

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Civil Case 184 of 2004

JAMES MAINA MWANGI.....PLAINTIFF

VERSUS

NADEM MOHAMMED.....DEFENDANT

RULING

By a ruling delivered on 20th April 2007 the applicant's application to set aside the interlocutory judgment and all the proceedings of the court was dismissed. The applicant filed a notice of appeal on 2nd May 2007 and on 4th June 2007 filed the present notice of motion seeking an order of stay of execution of the decree pending the hearing and determination of the appeal against the ruling of 20th April 2007. This application is premised on the grounds that the applicant has filed an appeal before the Court of Appeal which has high chances of success. Secondly the respondent is likely to proceed with execution of the decree thereby rendering the appeal nugatory.

The application is further supported by the affidavit of the applicant sworn on the 4th June 2007 in which he has averred that he is willing to meet any reasonable conditions imposed by this court. In further elaboration of the matters deposed in the replying affidavit counsel for the applicant submitted that the court should exercise its discretion in favour of the applicant so that the appeal is not rendered nugatory and in this regard he made reference to the case of **Butt vs. Rent Restriction Tribunal [1982] KLR 417.**

This application was opposed by the respondent on the grounds that the application was filed after an inordinate delay. Secondly the application was filed after the respondent had filed a bill of costs merely to preempt the taxation but not for the ends of justice. Thirdly, this being a money decree the applicant has not proved that the respondent would be unable to refund the money in the event that the appeal; was successful. The respondent has demonstrated in the replying affidavit that he is not impecunious, thus counsel urged the court to dismiss the application.

The applicant has an undisputed right of appeal but the respondent who has a right as a successful party to enjoy the fruits of his litigation. This claim involves a money decree. The essence of granting the orders of stay is to ensure that the appeal if successful will not be rendered nugatory. The applicant has averred in his affidavit that he is not impecunious. The money was as a result of sale transaction of a motor vehicle even if the appeal was successful I do not think that the respondent would be unable to refund the decree of Kshs 80,000/=. Secondly this application was not filed within a reasonable time. The ruling was delivered on 20th April 2007 and this application was filed six weeks later after the respondent filed a bill of costs. This lends credence to the submission that the applicant's intention is to delay and frustrate the respondent from enjoying the fruits of his litigation. In the circumstances I decline to exercise my discretion in favour the application for stay of execution. The application is hereby dismissed with costs to the respondent.

Ruling read and signed on 9th day of November, 2007

M. KOOME

JUDGE