



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU
CIVIL APPEAL CASE NO.21 OF 2004

CYRUS NDERI CHIRA APPELLANT/APPLICANT

VERSUS

JENNIER WANJUKI KANGANGI RESPONDENT

RULING

1. The Application dated 3/1/2005 seeks orders that this court does grant to the Appellant, a stay of execution pending appeal from the decision in SRM Court Civil Suit NO. 232/2002 (Kerugoya). It is brought under order XLI Rule 4(1) of the Civil Procedure Rules.

2. The Applicant in his supporting affidavit and in submissions by Counsel, raises the following issues;-

(i) that the principal sum has been paid and the intended execution is for the sum of ksh.91,851.65 the basis of which is unknown.

(ii) that if the execution proceeds, the appeal would be rendered nugatory

(iii) the Applicant would suffer substantial loss as the motor vehicle proposed to be sold in execution is of tremendous sentimental value to him.

3. The Respondent in a Replying Affidavit sworn on 12/1/2005 attacked the Application as actuated by bad faith and details out the history of the matter leading to the execution. Of importance and relevance to what is before me is the fact that the Judgment in the lower court was for ksh.77,000/= plus interest at 12% per annum from the date of agreement between the parties (subject of that suit). On 20/8/2004, the lower court granted a stay of execution on condition that he deposited in court the costs and interest failure to which execution would issue. He did not comply and orders of execution were issued. It is generally agreed that he paid the principal sum of ksh.77,000/= directly to Counsel for the Respondent but the Applicant now says that he did not know how much the costs and interest amounted to and that the figure of ksh.91,851.65 was not explained to him. The Respondent's Counsel nonetheless argues that the contention in that regard is merely an excuse for non-payment because it was well known to all parties that the only outstanding amount relates to costs and interest as earlier stated.

4. Counsel for the Respondent urged one other important point; that a party approaching the court under Order XLI Rule 4(2) of the Civil Procedure Rules must fulfil the three conditions therein set out viz. that there was no delay in bringing the Application; that substantial loss would be occasioned to the Applicant and a security has been offered. He relies on *John Kamau Wanjoike vs Daniel Kinuthia Njoroge C.A. NO. 523/2003* in support of that position.

5. I shall dismiss the application for these reasons;

(i) The Applicant has deliberately withheld from court the fact that a stay of execution was granted by the lower court with certain conditions which conditions he has not complied with. A party seeking equity must come to court with clean hands and if it does not, equity will frown upon him. That is the place of the Applicant. I am aware that Order XLI Rule 4(1) as substituted by L.N. 36/2000 allows this court the liberty consider an application under that rule whether or not it was granted by the lower court. However where a party deliberately shows ill-faith, this court cannot consider the Application to his favour.

(ii) The Applicant surely knows what is being executed for. It is not enough to say that the ksh.91,851.65 is a mystery to him. The warrants of attachment came from court and I have not been shown what attempt he made to know the basis for it. I think that the intention hereto is a whole lot of nothing in real terms.

(iii) I agree with counsel for the Respondent that under order XLI rule 4(2) a party must show that it has met the three conditions therein set out. The sub-Rule starts with the words, "No order for stay of execution shall be made under sub-rule (1) unless". These words are so clear that a party invoking them must bring himself to comply with the three conditions earlier set out failure to which "no order for stay shall be made."

6. The Applicant, because of his shenanigans in the lower court, filed the instant Application six (6) months after the final order of the lower court. That is delay that would be used against him.

7. As regards the loss he may suffer I was informed that the motor vehicle has sentimental attachment to the Applicant. That may be so but hardly a ground for grant of a stay of execution Under order XLI Rule 4(2) the loss must be substantial. If it is so to the Applicant let him pay the sum of Ksh.91,875.65 as earlier ordered and avoid the trauma of losing his precious car. I have not been told that there is any security offered and therefore on all three grounds, the Applicant is afoul of order XLI Rule 4(2).

8. The Application dated 3/1/2005 is hereby dismissed with costs. Read and delivered in Open Court on 27th day of January 2005

Orders accordingly.

I. LENAOLA

JUDGE

In the presence of;

Mr. Muchiri for Respondent

N/A for Applicant

I. LENAOLA

JUDGE