



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

AT MERU

Civil Appeal 16 of 2006

JULIUS KOBIA

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

VERSUS

**BEATRICE NGORE.....1ST
RESPONDENT**

**PAUL MUCHOKA.....2ND
RESPONDENT**

RULING

1. The Applicant invokes Order XLI Rule 4 of the Civil Procedure Rules and prays for orders of stay of execution of the Judgment and decree in CMCC 871 of 2000 until the Appeal herein is heard and determined.
2. I have had occasion to look at the Judgment delivered in the suit before the lower court and I see that the subject matter therein was a number of pieces of timber (actually 523) and 9 “slabs” whose value is unclear but it is agreed that they are stored somewhere safely. The effect of the Judgment however, was to declare that the 1st Respondent is the owner of all those items and that she would pay the Appellant/Applicant the cost of splitting the timber, such costs to be agreed and if not to be assessed. Costs of the suit were awarded to the Respondents in any event.
3. When I sought to know from counsel from the Applicant what exactly was to be stayed, he said that it was in the end, preservation of the timber until the Appeal is heard, meaning that the 1st Respondent should not have possession until the Appeal is determined.
4. In response the Respondents argue that the Application was misguided as no decree had been extracted and without it no order of stay of execution can issue. That in any event no prejudice would be occasioned to the Appellant if the orders sought are not issued and that the Appeal is in any event hopeless and has no chance of success. Further, that if the Appeal succeeds, the value of the timber can be paid to the Appellant and that the timber may go to waste if the orders sought are granted.
5. Any party invoking Order XLI Rule 4 of the Civil Procedure Rules Must contend with Rule4 (2) of that Order which starts with the words:

“No Order for stay of execution shall be granted under sub-rule(1) unless.....”

6. The conditions which that party must meet are;

i) that he must satisfy the court that substantial loss will result unless the order is granted.

ii) Such security for costs has been given by that party

iii) That the Application itself has been made without undue delay.

7. There is no doubt that the Application under consideration was made without undue delay because it was filed six (6) days after the Judgment appealed from.

8. I have summarized the case as made out by the Appellant. Nowhere in his Affidavit sworn on 14.3.2006 has he said anything about a security for costs as is required by the Rule that he invoked.

9. As for substantial loss, at paragraph 7 of his affidavit aforesaid, he depones that he will suffer that loss because it would be “**impossible for the respondents to surrender the subject matter if disposed (sic) in the event that**” he succeeds in his Appeal. I have attempted to understand the meaning of this statement without much success. I gather from the evidence tendered before the lower court that the pieces of timber were for sale and not merely for decorative purposes and that none of the parties intended to keep them for themselves. The Appellant suggests otherwise and seems focused on the timber qua timber and not the value thereof. Even without this court having the benefit of knowing the value of the timber, it seems to me that the Applicant is headed the wrong direction and no substantial loss is disclosed nor argued in seriousness.

10. If the above are my findings on the three conditions set for the Applicant, he has met none and for that reason “**no order of stay of execution shall be granted.**”

11. The Application dated 14.3.2006 is hereby dismissed with costs to the Respondents.

12. Orders accordingly.

Dated, signed and delivered in open court at Meru this 27TH Day of JUNE 2006

ISAAC LENAOLA

JUDGE

In the presence of

Mr. Muchangi Advocate for the Appellant

Mr. Momanyi Advocate for the Respondent

ISAAC LENAOLA

JUDGE