



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

Civil Appeal 548 of 2004

ALLAN KIMANI MBURU..... PLAINTIFF

VERSUS

FRANKLIN MUGENDI MATI..... RESPONDENT

R U L I N G

The application herein, dated 17/10/05, under Order 41 Rule 4 of the Civil Procedure Rules, seeks stay of execution of the Ruling of the Lower Court, delivered on 24/6/05, pending the appeal herein.

The grounds of the application are, **inter alia**, that the court took a drastic step of failing to set aside the **ex parte** judgment unconditionally while there was evidence that the applicant was never served with the summons; the appeal has already been filed; execution would cause irreparable damage, especially of reputation, if it precedes the appeal herein.

I have perused through the pleadings and considered the submissions of the Learned counsels for both sides. I have especially studied the Replying Affidavit of Nelson Kaburu, filed on 17/1/06, but deponed on 26/10/05.

From the above, I have reached the following findings and conclusions.

An application for stay of execution pending appeal must meet the requirements of Order 41 Rule 4 of the Civil Procedure Rules; under which it is brought. Those requirements are: the application has been filed without unreasonable delay; that unless the stay is granted the appellant/applicant will suffer substantial loss, and finally that the applicant offers to provide such security as this court may order for the due performance of such decree or order as may ultimately be binding on the applicant.

The above requirements are mandatory and each and everyone thereof must be met to the letter before an order of stay is granted.

The applicant, has not met the requirements for a grant of a stay.

The application for stay order at the Subordinate Court was dismissed on 5/11/04. This application before me, was not filed until 18/10/05 – This is almost a year down the line. Accordingly, I agree with

the Learned Counsel for the Respondent that the application was not filed without unreasonable delay. Further, the applicant has not offered any security as required by the provisions of Order 41 Rule 4, under which the application is brought.

Finally, there is not even an attempt to show the substantial loss the applicant would suffer if stay of execution is not granted. This is the first time that potential loss of reputation has been raised in support of the substantial loss referred to under Order 41 Rule 4. There, the loss alluded to has been interpreted by the courts to mean a situation where the Respondent is shown to be a person of no means, and accordingly, if the decretal sum is paid to the Decree Holder, and the appeal succeeds, such sum will have been put beyond the reach of the appellant. No such an allegation has been made against the Respondent, much less proved.

Accordingly, the applicant failed to meet this requirement too.

I have considered the submission by the applicant, challenging the Lower Court's discretion in ordering deposit of the whole decretal sum as a condition to setting aside the **exparte** judgment. In my view the subordinate court's conditional setting aside of the exparte judgment was in an effort to dispense justice to both sides. Court's discretion should not and cannot be challenged unless it is shown that it was unjudicious or unreasonable. That has not been shown here. The condition was deemed fit and in pursuance of justice to both parties to the dispute.

All in all therefore, I hold that the applicant has not persuaded this court that an order of stay should be granted. None of the requisites under Order 41 Rule 4 has been met.

Accordingly, the application is dismissed with costs to the Respondent and against the applicant.

It is so held and ruled.

DATED and delivered in Nairobi this 29th Day of May, 2006.

O.K. MUTUNGI

JUDGE