

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Civil Appeal 93 of 2004

CMC MOTORS GROUP LIMITED.....1ST APPELLANT

EDWARD KINYANJUI.....2ND APPELLANT

Versus

SAMUEL MARARO MUSHIOKA.....RESPONDENT

(An appeal from the judgment of Honourable Nyakundi, Chief Magistrate, dated and delivered at Nyeri on 1st December 2004)

RULING

The Notice of Motion dated 11th May 2007 is brought under **Order XLI Rule 4** of the Civil Procedure Rules. It seeks stay of execution of judgment and decree delivered on 1st December 2004 pending the determination of this appeal. The Appellant stated in its supporting affidavit that an application for stay of execution was filed in the lower court but when it was due for inter partes hearing on 1st March 2005 for reasons unknown to them, the application was not listed. Thereafter the lower court's file could not be traced at the Court's registry. As a consequence the lower court's stay orders lapsed. The Appellant is of the view that the Respondent in the appeal cannot with his income, which is shown in his replying affidavit, be able to refund the amount of the decree. In that replying affidavit the Respondent stated that he runs a business by which he earns a profit of Kshs. 20,000/= per month. The Appellant relied on the case of CENTRAL BANK OF KENYA

AMAL Z SHAL & ANOTHER MISC. APPL. NO. 427 of 2000 and the following passage:

"I am of the view that substantial loss under Order 41 rule 4, envisages a situation where the respondent might fail to repay, where the appeal is successful. I find it irresistible to find otherwise, other than that there is the very likelihood that the respondents may not be in position to repay."

The Appellant described itself as a blue chip business entity with a firm financial base having various branches in the major towns of Kenya and that it would be able therefore to eventually pay the Respondent the decretal amount if the appeal was unsuccessful. Further the Appellant stated that it is adequately insured by A. P.A. Insurance Ltd. The Appellant as security offered to issue a bankers guarantee for the amount in the decree. In the replying affidavit the Respondent stated that the Appellant had delayed in filing the present application judgment having been entered on the 1st December 2004. This it was argued on behalf of the Respondent was contrary to the provisions of **Order XLI Rule 4** which requires that an application be made without unreasonable delay. The Respondent faulted the Appellant for failing to attach evidence of the loss of the lower Court's file. The Respondent said that he is an owner of a garage business known as Mbiri Motors. He annexed a certificate of registration of that business. He stated that in his business he makes Ksh.20,000/= per month profit. He referred to other civil suits involving his family members and the appellants arising out of the same accident where the Appellant, unlike in this appeal, did not contest the ownership of the motor vehicle.

I have considered the present application and opposition raised by the Respondent. Before making orders for stay I must be mindful of the factors that I need to consider as provided in **Order XLI Rule 4 (2)** of the Civil Procedure Rules. That rule provides:

“No order for 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.”

What I need to consider in the first instance is whether the Appellant has proved that substantial loss will occur if stay is not granted. Once the Appellant stated that the Respondent would not be able to repay the decretal amount if the appeal was successful, the burden of proving that he was in a position to pay shifted to the Respondent. See **Section 107** of the Evidence Act. The Respondent did not annex to his replying affidavit accounts of his business to prove that he earns Kshs.20,000/= profit. Even considering that amount he earns as profit if the Respondent was required to pay the amount of the decree it would take him a considerable period of time. I am therefore of the view that if the Respondent was paid the whole decretal amount the Appellant if the appeal was successful, would suffer substantial loss. The one thing that comes up against the Appellant as I consider this application is the delay in making the present application. Judgment was entered on 1st December 2004. To simply state that the Court’s file could not be found in the registry was a lame excuse when one considers that there are procedures of reporting missing files to the Executive Officer and at worse arranging for the reconstruction of the same. I find that I am not satisfied that the Appellant is not guilty of unreasonable delay. The Appellant has offered security by way of bankers guarantee for the due performance of the decree. In balancing the interests of the Appellant and those of the Respondent I believe the just decision is that the Appellant do pay the Respondent within 14 days from this date hereof Ksh.200,000/= being part of the decree of CMCC 583 of 2002. The balance of the decretal amount shall be secured by the Appellant filing in this Court within 14 days from this date hereof a bankers guarantee for the payment of the same at the conclusion of this appeal. The costs of the Notice of Motion dated 11th May 2007 shall abide with this appeal.

MARY KASANGO

JUDGE

Dated and delivered at Nyeri this 13th day of November 2007.

By: M. S. A. MAKHANDIA

JUDGE