



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MERU**  
**Civil Appeal 59 of 2007**

**JASPER MURITHI NJAGI.....APPELLANT/APPLICANT**

**V E R S U S**

**SAMSON MICHENI MURITHI.....1<sup>ST</sup> RESPONDENT**

**PHARIS NJERU NYAGA.....2<sup>ND</sup> RESPONDENT**

**JAMES MURITHI NKORU.....3<sup>RD</sup> RESPONDENT**

**R U L I N G**

1. On 4.7.2007, the Appellant, Jasper Muriithi Njage filed a Notice of Motion premised on s.3 and s.3A and s.63E of presumably the Civil Procedure Act ( it is not clear from the face of the application) and also under Order XLI Rule 4 of the Civil Procedure Rules and prayed for orders that:-

“1 This Application be certified as urgent

2 This Honourable court be pleased to issue an order for stay of execution of the judgment dated 17<sup>th</sup> May 2007 in Meru CMCC No. 408 of 2003 by Honourable S.O. Mogute R.M. pending hearing and determination of the instant Appeal.

3 The costs of this Application be provided for.”

2. The grounds in support are that:

“(a) The Applicant was aggrieved by the Judgement delivered on 17<sup>th</sup> May 2007 and has appealed against the whole judgment.

(b) The Judgement is against the law of vicarious liability and in case the execution proceeds and in the event of the Appeal succeeding the Appellant will suffer substantial loss as the Respondent is a person of meager means.

(c) The Appeal has high chances of success as shown in the Memorandum of Appeal.

(d) The learned trial magistrate gave stay of execution for only 30 days.

(e) That the Applicant is prepared to deposit security as shall be ordered by the court”.

3. From the Affidavit in support sworn by the Appellant on 4.7.2007, it is his position that the court should exercise discretion and grant him the orders above because if the decree is executed, he would suffer substantial loss and his appeal rendered nugatory because the issue litigated upon in CMCC NO. 408 of 2003 (subject of the Appeal) had nothing to do with him and the judgment entered was entered in error. It was his case, he deposes, that the litigation in the lower suit related to a claim for damages arising out of an accident involving “Motor-Vehicle Registration Number KAK 917Z and the 1<sup>st</sup> Respondent “. That the said motor vehicle although registered in his name had actually been sold to the 2<sup>nd</sup> Respondent before the accident in question and the 3<sup>rd</sup> Respondent was driving it at the time of the accident. That the said defence although raised before the lower court was rejected and the doctrine of vicarious liability was improperly applied. The judgment is attached to the supporting Affidavit as are documents in support of the averments above except that I do not seem to understand what motor vehicle registration number KAP 944 K has to do with the issues before me and who Irene Cirindi Munene is and what her interest in the Appeal is. I say so because exhibits “JMN3” are not properly explained at paragraph 13 of the supporting Affidavit. I will however take the position that those documents namely log-book, transfer form for the motor vehicle and Identity cards are being offered as security for costs, with the reservations I have expressed above.
  
4. In his Replying Affidavit, the 1<sup>st</sup> Respondent, Samson Micheni Muriithi deposes that the Appeal and the present Application are devoid of merit and that the Appellant has come to court with unclean hands because he had promised to pay the decretal amount and then reneged on that promise. Further, that the decree is a money decree for Ksh.205,586/- and no stay order should issue in such circumstances. He prays, lastly, that the application should be dismissed as it is an afterthought and based on falsehoods. Advocates for the parties relied on their clients respective affidavits and both filed useful authorities on the issue at hand including on the subject of vicarious liability. I will in this Ruling restrict myself to the issue whether I should exercise discretion and grant the order of stay and leave the substantive issues in dispute to the judgment on appeal. A party seeking that exercise of discretion must show what substantial loss it will suffer if the order is not granted and this is a condition expressly set by Order XLI Rule 4 of the Civil Procedure Rules (see also Philemon Ogigi vs Bamburi Portland Cement Co. Ltd. HCCC 331/91 Per Ringera JA and Khamoni J in Samuel Kamutua vs Joseph Kiango C.A. 80/97 per Khamoni J. a line of thinking that I am persuaded is correct) In this case, I am of the view that the Appellant has met this condition because he has argued that the motor vehicle that caused the accident was transferred to the 2<sup>nd</sup> Respondent and possession and control at the time of the accident may not have been with him. The question of negligence and liability in such a situation may be an important issue and if it is found that in fact the Appellant was not liable, execution at this stage would obviously cause him substantial loss in the end. Although it was argued that no stay order should issue in respect of a money decree, no authority was cited for the proposition and even if it was I believe that no firm law has ever been laid on the point and in the one Court of Appeal decision ordinarily relied on (in Kenya) the issue was raised in an obiter dictum by Platt Ag J.A.
  
5. A second question to address is whether the Application was made without undue delay. In this instance, judgment was delivered on 17.5.2007 and the Application made on 4.7.2007. I see no reason, and none has been offered, for me to hold that there was delay at all.
  
6. The third issue is whether the Appellant has offered any security prior to grant of stay. I have elsewhere above stated that it is unclear if annexures “JMN3” amount to sufficient security. I am not certain that they do but at paragraph 13 of the Supporting Affidavit the Applicant deposes that he is prepared to offer such security as the court may order. The discretion to demand a security is one for the court in any event and in line with Order XLI Rule 4 of the Civil Procedure Rules.

The decretal amount is Ksh. 205,586/- or thereabouts and the Appellant has not said that he is unable to raise that money and secure it in court. He has shown that he has a matatu which brings him income and that unlike the 1<sup>st</sup> Respondent he is not a man of meager means (see paragraph 11 of the supporting affidavit).

7. My final orders therefore shall be and in allowing the Application;
1. The Appellant shall deposit Ksh.150,000/- as security in an interest earning account in the names of the Advocates for the Appellant and the 1<sup>st</sup> Respondent pending hearing and determination of the Appeal.
  2. The said amount should be deposited as above within 30 days failure to which the order for stay will be vacated and execution should immediately commence.
  3. Costs of the application shall abide the Appeal.

Orders accordingly.

DATED, SIGNED AND DELIVERED THIS 16<sup>TH</sup> DAY OF OCTOBER 2007 AT MERU.

ISAAC LENAOLA

JUDGE

In presence of

Mr. Onganyi holding brief for Mr. Rimita Advocate for the Appellant/Applicant

Mr. Mwangi holding brief for Mr. Kiogora Advocate for the Respondent

ISAAC LENAOLA

JUDGE