



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 743 OF 2001

(From the original civil suit No. 2965 of 2001 of RMCC at Milimani)

CORPORATE INSURANCE CO. LTD.APPELLANT

VERSUS

DAVID KIPKURU BETTRESPONDENT

RULING

The application dated 6th March and filed in this court under certificate of urgency on 7th March 2002 seeks an order of stay of execution pending appeal filed in court on 25th October 2001.

The grounds upon which the application is lodged are stated on the body of the same; that the appellant has appealed against the lower court's judgment and its appeal shall be rendered nugatory should execution proceed; that the lower court dismissed the appellants application for stay pending appeal on 1st March 2002, that the applicant stands to suffer substantial loss unless a stay of execution is granted and that the application has been made without undue delay.

A supporting affidavit by one Rosemary Chege, Senior Legal Officer of the applicant, refers to a ruling of the Senior Principal Magistrate (Mr. Kanyangi) at Milimani Commercial Courts which struck out the applicant's defence in Nairobi Civil Suit Number 3965 of 2001 and awarded judgment to the respondent as prayed in the plaint; how the applicant being aggrieved with that decision instructed a firm of advocates to file an appeal and he filed memorandum of appeal, that an application for stay of execution was filed in the lower court but it was dismissing on 1st March 2002.

The affidavit depones of the amount involved in the decree, how the applicant would suffer substantial loss if execution is allowed to proceed because it is apprehensive that it may not be able to recover the sum from the respondent should the appeal be successful and that the application has been made without undue or unreasonable delay and that the applicant was willing to abide by any conditions as may be given by the court.

These averments were nearly repeated in the supplementary affidavit filed in court on 27th March 2002.

In a replying affidavit filed in court on 14th March 2002 the respondent stated in the main that he is able to refund the money to the appellant if the appeal succeeds as he owns assets in excess of Kshs. 1 million.

The appeal subject to this application arises from a declaratory suit filed at the magistrate's court at Milimani Commercial Court in which the respondent had been awarded a sum of Shs.150,000/= in High Court Civil Case No. 311 of 1996 at Machakos which the appellant did not pay.

The respondent went to the lower court through a declaratory suit to enforce that judgment.

This is the suit in which the magistrate struck out the defence and entered judgment which is the subject of the present appeal and application for stay of execution pending appeal.

Order XLI rule 4 of the Civil Procedure Rules gives two (2) conditions before the grant of stay of execution pending appeal can be made; namely substantial loss which will be suffered by the applicant if the stay order is not made; and issue of such security as the court may deem sufficient for the grant of stay of execution.

What does substantial loss mean? The appellant says he will suffer substantial loss if the decretal sum is paid to the respondent because if the appeal succeeds it will not be able to recover it because the respondent is not a person of means.

On the other hand counsel for the respondents submits that his client should be allowed to execute or at least half of the decretal amount paid to him and that if the appeal succeeds, the respondent will be able to refund the money as he owns assets in excess of Kshs.1000,000/=.

By saying this, the respondent has somehow satisfied holding No. 6 in *Kenya Posts and Telecommunications Corporation v Paul Gachanja Ngarua – C.A. No. 36 7 of 2001* ; cited in this application by counsel for the applicant.

In the same case the same court held that a party who has a decree in his favour is entitled to the fruits of his litigation unless circumstances exist which justify denying him/her the immediate realization thereof.

When, then, counsel for the applicant submits that the applicant will suffer substantial loss because if the appeal succeeds its client will not recover the sum from the respondent does he satisfy conditions XLI rule 4(9) of the Civil Procedure Rules?

I thought this rule refers to an immediate loss following execution say the collapse of the business, to take an extreme case, following the execution, or loss of client or dependable asset in business? The rule does not refer to the anticipated future inconvenience!

Previously the order included conditions like establishing that the appeal has the probability of success but such provisions are not there any more.

But I do not see how a litigant should be delayed in enjoying the fruits of the judgment passed in his favour because of a pending appeal which may later turn out to be worthless! www.kenyalawreports.or.ke
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Having heard counsel submit on this application and having perused the memorandum of appeal, I am satisfied this is a proper case where stay of execution should be granted pending appeal on the following conditions:- namely

- (a) A sum of Kshs.100,000/= be paid to the respondent within 21 days from today.
- (b) The balance of the decretal sum be deposited in an interest earning account with Barclays Bank Ltd in joint names of counsel for both parties within 21 days from today. In default of any of the above conditions this order will lapse and execution will proceed.
- (c) Costs of this application either taxed or agreed to be paid by the applicant to the respondent.

Dated this 21st day of May, 2002.

D.K.S. AGANYANYA

JUDGE