



## Editorial Note

### Order 41 rule 4

- Conditions to be satisfied
- Existence of a Decree and order
- Effect where no right to appeal against the decree exists.
- Resjudicata

## **REPUBLIC OF KENYA**

### **IN THE HIGH COURT OF KENYA AT NAIROBI**

#### **CIVIL CASE NO 2207 OF 1995**

**PHYLIS MUMBUA NGULI ..... PLAINTIFF**

**VERSUS**

**JOHN MAINA KARURI & ANOTHER ..... DEFENDANT**

### **RULING**

The application dated 28th November 2003 is predicated upon Order LXI rule 4 and S 3A of the Civil Procedure Act.

When the application came before me on 29th November 2003 the learned counsel for the applicant applied to amend the heading to read Order 41 rule 4 instead of order 61 Rule 4 which is non existent. As the application was not opposed it was accordingly allowed.

The application seeks an order for execution of the decree in this case to be stayed pending the hearing and determination of an appeal against the ruling and order given on 13th November 2003 by Hon GBM Kariuki.

The grounds as set out in the body of the application are

- (a) The applicant is dissatisfied with the ruling of this court read on 13th November 2003
- (b) The applicant has been given leave to appeal against the said ruling and has an arguable appeal
- (c) The applicant has only one property a parcel of land which is currently under attachment through a prohibitory order given by the Honourable court
- (d) Unless a stay is granted the property would be sold and the appeal would be rendered nugatory
- (e) The applicant is ready to put the property at the disposal of the court as a way of securing the

decree until the appeal is heard and determined

The application is also supported by an affidavit of one Samuel Kagumba on 28th November 2003.

The affidavit substantially raises the same grounds as set out in the body of the application and for this reason I will not repeat them here.

In opposition the plaintiff/respondent has raised 6 grounds:-

- 1.) The application is misconceived and bad in law
- 2.) The defendant and its advocates expressed no dissatisfaction with the judgment entered in favour of the respondent on 11th February 2000.
- 3.) There has been gross delay in bringing the application for stay of the judgment.
- 4.) The application is an abuse of the court process
- 5.) The respondent is entitled to the fruits of his judgment
- 6.) The application has no merits.

In addition the respondent swore an affidavit in reply on 14th January 2004 which affidavit in essence repeats the above grounds with the important addition that on 25th June 2003 an application to stay execution of the judgment entered on February 2000 was filed.

The application for stay of execution was dismissed by Hon Mr Justice Kariuki on 13th November 2003 for the reasons inter alia that there was no notice of appeal against the judgment delivered on 11th February 2000 and there was no intended appeal in process ie extension of time in the Court of Appeal and also that the application could not satisfy the other requirements of Order 41 rule 4.

The thrust of the current application is to stay the order refusing stay pending following the application to extend time for the appeal against the judgment pending the intended appeal. The only difference is that a notice of appeal has been filed and therefore technically there is an appeal pending against the order.

However it is quite evident that the order against which the applicants are appealing is not a decree as described in prayers 1 of the application. Apart from the above distinction the relief sought in the application is substantially similar to the one sought in the earlier application heard and dismissed on merit by my brother Judge Kariuki after hearing the application filed on 25th June 2003. In both cases it is intended to stop the sale by stay execution. It follows that the same point is being litigated twice before by courts of coordinate or same jurisdiction. The issue of stay of execution is therefore clearly res judicata.

Even if the matter was not res judicata any stay of the order would not result in the stay of the decree – the stay of the decree having been refused. Moreover even the appellants ability to comply with the provisions of O 41 rule 4 were considered by the previous court and the court had established that the applicant could not satisfy all the conditions ie

- (i) That the applicant will suffer substantial loss unless stay is granted
- (ii) That the application for stay has been made without unreasonable delay.
- (iii) That the applicant has furnished security for the performance of such decree or order appealed against.

This aspect is in the view of the court also res judicata.

In the current situation even assuming it was not res judicata whereas the applicant is able to satisfy that there is an appeal against the order by virtue of the notice of appeal filed within time and that the application for stay has been made without unreasonable delay, he has not been able to satisfy the court he is likely to suffer substantial loss in that firstly this is a money decree passed nearly four many years ago and all the respondent is doing is to enforce the a money decree in order to enjoy the fruits of the judgment, and secondly the process of execution by attachment and sale of the immovable property is a normal execution process to recover.

Similarly the applicant is also not able to satisfy the court by finding security for the performance of the decree or order. An offer of the immovable property which has already been technically attached is in the opinion of the court not good enough because the property is not legally in the hands of the applicant after the order of attachment was made. It is already charged by virtue of the prohibitory order.

For the above reasons the application is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 19th day of February 2004.

J G NYAMU

JUDGE