

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

Civil Appeal 196 of 2005

RICHARD OTIENO

WASHINGTON NYARANGA OKUMU.....PLAINTIFFS

VERSUS

SUSAN WANJIRU MWAURA..... RESPONDENT

RULING

The application herein, dated 24/10/05, under Order 41 rule 4 of the Civil Procedure Rules, seeks stay of execution of the judgment and decree in CMCC No. 5126 of 2003 issued on 1/4/05 pending the appeal herein.

The application is supported by the Affidavit of Richard Otieno, of even date, and on the grounds that: the Respondent has threatened execution unless the decretal sum of K.Shs.2,510,200/- is settled; the decretal sum is huge and Respondent cannot pay it back in the event the appeal succeeds; the applicant will suffer irreparable loss and damage if the stay is not granted; the applicant are willing to deposit insurance bonds as security for due performance; the applicants have an arguable appeal with high chances of success.

In their grounds of opposition, the Respondent **avers** that: the application is incompetent and devoid of merit; there has been undue delay in bringing the application; the applicant has not shown how the appeal would be rendered nugatory if the stay is not granted; the appellants have not offered to deposit the decretal sum in a joint account inclusive of costs.

Having perused through the pleadings and submissions of counsel for both sides, I have reached the following findings and conclusions.

The order under which the application for stay pending appeal, that is Order 41 rule 4 of the Civil Procedure Rules, has clearly stipulated conditions to be met before a stay order can issue. I begin with the requirement that the application must be made without undue delay. Counsel for the applicant submitted that the appeal was filed without delay.

Unfortunately the Learned Counsel seems to be under the impression that it is the appeal that must be filed without delay. The delay refers to the applicatioj, not the appeal. The judgment was delivered on 1/4/05, and the application filed on 24/10/05. This is clear six (6) months down the line. I find and hold that that was unreasonable delay given that the Judgment was delivered in the presence of both parties.

The reason given for the delay falls far from being satisfactory. Delay in receipt of certified proceedings of the lower court is no good ground for delay in filing the application for stay of execution pending appeal. As a matter of fact, such application can, and are filed, pending intended appeal.

The next condition under Order 41 Rule 4 is “such security as the court orders for the due performance”. Here, the applicant has, even before the court has ordered, offered deposit of insurance bonds. As this court has held in the court should order the security first, before the applicant specifies the mode of security he is offering. In practice, the applicant would meet such requirement by offering to deposit either in court, or opening a joint, interest earning account, in which the total decretal amount is

deposited. That is the normal practice in money decree orders; not insurance bonds, unless the court has ordered for such mode of security, which is not the case here.

The third condition under Order 41 Rule 4 is evidence that unless the stay is granted, the appellant/applicant would suffer substantial loss. To meet that requirement, the applicant has to put forward material to show how such loss will arise – See HCCC No. 6076 of 1993 at P. 8, Vide Njagi J's Ruling. It is not enough simply to say that the appellant/applicant is apprehensive or believes that the Respondent will not be able to repay the sum if the appeal succeeds. The applicant must allege, and have some evidence, that the Respondent is not a person of means. Once that is done, the burden shifts to the Respondent to show that he/she is capable of repaying the sum in the event the appeal succeeds.

In the application before me, the appellant has not met this condition under which the application is brought. There is no evidence that the decretal sum would be placed beyond the reach of the appellant, if paid to the Respondent, and if the appeal succeeds. In brief, the applicant fails also on this count.

All in all, it must be remembered that a successful litigant should not be kept away from enjoying the fruits of his/her litigation without good cause. That is the genesis of the conditions in Order 41 rule 4 of the Civil Procedure Rules, which must be met to the letter, before an order of stay is granted.

To emphasis, from the above, I find and conclude that the applicant/appellant has not met the requirements of Order 41 rule 4 of the Civil Procedure Rules. To that end, the application herein fails and is dismissed with costs to the Respondent and against the applicant.

It is so ordered.

DATED and delivered in Nairobi, this 31st Day of May, 2006.

O.K. MUTUNGI

JUDGE