

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 121 OF 2000

FRANCIS J. MAINGI MUNYAO ::::::::::::::: APPELLANT

VERSUS

MWANGANGI KISYULA)

ATTORNEY GENERAL) ::::::::::::::: RESPONDENT

R U L I N G

The appellant is dissatisfied with the court judgement delivered by this court on 17.1.2003 and seeks orders of stay pending determination of an appeal lodged in Court of Appeal. The applicant contends that they have lodged an appeal against the court's judgement and there has been proclamation of the appellant/applicants property and if execution proceeds the appeal would be rendered nugatory, that the appellant has high chances of success on the appeal and that execution is only directed at 1st defendant and yet there are other defendants. The applicant Mwangangi Kisyula swore an affidavit in support of the application.

The respondent filed an affidavit in opposition to the application. He is acting in person. The court is not able to have to make head of tail what his deponements are. He tried to submit in court and similarly court was not able to understand what his submissions are. However, this court will still consider the application on merit guided by principles laid down in Order 41 R 4 (1) for grant of orders of stay pending appeal.

Under Order 41 Rule 4 (2) an application for stay has to be made without reasonable delay. In the present case the judgement was delivered on 17.1.2003. This application of stay was not made until 17.11.2003. The applicant has not accounted for the period from January till November about 10 months which elapsed before this application. The applicant refers to an application of stay made earlier before the Deputy Registrar which gave interim orders of stay as per annexure MK2 annexed to affidavit in support. As per the proceedings of that day the application that came under certificate of urgency was dated 2.4.2003. I have had a look at the court file and I see no such application. From the court record I do note that taxation had been done and the applicants were seeking to stay it. It was not an application for stay pending appeal. I do find that the applicant has not explained why the delay of about 10 months before bringing this application. There has been inordinate delay.

The applicants contend that they have a good case with chances of success on appeal. However the court can not confirm this as they have not annexed a copy of the notice of appeal and memorandum of appeal of the said proceedings before the Court of Appeal. Infact there is no evidence that any has been filed. The applicants have to demonstrate that they are serious and have indeed taken steps to file an appeal and this court should have a chance to look at the reasons for such appeal in their memorandum of appeal first to see if there is an arguable appeal leave alone good chances of success on appeal.

The applicants should also demonstrate that they will suffer irreparable loss if the order of stay is not granted. The applicants never even attempted to address this issue. Though the decretal sum is deposited with the court, it is upto them to show that if paid out, they cannot be able to recover it.

The applicant was sued along with others jointly and severally and the respondent has a right to pursue

whichever defendant he chooses or is available.

From the foregoing I do find that the applicants have failed to meet conditions necessary for grant of stay pending appeal and the application therefore fails and is dismissed with costs to respondents.

Dated, read and delivered at Machakos this 18th day of February, 2004.

R. V. WENDOH

JUDGE