

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 3204 of 1994

JAMES MWANGI GICHIRA.....PLAINTIFF

VERSUS

JAMES K. MWAURA & ANOTHER.....DEFENDANTS

RULING

This is the Defendant's application brought under Order XLI Rule 4 (1) (2) of the Civil Procedure Rules and section 3A for the Civil Procedure Act seeking stay of execution of judgment and decree of this court delivered on 6th July 2005.

The application is based on the ground that judgment was delivered on 6th July 2005; that the Applicant being dissatisfied with the said judgment has lodged a Notice of appeal against the said judgment; that there is eminent likelihood that the Plaintiff could move to execute the said judgment against the Defendant/Applicant; that the applicant has a good and serious appeal with a high likelihood of success; that the appeal could be rendered nugatory should the Respondent move to execute the decree herein and that the Applicant is ready to abide by any condition or provide security as may be imposed by the court.

This application is brought under Order XLI Rule 4 (2) which provides:-

“2” No order of stay of execution shall be made under sub-rule(1) unless

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.”

It is not clear from the affidavit evidence when the Notice of appeal was lodged and whether the Applicant has lodged the record of appeal. As much as the Applicant is ready to provide security as one of the conditions required under Order XLI Rule 4, he has not demonstrated their substantial loss that may result if the orders sought is not granted. The second condition is that the application must be made without unreasonable delay. The judgment was delivered on 6th July 2005 and this application is made after 24 months. This is unreasonable delay which is not explained. The Applicant is already barred by the provisions of Rule 81 (1) of the Rules of the Court of Appeal which requires that the record of appeal shall be lodged in the appropriate registry of the court within sixty days of the date when the Notice of Appeal was lodged. Under Rule 80 of the rules, an essential step in the proceedings has not been taken. In the result the Applicant's application must fail. Consequently the Applicant's Notice of Motion dated 23rd April 2007 is dismissed with costs to the Respondent.

Dated and delivered at Nairobi this 17th day of July 2007.

J.L.A. OSIEMO

JUDGE