

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI

PETER MWONGELA MWOLOLO APPELLANT

VERSUS

UNITED INSURANCE CO. LTD RESPONDENT

RULING

In this application, made under Order 39 Rule 1 of the Civil Procedure Rules, the Applicant seeks “an injunction staying the orders made by the Principal Magistrate at Milimani in RMCC No 1363 of 2004, and RMCC No 6857 of 2004 until the final determination of this appeal”.

Clearly, this application is meant to “stay” the Orders of the lower court pending appeal, and should have been brought under Order 41 Rule 4 of the Civil Procedure Rules. The Counsel for the Applicant did not apply to amend the application, but that notwithstanding, and in the interest of Justice, I will proceed to determine the application as if it was brought under the correct provisions of the law.

By an order dated 22nd February, 2005 and issued on 23rd February, 2005, the lower court ordered that the goods and office equipment of the Defendant attached on 10th December, 2004 by the auctioneer be released to the Defendant (Respondent). The Applicant has appealed against that Order, and presently seeks a stay of the same on grounds that the decretal sum of Kshs.700,000/= together with the auctioneer’s charges are still unpaid.

There was some argument about whether leave to appeal was required, and if so, obtained. I do not think that issue is relevant at this time, and in any event the lower court file is not here to enable the Court address that issue. The only issue is whether I should stay the Orders of the lower court, pending appeal.

The Applicant’s main reason for wanting to retain the goods that have been attached are a blanket and unsubstantiated statement that the decretal sum amounting to Kshs.700,000/= remains unpaid, plus an unspecified sum in respect of the auctioneer’s charges are unpaid. Surely, the auctioneer knows, what amount is unpaid, and could have been more candid with this Court.

The Applicant has not shown, as is required by Order 41 Rule 4, how he will suffer substantial loss if an order of stay was not made, and has offered absolutely no security for the Order. He has not complied with the requirements of Order 41 Rule 4 and is, therefore, not entitled to the Order sought.

On the other hand, the Respondent has outlined in details how it believes the decretal amounts in various suits have been paid or stayed, and I have reason to believe those statements on a balance of probability.

Accordingly, this application for stay dated 23rd February, 2005 is dismissed with costs to the Respondent.

Dated and delivered at Nairobi this 15th day of June, 2005.

ALNASHIR VISRAM

JUDGE