



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL CASE NO.20 OF 1998**

VICTORIA INSURANCE BROKERS PLAINTIFF

VERSUS

BENJAMIN ONKOBA

ALICE NYAMASEGE DEFENDANTS

t/a KEMERA GENERAL STORES

RULING:

Applicants/defendants application is for a grant of stay of execution of the decree in this case pending hearing and determination of appeal filed in the Court of Appeal. He also prays for costs.

It was submitted that the applicant was dissatisfied by the Judgment of this court delivered on 9th February 2004. He filed a memorandum of appeal in the Court of Appeal. He said that unless there is a decree he will suffer loss. The judgment was for shs.1,123,159/80 and that Respondent is a man of strum if execution takes place and the appeal succeeds he may not be able to refund the money.

Further it was stated that the Respondents too have preferred an appeal against the same judgment. Thus there are two appeals in Court of appeal, one by the applicant and the other by the respondent.

Mr. Getanda for the respondent vigorously opposed the application. First he said the application only states it is under s.3A CPA and order XLI CPR. The application should have been under Order 41 CPR. Further it was submitted that affidavit supporting the application is by the advocate and not the applicant. It offends provisions of order 18 rules 3, 5 and 6 CPR. Respondent further said applicant will not suffer any loss and that the issue of security was not addressed. This being a money decree stay should not be granted.

I have considered application and submissions by counsels. Indeed the application only shows it is brought under s.3A CPA and order 50 CPR. I concur this was wrong. Ideally an application like the present one should be made under Order 41 rule 4(1) CPR. Applicants should have shown clearly that application is under that rule. However failure to state the proper provisions is not fatal. Order 50 rule 12 provides that no application shall be refused merely by reason of a failure to state the provisions.

As to the affidavit being sworn by the counsel and not the applicant, the respondent should have raised it as a preliminary point. Instead he sat mum as the advocate for the applicant submitted and relied on the said affidavit only to raise the issue as he was submitting.

I concur that an advocate should not depone on matters which are in dispute. However on the grounds on face of the application the same issues are raised.

Indeed this is a money decree. However the amount involved is over shs.1,000,000/=. Issue of the Respondent not being a man of means were raised. The respondent did not adequately respond to the same.

Lastly the respondent has admitted that he too have appealed against the judgment he want to execute against. This is a case of one having his cake and easting it. His appeal has not been disposed off and I feel it is only fair that status quo be maintained.

As to the issue of security it is for the court to direct the security to be availed as a condition of issuing an order of stay.

The applicant had offered land parcel No.KISII BLOCK III/428. He had wanted to put in a valuation report of the said land but his counsel filed affidavit late and was expunged. Nevertheless there was that indication. The value is about shs.1 million. I feel it would be a satisfactory security.

In the circumstances I allow the application and order there be a stay of execution of this court's decree until the appeals in Court of appeal are heard and determined. Applicant to deposit title of land No.KISII BLOCK III/428 with the Deputy Registrar as a security. Costs of the application will be in the cause.

It is so ordered.

Delivered on 17th June 2004.

KABURU BAUNI

JUDGE

17/6/04

Mr. Ondika for applicant

Mr. Ogari for Mr. Getanda for respondent

KABURU BAUNI

JUDGE