



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Appeal 188 of 2012

Editorial Summary

1. *Civil Appeal*
2. *Civil Practice and Procedure*

Order 42 r 6 Civil Procedure Rules

3. *Subject of Subordinate Court case*

UNKNOWN

3.1 *Appellant defendant in civil suit.*

3.2 *Judgment entered against him at
Ksh. 463,810/-*

3.3 *Failed to file appeal*

3.4 *Leave to file appeal out of time granted
(Kimondo J)*

3.5 *Appeal filed 16th April 2012*

3.6 *Application Notice of Motion 17th April 2012
for stay of execution of*

judgment.

4. *Application 17th April 2012*

4.1 *Claim against applicant appellant now stands
at Ksh. 941,642/-*

4.2 *If execution issues, irreparable loss would occur.*

4.3 *The application brought under wrong order*

- 4.4 *Delay inordinate*
4.5 *Application be dismissed.*

5. *Held:*

Application allowed.

6. *Case Law:*

7. *Advocates :*

- i) *M.W. Bwire & Co Advocates for appellant/
original defendant*
- ii) *T.K. Kariba Mbaabu & Co Advocates for respondent/
original plaintiff*

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CIVIL APPEAL NO. 188 OF 2012

DAVID MWANGI MACHARIA APPELLANT/

ORIGINAL DEFENDANT

VERSUS

NEW ABERDARE TIMBER

& HARDWARE LTD RESPONDENT/

ORIGINAL PLAINTIFF

(Being an appeal from the judgment and order of the Principal Magistrate P. Nditika in Civil Suit No. 10565 of 2005 dated 30th January 2012 at Milimani Commercial Courts)

R U L I N G

Application for Stay of Execution

Notice Of Motion 17th April 2012

I. BACKGROUND

1. The application of 17th April 2012 has little or no information on the original case before the subordinate court. What I can gather from it, is that the applicant (now appellant/original defendant) was sued in the subordinate court. Judgment was entered against in for a sum of

Ksh. 463,810/-. He failed to file appeal against this judgment and presumably failed to pay the decretal sum.

2. On 4th April 2012 he obtained orders from this High Court during the court vacation (Kimondo J) to file appeal out of time. This he did on

16th April 2012. The following day, he filed an application for stay of execution of those orders. This is the subject of this ruling.

II APPLICATION FOR STAY OF EXECUTION

NOTICE OF MOTION 17TH APRIL 2012

3. The appellant admitted that he had been sued and judgment entered against him. The claim now stands at Ksh. 941,642/-. He claims that if execution is issued, irreparable loss would occur.

4. In reply, the respondent stated that the application had been brought under the wrong rules. (It ought to have been under Order 42 r 6

Civil Procedure Rules).

5. The delay of bringing this application was inordinate. There was indeed no action taken by the appellant till the respondent began execution proceedings.

6. The respondent prayed that the application be dismissed.

III FINDINGS

7. The court notes that the decretal sum of Ksh. 941,622/- together with interest had been deposited to this court on 25th April 2012 by the appellant. This was as a result of an agreement by consent of the parties on 20th April 2012 before this court. The auctioneers charges as agreed and assessed was personally paid.

8. Using my discretion, I would allow the application of stay of execution pending the determination of the main appeal.

DATED THIS 6TH DAY OF JULY 2012 AT NAIROBI

M.A. ANG'AWA
JUDGE

Advocates :

i) *M.W. Bwire & Co Advocates for appellant/*

original defendant

ii) *T.K. Kariba Mbaabu & Co Advocates for respondent/*

original plaintiff