



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

Civil Appeal 118 of 2000

LUCY NYAMANU KIMANI..... APPELLANT

VERSUS

LAWRENCE MBURU MUTHIGA..... RESPONDENT

R U L I N G

On 1/7/05, the appellant/applicant herein, applied under Order 41 Rule 4 of the Civil Procedure Rules, seeking the following orders:

1. Already spent
2. Stay of execution of the judgment and Decree herein, pending the hearing and determination of the appeal herein.
3. Costs of this application.

The application, which is supported by an affidavit by L. Mburu Muthiga of even date, is on the grounds stated on the face of the application.

In opposition the Respondent avers that the application was made more than 1 ½ years after the judgment appealed against, and hence there is unexplained and inordinate delay; that the applicant has not shown any substantial loss that would be suffered as the Respondent is a person of means, married to a person of means, and finally, the applicant must show that he has an arguable appeal, which he has not done as that can only be ganged from the Memorandum of Appeal which does not exist as yet.

Close perusal of the pleadings and consideration of the submissions by counsel for both sides lead me to the following findings and conclusions.

The judgment sought to be appealed from was delivered by Ransley, J on 5/12/03. The application herein was filed on 1/7/05. That is clearly 1½ years down the line.

I have no doubt that by whatever standard, the application has not been made without unreasonable delay. The application is lased with unexplained and inordinate delay. This violates one of the tenets of Order 41 rule 4 (2) (a) of the Civil Procedure Rules, under which the application is brought.

I need only observe that for a stay order to issue each and every tenent of Order 41 rule 4 must be met to

the letter. That is clearly not the case here.

The applicant is also required to show that substantial loss would be suffered if the decretal sum is paid to the Respondent prior to the appeal, and the appeal succeeds. This is done by the applicant showing that the Respondent is not a person of means, and payment of the decretal sum prior to the appeal would put the same beyond the reach of the appellant. Here, the Respondent has sworn an Affidavit that he is a person of means and can repay the money if the appeal succeeds.

Overall therefore the application has not satisfied the mandatory requirements of the law under which it is brought.

Accordingly, the application for stay pending appeal is hereby dismissed with costs to the Respondent and against the appellant/applicant.

Dated and delivered at Nairobi this 21st Day of June, 2006

O.K. MUTUNGI

JUDGE