

IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Appeal 438 of 2005

**(From original conviction and sentence in Civil Case No. 777 of 2005 of the
Principal Magistrate's Court at Milimani)**

CHARLES EVANS MUGA.....APPELLANT

VERSUS

JIMMY T. MBUGUA.....RESPONDENT

J U D G M E N T

On 24/6/2005, the appellant/applicant moved to this court, under Order 41 rule 4(1) of the Civil Procedure Rules seeking a stay of execution pending the hearing of the appeal herein. The application is on the grounds that: the appeal has an overwhelming chance of success; if the stay is not granted, the applicant will suffer substantial loss, and the application has been made without undue delay.

In the applicant's supporting affidavit, he is alleged to have been served with summons to enter appearance, by a court process server on 26/2/05, which was a Saturday and when he was in his rural home in Ugenya; and that is how judgment, in default of appearance, was entered against him. Briefly, he was not served; and he had no chance of defending himself on merit. He further avers that if the decretal amount is paid to the Respondent it will have been put beyond the appellant's reach. Further, the applicant avers that the Respondent has migrated to Germany.

Upon perusal of the pleadings herein the submissions by learned counsel for both sides, and considering the authorities quoted by Mr. Oluoch, for the applicant, I have reached the following findings and conclusions. The judgment from which the appeal herein arose, was based on the technicality of non-appearance, by the appellant (applicant). However, that notwithstanding, the judgment is still in favour of the Respondent and remains so until and unless it is set aside or overturned in the appeal. The appellant/applicant, filed the appeal herein barely two days after the order appealed against, has shown good cause to come to the seat of justice for relief seeking an opportunity to have his case heard and determined on merit.

However, under Order 41 rule 4(1) of the Civil Procedure Rules, the issue of security for the due performance of such decree or order as may ultimately be binding on the applicant is the only requirement that seems to be inconclusively canvassed. The decretal amount is K.Shs.185,963/-, which is not, in my view, a very large sum that any of the two parties would be unable to raise in the event the appeal succeeds. But there is the uncontroverted averment that the Respondent has migrated outside this court's jurisdiction and that is the main fear of the appellant/applicant. The Respondent may be a man of substance. From the pleadings, the Respondent has a vehicle valued at over 500,000/- K.Shillings. However, in my judgment, that has to overcome two real issues. First, it is irrelevant that a party is a person of substance, if that party is outside this court's jurisdiction. That is the appellant/applicant's apprehension that if he pays the decretal sum and wins the appeal, he might not recoup the sum when the Respondent is beyond the reach of this court's jurisdiction.

Secondly, and this is both practical and theoretical, a vehicle, such as the one claimed to be owned by the Respondent, is a fluid asset which can be dismatated by an accident any time, and the insured value therefore more or less wiped out unless it is comprehensively insured. And even that has its loopholes, especially depending on the cause of the loss vis-a-vis the insurance cover and the conditions therein.

Doing the best I can under the foregoing facts and circumstances, I rule as follows:

1. Grant stay of execution of the decree in the Subordinate Court in CMCC No. 777 of 2005, pending the hearing and determination of the appeal herein, on condition that the appellant/applicant deposits in court, K.Shs.90,000/- within 30 days from the date of this order.

2. Costs of this application to abide the results of the appeal herein.

DATED and delivered in Nairobi this 28th day of November, 2005.

O.K. MUTUNGI

JUDGE