

REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL 131 OF 1999

FREDRICK MWENDA.....APPELLANT

VERSUS

DAVID KIRIMI JULIUS.....RESPONDENT

RULING

The application before the court is dated 14th January, 2004 and seeks a stay of execution pending the hearing and final determination of the appeal which is appeal No. 270 of 2003 of the Court of Appeal. Judgment was delivered on 19th June, 2003 while as indicated above this application was filed on 14th January, 2004, a period of about just over 330 days later.

Mr. Kirubwa for the applicant argued that if the Respondent did not threaten to execute for the said period, he may lose nothing in waiting further. He confirmed that the applicant has come for this stay mainly because the Respondent is now threatening to execute.

Mr. Mithiga for Respondent on the other hand submitted that the appeal before the Court of Appeal is only on payment of costs, assessed by the lower court. That when the applicant appealed to this court, the appeal which was still on costs, was dismissed which then prompted applicant to appeal to the Court of Appeal. The total costs now due both in the primary court and this court is about Kshs.84381/=. Respondent further argued that if these costs are settled by the applicant as he awaits to prosecute his appeal, the act will neither prejudice the applicant nor will it render the appeal nugatory. And finally that the Respondent is a man of means and will readily refund the sums of money paid to him in settlement of the sum aforementioned.

I have carefully considered the application. The Respondent argued that he would easily refund the sums of money, if paid to him in settlement of the costs. The applicant did not appear to dispute that fact. He instead argued that it was in law incumbent upon the Respondent to prove that he was a man of means. In my view, the right position is that it will be upon the applicant to demonstrate to this court that if the sums of money to be paid are paid now, the same will not be easily refunded on the basis that the Respondent is not a man of means. The applicant has not demonstrated so. He did not as much as say that the Respondent will not be able to refund or that he will render the eventual successful result of the appeal nugatory.

Secondly, the applicant did not in my view and understanding of this legal principle demonstrate that his appeal has arguable points or as otherwise stated, the appeal has chances of success and is not frivolous.

On either of the above grounds this application would in my findings fail. But there is also in this case a serious and inordinate delay by the applicant in seeking a stay. He admits that he came to court to file this application after a delay of over 330 days and only after execution was threatened. In my view and finding the delay in all the circumstances of the case, was inordinate for a party seeking a favourable discretion of the court. On this ground alone as well, this court would not have granted the stay sought.

The end result therefore is that this application must fail. It is dismissed with costs to the Respondent herein.

Orders accordingly.

Dated and delivered at Meru this 14th day of April, 2005

D. A. ONYANCHA

JUDGE