



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL 12 OF 2005

CENTRE SHOP

.....**APPELLANT/APPLICANT**

V E R S U S

PHARIS NKARI GITARI..... 1ST
RESPONDENT

ROSEMARY GACHERI.....2ND
RESPONDENT

R U L I N G

1. The Applicant herein is the Centre Shop and seeks orders that stay of execution and sale of the Applicant’s properties be granted **“pending hearing and determination of this Application.”** The Application is dated 25.4.2005 and is brought under Order XLI Rule 4 of the Civil Procedure Rules. Parties agreed that the Application was wrongly worded and also agreed that the orders sought are stay of execution of the decree and judgment in Chuka PMCC No. 8/2003 **“pending hearing and determination of the Appeal.”** It was so amended.
2. The Application is supported by the Affidavit of Silas Murithi a partner in the Appellant business entity and in the Application dated on 25/4/2005 it is his contention that Judgment was entered in the lower court against the Applicant and the amount now due is Ksh.539,047/= plus Auctioneers charges. That the judgment was entered without the Applicant being heard as the partners had not been served with summons to enter Appearance and the attempts made at setting aside the judgment were thwarted by the lower court hence the pending Appeal. The Applicant now fears that if execution proceeds the business will suffer tremendous loss and damage.
3. The Advocate for the Applicant reiterated these matters in his submissions and added that the appeal is with merit and is not seriously challenged.
4. The Respondents filed a Replying Affidavit sworn on 10.5.2005 by one Pharis Nkari Gitari wherein it is deponed that the Applicant knew of the suit in the lower court and did nothing about it until judgment was entered after due hearing. That the Application is a mere delaying tactic to stop the Respondents from enjoying the fruits of their judgment properly obtained and the Appeal is itself frivolous and has no serious basis. Further that the Ruling which triggered the Appeal was well reasoned and cannot be faulted as there was no defence, even a draft one that was placed before the court to justify setting aside of the judgment.

5. I note that under Order XLI Rule 4(2) of the Civil Procedure Rules this court can only grant an order of stay of execution pending appeal if it is satisfied that;

- (i) substantial loss may result to the Applicant unless the order is made, and
- (ii) that the Application has been made without unreasonable delay and
- (iii) such security as the court may order and binding on the Applicant has been made.

6. Applying these three conditions to this case, I note that the suit before the lower court related to an accident involving Motor Vehicles Registration numbers KQK 803 and KVP 573 on 31/8/2002. The Respondents were passengers in KQK 803 and suffered injuries for which they sought damages. It was alleged that the Motor Vehicle KVP 573 belonged to the Applicant and it was to its driver that the negligence alleged to have led to the accident was pointed. Interlocutory judgment was entered against the Applicant, suit proceeded to determination by way of formal proof and final judgment in the sum of Ksh.259,297/- and Ksh.204,100/- was entered in favour of the 1st and 2nd Respondents respectively together with costs and interest. An application to set aside the judgment was denied on 8.3.2005. The Appeal was filed on 10.3.2005 and the Application herein filed on 25.4.2005. I would agree that the Application was filed without undue delay and no delay has been alleged at all.

7. I further note that the total sum due is Ksh.539,047/= and including costs and interest is a large sum by any standards. Substantial loss may occur if the execution occurs and the Respondents have not said that they can repay it if the appeal succeeds.

8. Notwithstanding what I have said, the Respondents have a Judgment that they consider properly obtained and are entitled to an assurance that the money is safe if the Appeal is not successful. I shall therefore exercise discretion and applying condition (iii) above order that the Applicant should do the following:-

- (i) Deposit in court Ksh.500,000/- within 30 days of this Ruling.
- (ii) In the alternative, the Applicant do deposit a bankers's guarantee of Ksh.500,000/- within 30 days of this Ruling.
- (iii) Failure to comply with either (i) or (ii) above, execution may proceed.
- (iv) Applicant to pay Auctioneers charges as shall be agreed with the Auctioneers.
- (v) Costs of the Application shall abide the Appeal.

Dated, signed and delivered in open court at Meru this 3rd day of May 2006

ISAAC LENAOLA

JUDGE