



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

**Civil Appeal 138 of 2002**

**STEPHEN M’IKUNYUA M’IMATHIU. ....  
APPELLANT/APPLICANT**

**VERSUS**

**REV. ELIJAH MWIRIGI .....1<sup>ST</sup>  
RESPONDENT**

**REV. WILFRED KABURU..... 2<sup>ND</sup> RESPONDENT**

**R U L I N G**

1. The application dated 7.3.2006 is expressed to be brought under Order XXI Rule 25 of presumably the Civil Procedure Rules and in it the Appellant seeks orders of stay of execution on costs pending the hearing and determination of CMCC No. 831 of 1999.
2. What I gather from the supporting Affidavit of Stephen M’Ikunyua M’Imathiu sworn on 6.3.2006 and submissions by counsel is that on 17.11.2005, Lady Justice Sitati dismissed the Appeal herein “**with costs to the Respondents both in this Appeal and for the Application in the lower court.**” It would seem that on 13.2.2006, the taxing officer of this court awarded Ksh.38,620/- as such costs. The dismissal of the Appeal in any event returned parties back to CMCC No. 831/1999 from where the Ruling, subject of the Appeal, emanated from. The Applicant now seeks the amount of money awarded in the Appeal as costs until the lower court suit is finalized.
3. In a further affidavit sworn on 10.4.2006, the Appellant depones that he is unable for reasons of impecunity to pay the costs awarded in the Appeal and prays at paragraph 5 thereof that in the event no stay of execution is granted, then he should be allowed to pay the said amount by instalments of Ksh.3,000/- per month until payment in full.
4. In his Replying Affidavit sworn on 3.4.2006, the Respondent depones, and of relevance to the Application at hand, that the suit in the lower court is frivolous as it seeks orders against the Defendants therein for acts allegedly committed in their position as servants and agents of the Methodist Church in Kenya, a body corporate, and not in their individual capacities as pleaded in their plaint. That in any event, even if that suit was to succeed, the costs can easily be refunded to the Appellant.
5. Order XXI Rule 25 of the Civil Procedure Rules which has been invoked by the Appellant provides as follows:

**“ Where a suit is pending in any court against the holder of a decree of such court in the name of the person against whom the decree was passed, the court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided.”**

The marginal note to the Rule reads as follows; **“Stay of execution pending suit between decree-holder and Judgment debtor.”**

6. If we were to apply the meaning expressed in the Rule and summarized in the marginal note, then the Appellant is the Judgment-debtor and the Respondent is the decree-holder. The pending suit is CMCC No. 831 of 1999. For discretion to be exercised in favour of the Appellant, the court is enjoined to do so upon a security being given by the Appellant or the court would otherwise create other terms as it deems fit for granting the stay of execution.

7. In the instant Application, it is from the bar that Mr. Kariuki for the Appellant has offered security which is unclear. Why was that matter not deposed to in an Affidavit by the Appellant even after being granted the opportunity to file a further Affidavit, which he filed on 11.4.2006? I am otherwise also told to find that the prayer at paragraph 5 of that further affidavit (to pay the costs by instalments) amounts to a security. I do not in my view understand that an offer made to pay a decretal sum by instalments under Order XX Rule 11 of the Civil Procedure Rules by itself amounts to a security to pay the whole decretal sum and I take it therefore that no security has been put forward in any serious or acceptable manner by the Appellant.

8. I have also been told that the court should consider that the Appellant is a man of straw who derives rent from the Marie Stopes Clinic at an undisclosed location and he cannot therefore afford the hefty sum sought in costs. Sadly, the argument in this regard is hollow and unsupported by any evidence whatsoever and I take it to be wholly unhelpful to the Appellant’s cause.

9. What then is there to bend the court’s discretionary eye towards the Appellant? I submit nothing has been offered in that regard.

10. I see no good reason to grant the prayers sought to stop the payment of the minimal sum of Ksh.38,620/- and I order that the Application dated 7.3.2006 be and is hereby dismissed with the costs incurred thereby to be paid by the Appellant.

11. Orders accordingly.

**DATED SIGNED, AND DELIVERED AT MERU THIS 27<sup>TH</sup> DAY OF JUNE 2006**

**I. LENAOLA,**

**JUDGE**

In the presence of:

Mr. Muchngi Advocate for the Appellant

Mr. Mokuu holding brief for Mr. Ondari Advocate for the Respondent.

**I. LENAOLA,**

**JUDGE**