

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL APPEAL NO. 48 OF 2003

STEPHEN NJUGUNA KARIUKI1ST APPELLANT

DAVID OMATO NYAMWANGE2ND APPELLANT

VERSUS

PETER NGANGA KAMAU & 6 OTHERSRESPONDENTS

RULING

This is an application under Order XLI Rule 4 and Order L Rule 1 of the Civil Procedure Rules (hereinafter referred to as “the Rules”) and Section 3A of the Civil Procedure Act (Cap. 21). In it, the Appellants seek, in pertinent part, the following order:

“3. THAT there be a stay of execution of the Judgment in NAKURU CMCC NO. 800 OF 2000 until the hearing and determination of the Appeal herein”

It is common ground that Judgment was entered in favour of the Respondents against the Appellants jointly and severally in consequence of nonattendance. The Appellants applied to the lower court to have the Judgment entered against them set aside but their application was refused. They have appealed to this Court against the said refusal. Presently, they seek stay of execution of the Judgment of the lower court.

I was addressed on the merits of the appeal but I do not want to comment on the same because I have not had the benefit of seeing the record of the lower court.

The jurisdiction of this Court in dealing with applications for stay of execution pending appeal is governed by Order XLI Rule 4(2) of the Rules which provides as follows:

“No order for stay of execution 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 unreasonable 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.”

Mr. Karanja for the Respondent said, and this was not disputed, that the decree sought to be stayed was for Kshs. 570,000/= yet the value of the security proffered as per the Supplementary Affidavit of David Omato Nyamwange sworn on July 4, 2003 was Kshs. 290,000/=. This is half the value of the decree and that cannot be sufficient by any standards. In any event, I agree with Mr. Karanja that one of the securities belongs to a third party and there was no evidence that she had personally offered the same as security in this case. If I may go further, the Appellants did not provide any certificates of searches nor valuation reports of the lands sought to be given as security to enable the Court decide whether the same were suitable. On this conclusion alone, I do not think that the Appellants are entitled to the order sought.

I, therefore, dismiss the Appellants’ application dated April 2, 2003 with costs.

Dated and Delivered at Nakuru this 23rd day of July, 2003.

ALNASHIR VISRAM

JUDGE