



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CIVIL APPEAL NO. 103 OF 2003**

**BENJAMIN KALUNGU KIMATU )**

**BONIFACE MWANIA MATHEKA ).....APPELLANT**

**VERSUS**

**DAVID KILUVA MAUNDU.....RESPONDENT**

**R U L I N G**

By a notice of motion dated 12.2.2004 the appellant moved the court under Order 41 Rule 4 Civil Procedure Rules and Section 3A Civil Procedure Act seeking orders of stay of execution in SPMCC 188/2002 – Kitui pending hearing interpartes and then until hearing of the appeal herein. It was brought for reasons that the lower court’s decision was being challenged; that the appellants property has been proclaimed in execution of a decree and if stay is not granted substantial loss would be suffered, that there was no delay in bringing the application and that the applicant is willing to give a security. The application was also supported by the affidavit of Peter Kariuki a legal assistant Kenyan Alliance Insurance 1st appellants insurers.

The above application was consolidated and heard together with notice of motion dated 9.3.2004 and brought under Order 41 Rule 4, Order 44 Rule 1 Civil Procedure Rules, Section 80 and 3 A Civil Procedure Act; seeking stay of execution a review of courts orders of 16.2.2004 by allowing appellant to deposit decretal sum in court or give unconditional stay. This application was based on grounds that there was misunderstanding between the counsels that led to confusion that counsels mistakes should not be visited on the parties and that Mr. Kilonzi had refused to co-operate in opening of a joint account.

These applicants were opposed. Two affidavits were sworn by the respondent’s counsel Mr. Kilonzi, filed on 23.2.2004 and 16.3.2004 and grounds of opposition filed on 23.2.2004.

This being an application for stay the court has to consider whether the application was brought within reasonable time of delivery of the judgement in RMCC 188/02. At paragraph 2 of the affidavit dated 12.2.2004 sworn by the applicant, the judgement in the above case was delivered on 18.9.2003. From that date the applicant did not apply for stay till 12.2.2004. This was a bout 5 months after delivery of the judgement. There is allegation of an agreement that a cheque would be deposited in an interest earning account by advocates of both parties but those who agreed have not deponed to that fact.

The deponent of the affidavit is referring to what he was told. In any case even if that were the case that was supposed to have been done in November 2003. When it did not work why would it take the applicant so long to bring this application. I do find that this application was not brought within the urgency that it deserves. There has been unexplained inordinate delay.

The appellant has filed a memorandum of appeal. However the court has not had a chance to look at the proceedings of the lower court to appreciate whether or not the applicant has an arguable appeal. Infact the deponent Peter Kariuki depones to evidence adduced in the lower court but the court can not confirm that that is the case. The applicant did not apply for lower court’s proceedings till 3.11.2003 as per their annexure ‘PKI’. If the applicant was dissatisfied with the judgement of the lower court they should have moved with diligence to get the lower court proceedings. There is no explanation why it took the applicant over 1½ months to apply for proceedings. It seems there was not even a follow up of the proceedings by the applicant. They did not even bother to get a photocopy of the proceedings for purposes of this application or even get the judgement alone. In my view the applicant has been lax in

their handling of this case. As things stand the court is not able to find whether or not the applicant has an arguable appeal in order to get an order of stay.

Will the applicant suffer irreparable loss if the order of stay is not granted. In my view the applicant has not demonstrated that. It is not enough for the advocate for applicant to tell court that respondent is not able to pay. The record of lower court may have been able to show what the respondent's station in life is or what he does for a living and whether he is able to repay the decretal sum in the event that the appeal succeeds. It is not enough that applicant offers security. He has to show that an order of stay is deserved as per provisions of Order 41. Under the circumstances the applicant has not acted diligently and has failed to demonstrate to court that an order of stay is deserved and it is therefore refused. That being the case, the court can not therefore review its order dismissing the order of stay and both applications dated 12.2.2004 and 9.3.2004 are hereby dismissed with costs.

**Dated, read and delivered at Machakos this 6th day of May, 2004.**

**R. V. WENDOH**

**JUDGE**