeal. In that application his father, the Appellant herein, offered himself by way of affidavit as a surety who would be liable to satisfy the decree should the appeal be dismissed. That application for stay of execution was refused. The Appellant was thus never accepted as a surety for the judgement-debtor. The decree-holders (the Respondents in this appeal) subsequently applied to the lower court for the Appellant to be made a party in the lower court suit so that they could execute the decree against him. That application appears to have been made upon the main ground that the Appellant had offered himself as a surety in the application of stay of execution of decree. As already seen, the application was allowed and the Appellant was made a party to the lower court suit, hence the appeal herein.

I am satisfied in the circumstances of this case that the Appellant stands to suffer substantial loss should the decree of the lower court be executed against him in a matter in which he was not a party and, *prima facie*, should not be a party. In saying so, let it not be understood that I am in any way pre-empting any arguments that may be made in the appeal. I am also satisfied that the application has been made without unreasonable delay. Finally, I do not deem it necessary to impose any security.

I will allow the application and order stay of execution of the orders of the lower court of 2nd

December, 2004 and any consequential orders pending disposal of the appeal herein. Costs of this application shall be in the appeal. Orders accordingly.

DATED AT NAIROBI THIS 17TH DAY OF JULY 2007

H. P. G. WAWERU

J U D G E

DELIVERED THIS 20TH DAY OF JULY 2007