

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION, MILIMANI
CIVIL CASE NO.457 OF 2003

PETER THARAU NGURE.....PLAINTIFF

VERSUS

MARGARET WAIRIMU MAGUGU.....DEFENDANT

RULING

The Defendant/Judgment Debtor, MARGARET WAIRIM U MAGUGU, seeks by notice of motion dated 16th July 2004 stay of execution of decree passed on 8th March 2004 pending hearing and determination of an intended appeal to the Court of Appeal. The requisite notice of appeal dated 12th March 2004 was lodged on the same date. The application is brought under rule 4 of Order 41 of the Civil Procedure Rules (the Rules). There is another prayer, that is, that the bill of costs taxed at Kshs.197,029.90 on 9th July 2004 be set aside. This prayer was not pursued, perhaps because as presented it is incompetent, there being a specific procedure for challenging taxation of costs under rule 11 of the Advocates (Remuneration) Order.

Stay of execution of decree is sought upon the grounds that the intended appeal has high chances of success; that unless stay is granted the intended appeal may be rendered nugatory; and that it is fair and just that there be a stay of execution. The Plaintiff/Decree-Holder has opposed the application upon the grounds that it is an abuse of the court's process; that the Judgment-Debtor has the means to satisfy the decree; that no substantial loss has been shown; that no draft memorandum of appeal has been annexed to the application; and that the application otherwise lacks merit.

I have read the affidavit sworn in support of the application and that sworn in reply. I have also given due consideration to the submissions of the learned counsels appearing. Under subrule (1) of rule 4 of Order 41 the court has power to order stay of execution of decree. But, as decreed by subrule (2) of the same rule, no such order shall be made unless –

“(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonably delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant”.

In her affidavit sworn in support of the application the Judgment-Debtor has not at all stated that she stands to suffer substantial loss unless stay is granted, or what this substantial loss might be. The learned counsel stated from the bar when arguing the application that were the Judgment-Debtor to pay the decretal sum it would cripple her financially as the decretal sum is large. But this, in my respectful view, was an attempt to correct from the bar a major deficiency in the application. It has not been shown that the Judgment-Debtor will suffer substantial loss unless the order of stay is granted, and I am not so satisfied.

Judgment was passed on 8th March 2004. The application for stay of execution was filed on 16th July 2004, that is more than four months later. There is no explanation for this delay at all in the supporting affidavit. The explanation from the bar that as costs were not taxed until 9th July 2004 and that therefore there was no need to apply for stay earlier does not hold water. Once judgment has been passed there is always the possibility of execution at anytime thereafter, and the Judgment-Debtor must seek the court's intervention without unreasonable delay if he wants stay of execution pending appeal. In the present case I find that the application has been made with unreasonable delay that has not been satisfactorily

explained.

That being the position, the Judgment-Debtor has not successfully cleared the hurdles put in place by subrule (2) of rule 4 aforesaid. I must therefore refuse the application. It is hereby dismissed with costs. The interim stay of execution ordered on 26th July 2004 is hereby lifted. If the Kshs.3,000,000.00 was deposited as ordered the same shall be paid over to the Decree-Holder's advocates as part of the decretal sum. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS

5TH DAY OF AUGUST, 2004.

H.P.G. WAWERU

JUDGE