



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

Civil Case 84 of 1994

PAUL K. BULLUT 1ST PLAINTIFF

ISAIAH K. MUTAI 2ND PLAINTIFF

VERSUS

CHEMWOLO TOROITICH DEFENDANT

RULING

Chemwolo Toroitich, who is the applicant herein, had his Notice of Appeal and Record of Appeal struck out by the Court of Appeal on 20/9/2006, owing to the fact that the appeal had been filed out of time without leave.

He has now moved this court in an application, taken out under Order XLI rule 4 of the Civil Procedure Rules (CPR), and seeks an order of stay of execution pending the hearing and determination of his intended appeal, as well as costs. He bases his application on the grounds inter alia that the ex-parte judgment which is the basis of his intended appeal, may be executed, as a result of which he stands to suffer substantially. He has deponed to that effect and further that he currently occupies the land and has nowhere else to move his family and livestock.

Though his counsel, Mr. Limo raised an objection to the hearing of the respondent's counsel, whose grounds of opposition were not filed in court until the day when application was due to be heard instead of 3 days before, I nevertheless allowed Mr. Ingosi to address the court, because it is now accepted that once a replying affidavit or grounds of objection are on record, the court should consider the same.

In his objection to this application, Mr. Ingosi urged the court to find that the applicant has not met requirements for the grant of an order of stay as set out under Order 41 rule 4 (2); that he has not demonstrated what loss he stands to suffer, and finally that he has not offered any security. He urged the court to dismiss the application as there is no appeal pending, but that what is pending is an application for leave to file an appeal out of time, and that even if it was admitted, it would not have any chances of success because it would depend on the discretion of the court.

Order XLI rule 4 of the CPR provides that:

“(1) No appeal or second appeal shall

operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (1) unless-

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.”

It is clear this applicant's appeal was struck out for having been filed out of time, and that he has now moved the Court of Appeal to have his appeal filed out of time. It cannot thus be said that he has an appeal on the record and ideally, he would not qualify for the orders which he seeks because for an applicant to qualify under Order XLI of the Civil Procedure Rules, he must show that he has already filed an appeal. In my humble opinion, and as I understand it, having filed an appeal is a prerequisite to obtaining the order of stay which this applicant seeks. Where an applicant has not filed an appeal, he cannot qualify for an order of stay of execution pending appeal for there is no appeal.

In view of the above, I find that this application lacks in merit and the same is dismissed with costs.

Dated and delivered at Eldoret this 24th day of November 2006.

JEANNE GACHECHE

JUDGE

Delivered in the presence of:

Mr. Shivaji for the respondents

Mr. Yator for the applicant