

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT
MACHAKOS

Civil Appeal 66 of 2004

MULWA KATUNGATI APPELLANT

VERSUS

JAMES MUIMI MUNYALO RESPONDENT

R U L I N G

Before me is the amended application dated 4/11/04 taken out under Order 21 Rule 22, Order 50 Rule 1, Order 41 Rule 1, Civil Procedure Rules and Section 3A Civil Procedure Act, seeking orders that this court do set aside the orders made on 31/8/04 and stay of execution pending the hearing and determination of the appeal. Though the application is entitled Chamber Summons, this is unprocedural as an application for stay should be brought by way of Notice of Motion.

However, this court will look at the substance of the application and ignore the form which is defective.

Under Order 41, Rule 4 Civil Procedure Rules, the onus is on the applicant to satisfy the court that there is sufficient cause for the issuance of an order of stay pending appeal.

Under Order 41 Rule (2) there are conditions which the applicant has to fulfil before a stay can be ordered even if sufficient cause has been shown. The applicant as to show that substantial loss may result if the order of stay is not granted; that the application is filed without unreasonable delay and the applicant has to provide security for the due performance of the decree.

The order ensuing from the ruling of the trial magistrate is not exhibited but the handwritten proceedings (photocopies) before the lower court are annexed. My understanding of the affidavit evidence available, the core of the dispute is that the Respondent sued the applicant for damages for slander in the lower court.

The court entered judgement for the Respondent for 30,000/= and the applicant is dissatisfied with the lower court's decision. He made a similar application in the lower court which prayer was granted on condition that the applicant did deposit Kshs.65,340/= as security for costs.

The applicant claims to be a school teacher and unable to raise the said sum and asks that the order for deposit of Kshs.65,340/= be set aside. On the other hand, Mr Kilonzi for the Respondent urged that the applicant had not offered security for costs as required and ordered and that the applicant has not demonstrated why he cannot comply with the said order and that the fact that applicant cannot raise the decretal sum means he cannot satisfy the decree in the event of the appeal being dismissed.

I have considered the application, authorities cited and submissions by all counsels. On 31/8/04 the lower court gave the applicant 60 days within which to make the deposit of the decretal sum. The period given expired on 4/10/04. The applicant then moved this court on 8/10/04 with the present application. I do believe the application was filed without unreasonable delay. It is the contention of the applicant that being a teacher, if arrested and put in prison for the debt incurred he will loose his job and, therefore, suffer substantial loss.

Unfortunately, the applicant did not avail any evidence to support his contention that he is a teacher and not able to raise the decretal sum. He has not offered any other form of security as required by Order 41

Rule 4 (2). In my view, the applicant has not even shown that there is sufficient cause to warrant the court order a stay. It is hereby alleged that the applicant is dissatisfied with the judgement of the lower court and has high chances of success on appeal but does not allude to the said high chances of success.

The applicant moved this court under Order 41, Rule 4 (1) Civil Procedure Rules seeking the setting aside of the order of the lower court. This court has the discretion to do so under the said sub rule.

However, the applicant has not made any further request on what to do thereafter. An order for providing of security is mandatory for an order of stay to issue. Since the lower court had found it in order to grant stay, this court will exercise its discretion and do likewise and relax the terms of the security to be deposited with the court for the due performance to half the decretal sum.

The said sum should be deposited within 21 days of the date of this ruling and in default, this application will stand dismissed. Costs to the Respondent.

Dated at Machakos this 25th day of January 2005

Read and delivered in the presence of

R.V. WENDOH

JUDGE