



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA
CIVIL APPEAL 49 OF 2010

SURJIT SINGH TRANSPOTERS.....APPELLANT

~VERSUS~

LUKE NAHASHON KUTAYI.....RESPONDENT

(Appeal arising from the judgment and decree of the Principal Magistrate M. Wambani in Bungoma court
in civil case no.550 of 1997)

RULING

In the trial court there was a judgment for the Respondent against the Appellant for material damage and loss of income. A decree followed and by the time the appeal was filed on 27/5/2010 a proclamation in the sum of Ksh.694,033/= had been done. Following the appeal, the Appellant on 29/3/2011 filed an application under Order 42 rule 6 (1) and (2) of the Civil Procedure Rules for stay of execution pending the hearing and determination of the appeal. It is clear from the supporting affidavit that judgment subject of the appeal was delivered on 28/4/2010. On 3/11/2010 a similar application for stay was filed before the trial court and on 4/3/2011 stay was granted on condition that the Appellant deposits the decretal sum into a joint interest earning account in the names of counsel for the parties.

It is patently clear that under Order 42 rule 6 (1) of the Civil Procedure Rules the High Court to which an appeal has been preferred has powers to hear and determine an application for stay, notwithstanding that a similar application was heard and determined by the court appealed from (**John Kamua Gitau v. Robinson Omwancha, HCCA no.207 of 2002 at Kisumu**). This disposes of the plea by the Respondent that the present application is *res judicata*.

The discretion of the court to grant stay is wide and the court will take into account the substantial loss likely to be suffered by the applicant, whether or not security has been offered and the adequacy of the same and the expeditious filing of the application (**Halai & Another v. Thornton & Turpin [1963] Ltd [1990] KLR 365**). The substantial loss envisaged by the rule is *prima facie* that if the appeal succeeds the respondent would not be in a position to make full restitution. It is trite that courts will not normally grant stay where a money decree is involved unless the money in question is substantial and the respondent has no known assets from which the applicant can recoup in the event the appeal is successful

(Singh v. Runda Estates Ltd [1960] EA 263). This is why the security offered should be adequate to ensure that if the appeal is not successful the respondent will get his money without undue delay.

The Applicant should not just allege that the Respondent is a man of straw with no known assets. It is his responsibility to place evidence on record from which the court can find that the Respondent lacks the means to refund the decretal sum. In the instant case, it would appear that the Respondent was the owner of the vehicle registration number KSK 186 make Subaru that was damaged in the accident. It was not shown that the vehicle was the only property that he had. He denied that he was not a man of straw. If the Appellant alleges that he was a man of straw he had to prove it.

In the lower court the Appellant was asked to deposit the decretal sum into a joint interest earning account and no complains that the order was punitive. He proposed that he deposits a title deed or issues a bank guarantee. The Respondent opposed the application, but asked that if the court wishes to indulge the Appellant it directs that the outstanding decretal sum now standing at Ksh.1,110,950/= be deposited into an interest earning account to be operated jointly by counsel. The Appellant's supplementary affidavit did not deal with the issue. Neither was the issue dealt with in the Appellant's subsequent application dated 26/1/2012.

In dealing with this kind of application the court has to bear in mind two competing interests. The Appellant is appealing in exercise of its undoubted right and the court should guard against such an appeal being rendered nugatory. On the other hand, the Respondent has a judgment whose fruits he is entitled to enjoy without undue delay. It is for these reasons that the security offered as condition of stay must be such that when the appeal is lost the Respondent can immediately realize the decree.

I will allow the applications dated 26/1/2012 and 29/3/2011 and stay the execution of the decree on condition that within 30 days the Appellant shall deposit the said Ksh.1,110,950/= into a joint interest earning account to be operated by both counsel. When that is done, the Ksh.694,033/= deposited into court shall be refunded to the Appellant. The Appellant has been indulged and is therefore asked to pay costs of the two applications.

Dated, signed and delivered at Bungoma this 12th day of July 2012.

A. O. MUCHELULE
JUDGE