



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MERU**

**Civil Appeal 45 of 2004**

**AMOS KIUNGA ..... APPELLANT/APPLICANT**

**VERSUS**

**MARY MWATHE ..... RESPONDENT**

**RULING**

1. The application herein is dated 22.11.2004 and the Applicant has invoked Order XXI Rule 22 of the Civil Procedure Rules to pray for these Orders:-

1. ....

2. That warrants of attachment and sale dated 7/10/2004 be stayed pending the hearing and determination of the appeal herein.

3. That courts be provided for.

2. The Grounds in support are that:-

a. There is already an appeal lodged with high chances of success

b. Attachment has already taken place.

c. If execution or proceeds the Applicant will suffer substantial damage.

d. The decree-holder has no means to pay if the appeal succeeds.

4. In his supporting affidavit sworn on 22.11.2004 the Applicant, Amos Kiunga depones that in a Judgment delivered on 30.6.2004 it was ordered by the lower court that he should pay 30% of Ksh.451,385/= to the Respondent. The Applicant being dissatisfied, then filed the instant Appeal and on 20.10.2004 filed an Application for stay of execution pending determination of Appeal. The same was struck out by the lower court on 18.11.2004. A day later on 19.11.2004, Clear Real Traders Auctioneers attached certain properties which the Applicant depones at paragraph 8 of the Affidavit, do not belong to him. He annexed the seizure order as annexure "AM 4a and b". At paragraph 10 thereof he depones that his vehicle had no insurance cover and therefore the judgment debt would be settled personally by him and this would occasion him untold damage and loss.

5. In response the Respondent filed a Replying affidavit sworn on 3.12.2004 and in it depones that the Application is a delaying tactic and is made in bad faith. That the Applicant sought a stay of execution in the lower court saying that the attached goods belonged to him. Later other persons came and sought to

object to the attachment claiming that the goods belonged to them. When the Application was dismissed, he came to this court. In furtherance of these arguments the advocate for the Respondent argued that following the decision in Meru HCCC 35/2000 Margaret Bundi vs Erastus Mara, where a party uses delaying tactics to seek stay orders, the Application should be denied. He argued also that whereas the Application was seeking orders of stay pending Appeal, the Applicant had instead of invoking Order XLI Rule 4 of the Civil Procedure Rules, had invoked Order XXI Rule 22 and is not deserving of any orders as prayed.

6. I should state at this juncture that counsel for the Applicant argued that the Appeal had high chances of success and if attachment proceeded, then it would be rendered nugatory. That the Respondent has not deponed that she is able to repay the decretal sum and relying on C.A. 20/2001 (Nairobi) Pamela Kikumu vs Francis Mulwa, he argued that even if she had said so, she would still have to prove her ability to do so.

7. The Applicant's Advocate also submitted that there was no delay in bringing the Application and at no time did the Applicant seek time to raise the decretal sum and then renege on his promise. That his client was not dishonest and did not collude with other persons to file objector proceedings to the attachment in the lower court.

8. For my part, I need not go into the technicalities of the Application and decide whether it has been brought under the correct provision i.e. whether stay of execution under Order XXI Rule 22 or under Order XLI rule 4 of the Civil Procedure Rules. I should only say that the two Rules are not contradictory of each other and operate upon amendment of Order XLI Rule 4 vide Legal Notice No. 43/2000 to address different situations. I should, I think, merely address the bona fides of the Application as I see it and determine whether prayer 2 of the Application dated 22.11.2004 is available to the Applicant. I say so because what is sought is something called "**stay of warrants of attachment pending determination of the Appeal**". I am not certain that I understand what a "**stay of a warrant**" is because a warrant is a writ authorizing and directing a law enforcement agent to make an arrest, a search or a seizure. The aspect of enforcing that writ is execution so that once the warrant has been issued what can be stayed is the execution of it. In this case, it is agreed that the warrant has been issued, attachment made and if I understand it, sale has not been done. What warrant, should be stayed, even if such a term exists? I see none on my part.

9. Secondly, if I should assume that the Applicant seeks to stop sale of the attached items pending hearing of the Appeal, what interest does he have in those goods? It is not open to him even as judgment debtor to complain if the decree-holder attaches in execution of his decree, goods that belong to a stranger. The stranger has the remedy to object to the attachment of his innocent goods through proceedings under Order XXI Rules 53 – 58 of the Civil Procedure Rules. I say this because I did earlier allude to paragraph 8 of the supporting Affidavit in which the applicant boldly states as follows:-

**"That on 19<sup>th</sup> November [2004] auctioneers by name Clear Real Traders descended upon my homestead and took away property which does not belong to me (annexed hereto and marked Am 4a & b are copies of the seizure Order."**

10. If the goods that were attached did not belong to the Applicant what is his interest in them? Why should he seek stay orders (by whatever name called) in respect of them? If they belong to him and he now says they do not, he is still in a bind – why lie to court on oath and expect a favourable response? Either way the Applicant is undeserving of the orders of this court.

11. Is the application made in good faith? I doubt it. It is unclear what the Applicant seeks and in respect of goods that he says do not belong to him and just to add to the bad faith of it, he again proudly announces at paragraph 10 of his Affidavit;

**"That my vehicle had no insurance cover and I would be the one to personally meet the claim."**

12. If this is so, he is an admitted criminal for not taking out an insurance cover and yet he expects this

court to ignore that fact and grant him an equitable relief. He clearly is devoid of good faith and should not expect any relief with these unclean hands.

**13.** I should conclude by saying that the Application dated 22.11.2004 is misguided, mischievous and totally incompetent. It belongs far from what a genuinely aggrieved party ought to bring before a court of equity.

**14.** It must and is hereby dismissed with costs to the Respondent.

**15.** Orders accordingly.

Dated, signed and delivered in open court at Meru this 3<sup>rd</sup> . Day of May 2006

**ISAAC LENAOLA**

**JUDGE**