REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

CIVIL APPEAL 21 OF 2005

BETWEEN

MUTERA M'LIMBUTU …….. APPLICANT/APPELLANT

AND

M'IMATHIU MWIRICHIA ……..…… RESPONDENT

(Being an appeal from the judgment/decree of the learned resident magistrate Mr. G.

Oyugi dated 23.3.2005 at Tigania
SRMCC No. 35 of 2004)

RULING OF THE COURT

The applicant herein was the defendant in Tigania SRMCC No. 35 of 2004 in which judgment was entered for the plaintiff in the sum of Kshs. 50,000/= being general damages for defamation. The applicant was also ordered to pay costs of the suit.

In his application brought by way of chamber summons under the provisions of Order 41 Rule 4 of the Civil Procedure Rules (the rules) and section 3A of the Civil Procedure Act (the Act) the applicant prays for an order in the main that the applicant be granted stay of execution pending the hearing and determination of the appeal herein. The application was filed under certificate of urgency and same was duly certified as such on 3.10.2005 with an order that the same be heard on 4.10.2005. On 4.10.2005, the court made an order directing applicant to serve the application upon the respondent for hearing on 19.10.2005.

The application is based on five grounds on the face thereof, namely that:-

(a) The applicant has filed a Civil Appeal No. 21 of 2005 Meru which is pending for hearing.

(b) The appeal as filed has high chances of success.

(c) The appellant was refused audience in the lower court.

d) If stay is granted, neither of the parties will suffer any prejudice.

(e) If stay is denied, the appeal will be rendered nugatory.

The applicant also swore an affidavit on 30.9.2005 in which he depones that judgment in Tigania SRMCC No. 35 of 2004 was entered against him on 22.3.2005 for general damages of Kshs. 50,000/=

plus costs and interest. A copy of the decree was annexed to the supporting affidavit marked “MMI”. He has also deponed that he was not accorded an audience during hearing in the lower court and had his counterclaim dismissed with costs to the respondent. He states further that he was not given any prior notice as to denial of right of audience despite the fact that he had paid costs of Kshs. 1,400/= to the plaintiff’s advocates m/s B.G. Kariuki & Co. Advocates. The applicant avers further that the court ought not to have proceeded with the hearing of the case before the respondent was made to pay the court adjournment fees which the applicant had failed to pay. The applicant has also averred at paragraph 9 of the supporting affidavit that unless the orders sought are granted the outcome of his pending appeal shall be rendered nugatory.

The application is opposed. The replying affidavit is sworn by the respondent M’Imathiu Mwirichia and is dated 14.10.2005. He states therein that the applicant failed to obey the court orders made on 1.2.2005 by refusing to pay court adjournment fees and that that was the reason why he was not given audience by the lower court. He has deponed further that the lower court judgment was soundly made and that the appeal against the said judgment has no chances of success. It is further deponed that the decision by the applicant to file the appeal was an afterthought on the part of the applicant and that for this reason this application should be dismissed.

During the hearing of this application, Mr. Omayo appearing for the applicant submitted that the matter ought not to have proceeded because the parties had filed a consent standing the matter over generally. Further, it was contended for the applicant that if the learned trial magistrate felt inclined to proceed with the case, then he ought to have made the respondent pay up the court adjournment fees on behalf of the applicant instead of proceeding with the hearing without payment of those fees.

Under the provisions of Order 41 Rule 4(2), an order of stay shall not be made unless:-

> (a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay.
>
> (b) Such security as the court orders for the due performance of such decree or order as may ultimately be finding on him has been given by the applicant.

The above subsection is to be read in conjunction with sub-section (1) of Rule 4 of Order 41 which is to the effect that no appeal shall operate as a stay of execution.

After carefully considering the application before me and submissions made by counsel on behalf of their respective clients, I am not persuaded that the applicant has satisfied the conditions for the granting of a stay of execution as set out under Rule 4(2) of Order 41. First and foremost, the applicant has not demonstrated to this court what loss, if any, he is likely to suffer if the orders sought are not granted. For example, he has not deponed that the respondent is a man of straw and therefore would be unable to repay the decretal amount in case the appeal succeeds. The matters which the applicant has dwelt on in his supporting affidavit are, to my mind not helpful to the applicant’s cause. He has contended that the learned trial magistrate ought not to have proceeded with the hearing of the case when there was a consent to have the matter stood over generally.

The issue of whether or not to adjourn any matter is within the discretion of the court, whether or not the parties think they should have the matter adjourned. It is not in dispute that the suit had earlier been adjourned at the behest of the applicant who was ordered to pay both court adjournment fees and the day’s costs to the advocate for the respondent. The applicant paid only the costs of Kshs. 1,400/= but failed to pay the court adjournment fees as a result of which the applicant was denied audience when the suit came up for hearing. The applicant has contended that he ought to have been warned in advance that he would not be heard unless the adjournment fees was paid. I have considered all these submissions and contentions but find no merit in them. The applicant was well aware of his obligation. By failing to comply with the court orders, the applicant became the author of his own troubles and cannot now turn round and say he was unfairly treated. So, on the basis of the first limb of Rule 4(2) (a) this application fails.

What about the reasonableness of time within which the applicant's application was filed? In his supporting affidavit, the applicant avers that judgment was entered against him on 22.3.2005. Then he duly filed his appeal on 30.3.2005 but it was not until 30.9.2005 that he filed this application for stay of execution. He does not say why it took him six months to file this application. In my view therefore, it cannot be said that the applicant filed this application without unreasonable delay. Infact, the delay on the part of the applicant in filing this application was inordinate. Since equity aids the vigilant, I find that the applicant, having not demonstrated to me that he was vigilant is not entitled to the order of stay that he seeks from this court.

I have further considered whether the applicant's prayer for stay of execution should be allowed when the decree sought to be stayed is a money decree. Authorities abound on this issue to the effect that a money decree would not normally be stayed unless the case has special features, namely that the respondent had no known assets within jurisdiction which would make the court grant the stay (see **Madhupaper Kenya Limited – Vs – Crescent Construction Company Limited** – Civil Application No. Nrb 60 of 1990 – Court of Appeal at Nairobi). As I have mentioned earlier in this ruling, the applicant has not placed before this court evidence to show that the respondent is a person who would be incapable of making full restitution should the appeal succeed.

If the applicant's application were to be allowed, the applicant would have to give such security as this court would deem fit to order for the due performance of such stay. The applicant has not made any offer of such security either in his affidavit in support or during the submissions made on his behalf. The inference I have drawn from this omission on the part of the applicant to make an offer of security for stay is that he is not prepared to make any.

I have also considered whether the applicant's appeal has high chances of success. I note that apart from the grounds in the Memorandum of Appeal, being annexture "MM2" to the supporting affidavit and the decree being annexture "MM1", the applicant did not place before me the record of the lower court for perusal so as to be able to say whether or not indeed the applicant's appeal has high chances of success.

In the result, I find that the applicant's application for stay lacks merit. The same is therefore dismissed in its entirety with costs to the respondent.

Orders accordingly.

Dated and delivered at Meru this 27th day of October 2005

. RUTH N. SITATI

JUDGE

27.10.2005