



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Case 343 of 2006**

**NICHOLAS MOCHAGE & ANOTHER.....PLAINTIFF**

**VERSUS**

**TRENDY MOBILES LTD & ANOTHER.....DEFENDANT**

**RULING**

I have before me an application by way of Chamber Summons and expressed to be brought under Section 75 of the Civil Procedure Act and Order XLI Rules 4 and 5 and Order XLII R 1(3) of the Civil Procedure Rules seeking orders:

1. That the orders issued by Honourable Mrs. Wamae on 10<sup>th</sup> April 2006 for committal to civil jail of the 1<sup>st</sup> Judgment Debtor be stayed until the hearing and determination of the Appeal.
2. That the warrant of arrest issued against the 2<sup>nd</sup> Judgment Debtor be stayed until the hearing and determination of the Appeal.
3. That costs be provided for.

The application is based on the grounds:

- (a) That 1<sup>st</sup> Judgment Debtor was not given an opportunity to show cause why he should not be committed to civil jail.
- (b) That the learned magistrate based her ruling on an application dated 29<sup>th</sup> March 2006 which application had been dispensed with.
- (c) That the Judgment Debtors have made various proposals to the Decree Holder who has refused to accept the said proposals insisting on the Judgment Debtor liquidating the whole amount at once. The application is also supported by an affidavit sworn by Nicholas Mochage the 1<sup>st</sup> Judgment Debtor in which he avers that he was not given an opportunity to show cause, that he has made proposals to liquidate the decretal sum by instalments, and that he is of poor health and that he has already filed the appeal against that ruling being High court Civil Appeal No.248 of 2006.

The application is opposed by the respondent who has filed a replying affidavit sworn by George Mbugua the 2<sup>nd</sup> Respondent herein in which he avers that the present “*Miscellaneous Application*” is incurably defective as the orders sought can only be made in a substantive appeal and not by way of a miscellaneous application, that the applicant had been given an opportunity to show cause but he failed to do so; that the applicants have systematically frustrated all efforts to execute the decree which now stands as Shs.1.8 million, that the Judgment Debtor admitted being indebted to the Decree Holder in the sum of Shs.1.5 million was in 2004 but no serious efforts have been made to liquidate the decretal amount; that the applicant had filed another appeal in the High Court in March 2005 over the same subject matter being HCCA A NO.131 OF 2005 which appeal was never pursued; that the new appeal now filed by the applicant NO. 248 OF 2006 has absolutely no merit and raises no arguable issues, that the present application does not meet the criteria for grant of stay pending appeal as set out in the Civil Procedure Rules, that it is evident from the conduct of the applicants who have filed over seven applications in the subordinate court that their sole aim is to frustrate the Decree Holder from enjoying the fruits of their Judgment and lastly that in October 2005 the applicants (Judgment Debtor) have been allowed by the

subordinate court to pay the decretal sum by instalments but they disobeyed the order after which execution orders were reinstated.

The applicants applies for orders to stay execution until the appeal they have filed being Civil Appeal No.248 of 2006 is heard and determined what he was stayed is the order for commitment to civil jail. He had been given opportunity to pay the decretal sum by instalments which order he breached because according to him what he earns is not enough to enable him pay substantial instalments. He only offered Shs.20,000/= per month while the decretal sum is Shs.1.8 million. He has filed a similar appeal being Civil Appeal No.131 of 2005 which he abandoned.

The present appeal does not raise serious arguable issues. Further the applicant having filed an appeal, he ought to have made the application for stay in that Appeal.

Before a stay of execution can be granted, the applicant must satisfy the court that there is good reason to do so. In exercise of its discretion the court looks at the circumstances and facts of the case. In this case the facts show that the applicant does not deserve the exercise of the court's discretion in his favour.

The application is dismissed with costs to the respondents.

Dated and delivered at Nairobi this 19<sup>th</sup> day of June 2006.

**J.L.A. OSIEMO**

**JUDGE**