

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 577 of 2001

SAMUEL MUCHIRI WA NJUGUNAPLAINTIFF

V E R S U S

ZACHARY WARUIRU MUKUIDEFENDANT

R U L I N G

I have before me an application by notice of motion dated 5th of April, 2006 filed by the Plaintiff. He seeks under Order 41, rule 4 of the Civil Procedure Rules (the Rules) an Order to stay execution of the decree herein pending hearing and determination of an intended appeal to the Court of Appeal. Notice of appeal was duly lodged under the Court of Appeal Rules; therefore, there is an appeal pending for purposes of this present application.

The decree appealed against dismissed the Plaintiff's suit with costs to the Defendant. Those costs were subsequently taxed at KShs. 197,270/00. So, stay of execution of the decree is sought in respect to those costs.

I have considered the submissions of the learned counsels appearing; no authorities were cited. I have also read the supporting and replying affidavits. Under rule 4 (2) of Order 41 aforesaid, the Plaintiff must satisfy the court, one, that he stands to suffer substantial loss if the order sought is not granted and, two, that he has made the application without unreasonable delay. He must also be prepared to give such security as the court may order for the due performance by him of such decree or order as may ultimately be binding on him.

I was told during arguments that notice of appeal was timeously lodged on 13th February, 2006. The present application was filed on 5th of April, 2006. I do not find in the supporting affidavit any reason why the Plaintiff waited for over two months to make the present application. Applications for stay of execution ought to be made as soon as possible after the passing of the decree or order execution of which stay is sought. I consider a delay of over two months to be inordinate in the circumstances of this case. As already observed, there is no explanation for this delay.

Regarding substantial loss, the supporting affidavit is bereft of any evidence that the Plaintiff stands to suffer any. There is no allegation that the Defendant will have any difficulties in recovering from the Defendant the decretal sum in the event that his appeal succeeds. He only avers that the sum involved is huge and that therefore execution of the decree will result in substantial loss to him. Without more, this is not a sufficient reason to deny the Defendant the fruits of his litigation. I do not find any good reason why the Defendant should be denied his costs, duly awarded and taxed, any longer.

Having considered all matters placed before the court, I do not find any merit in this application. I must refuse it. It is hereby dismissed with costs to the Defendant. Order accordingly.

DATED AT NAIROBI THIS 28TH DAY OF NOVEMBER, 2007

H. P. G. WAWERU

J U D G E

DELIVERED THIS 30th DAY OF NOVEMBER, 2007