REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA

Civil Appeal 11 of 2003

(An application for stay of execution of the decree pending the hearing and determination of an appeal)

VINCENT MUYUKA ASHIUNDU ….....…
APPELLANT/RESPONDENT

V E R S U S

ACTION AID KENYA …….....……RESPONDENT/ APPLICANT

R U L I N G

On 10.12.2004 this court allowed the appeal by Vincent Muyuka Ashihundu and held the Respondent 100% liable for the accident that resulted in the injury to the Appellant. Damages for the injuries had by consent of the parties been agreed on at Shs.850,000/=.

On 9.2.2005, the Respondent made an application by way of a Notice of Motion premised on Order 41 Rule 4 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act Cap 21 seeking an order for stay of execution of the decree pending the hearing and determination of the appeal.

The application was supported by an affidavit sworn on 2-2-2005 by the Applicant's advocate on record, Mr. John Olago-Aluoch. In it, the deponent deposed (1) that the appeal has overwhelming chances of success, and (2) that the applicant stands to suffer irreparable loss and damage in the event execution is not stayed because the Respondent "***is a man of straw and it will be impossible to recover the said sum from the Respondent in the event that the appeal succeeds"*** and (3) that if execution is not stayed, the "***sub strum of the proposed appeal will be destroyed"*** and (4) that the Applicant was ready and willing to abide by any conditions that the court may impose and (5) that the application was made in good faith and without undue delay and (6) that the Respondent stood to suffer no loss--- or prejudice if stay is granted.

The application was opposed. The replying affidavit was sworn on 10-2-2005 by Benjamin G. Wainaina, the advocate on record for the Respondent. In it the deponent averred (1) that the applicant had not shown sufficient cause for the grant of stay and (2) that there was no evidence that the Respondent/ Appellant was a man of straw and (3) that the application for stay was premature because decree had not been extracted and (4) that there was an existing order for stay that was due to expire on 14.3.2005 which rendered the application res judicata and (5) that the application was not in good faith and the applicant had not come to court with clean hands because of the discrepancy in the date of

taxation of the costs and the date on which the order for stay was to lapse.

The applicant has an undoubted right of appeal to the Court of Appeal and it is in the interest of justice that while substantial loss does not result to it, the Respondent/decree holder on the other hand should not be denied the fruits of his judgement to which he is legally entitled. In trying to balance the scales of justice, Order 41 Rule 4 of the Civil Procedure Rules reposes on an applicant who is desirous of an order for stay conditions which the latter must satisfy. Such an applicant must –

(i) satisfy this court that there is sufficient cause for the order of stay and;

(ii) that the application for stay was made without unreasonable delay;

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

(iv) that the appeal is not a non-starter.

The main issue in this application is whether the Respondent will be able to refund to the Applicant the decretal dues if the appeal is successful.

In the supporting affidavit, the applicant's counsel deposed in paragraph 6 that the applicant "***stands to suffer irreparable loss and damage in the event execution is not stayed in that the Respondent is a man of straw and it will be impossible to recover the said sum from the Respondent in the event that the appeal succeeds."***

Counsel for the Appellant took issue with this averment and urged the court to strike it out on the ground that the source of the information was not stated. The deponent did not show in the affidavit the source of income of the appellant nor did the Applicant offer evidence to show the basis for the claim that the Appellant was a man of straw.

As correctly stated by counsel for Appellant, the source of information in relation to paragraph 6 of the said affidavit was not stated. The paragraph offends the proviso to rule 3 of Order XVIII of the Civil Procedure Rules and is hereby struck out. **(see Life Ins. Corp. vs Pancsar (1967)EA 614; Standard Goods Corp. v Nathu (1950) 17 EACA 99; Mayers & Another v Akira Ranch Ltd (1974) EA 169).**

The Applicant's apprehension is that if the appeal succeeds, the Appellant may be unable to refund the decretal dues unless stay is ordered. The burden of showing that this apprehension constitutes a sufficient cause is reposed on the Applicant. It was the duty of the Applicant to show that the Appellant is a man of straw and may not be able to refund the decretal dues if the appeal succeeds. As the Applicant's supporting affidavit does not state the basis for that proposition, the statement remains mere rhetoric without evidence. Mere fear or apprehension that the Appellant might be unable to refund the decretal dues is not enough. There must be facts to buttress that proposition. It must not be forgotten that the decree-holder is entitled to enjoy the fruits of the judgement save where stay is ordered for sufficient cause. In the instant application, the Applicant has not shown that there is sufficient cause as there is absence of facts to prove the allegation that the Respondent is a man of straw.

The application was brought after about 60 days. There is no hard and fast rule as to what period may amount to unreasonable delay. Whether delay is unreasonable depends on the peculiar circumstances of each particular case. In the instant case, the applicant did not move the court with expedition. Yet the Applicant was not inhibited by any factor from seeking stay soon after the judgement on 10.12.2004. The applicant seems to have taken its sweet time to do so. Order 41 Rule 4 stipulates that an application for stay must be brought without unreasonable delay. It cannot be said that the period of close to 60 days did not amount to unreasonable delay in the circumstances of this case.

In the result, I am unable to grant the applicant the order for stay. The application is dismissed with costs.

Dated at Kakamega this 4th day of March, 2005

G. B. M. KARIUKI

J U D G E