



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 523 of 2008

SOLOMON KIRAGU THANDE.....APPELLANT

VERSUS

**SUPERSONIC TRAVEL & TOURS
LIMITED.....RESPONDENT**

R U L I N G

1. The Applicant, Supersonic Travel & Tours Limited has moved this Court by way of a Notice of Motion dated 22nd April, 2009 seeking orders as follows:
 - (i) That the Honourable Court be pleased to set aside the order of Honourable Mr. M. K. Kiema Resident Magistrate, dated 14th January, 2009.
 - (ii) That the Honourable Court do order the Appellant to deposit the entire decretal sum in Court within such time as the Honourable Court may deem fit, and in default the Respondent be at liberty to execute.
 - (iii) That costs of the application be provided for.
2. On 21st July, 2000 the Applicant successfully sued and obtained judgment in the lower Court against Solomon Kiragu Thande who is the Appellant herein. Pursuant to warrant of arrest issued against the Appellant on 9th July, 2000 in execution for the decretal sum, then standing at Kshs.1,158,724/=, the Appellant applied for an order of stay of execution and setting aside of the order of warrant of arrest.
3. On 30th July, 2008, the appellant was granted an order for stay of execution pending appeal on condition that the entire decretal sum is deposited in Court within a period of 14 days. The appellant did not comply with the requirement for the deposit of the decretal sum, but filed another application for stay of execution and a review of the orders issued on 30th July, 2008. That application was dismissed on 24th September, 2008 and is subject of the current appeal which was filed on 2nd October, 2008.
4. By an application dated 6th October, 2008 the appellant sought an order for stay of execution pending appeal. This application was granted by the Court on 14th January, 2009 and an order for stay of execution pending appeal issued.
5. The applicant has now moved the Court under Order XLI Rule 4(1) of the Civil Procedure Rules,

seeking to set aside the order of stay of execution issued by the Resident Magistrate on 14th January, 2009. The applicant maintains that the appellant has not given any security for the stay of execution which was granted, and that the appellant has not taken any steps to pursue his appeal, nor has the appellant appealed against the decree which was issued way back in 2000. The applicant maintained that it is in the interest of justice that the order of stay of execution be set aside or varied.

6. The application is opposed through a replying affidavit sworn by the appellant on 15th June, 2009. It is contended that the application is incompetent, and an abuse of the Court process, as it seeks to review and vary an order of the lower Court. It was further submitted that such a review can only be done in an application for review under Order XLIV of the Civil Procedure Rules.

7. It was argued on behalf of the appellant that the prayer for deposit of the decretal sum was also defective as it was not an alternative prayer but a substantive prayer. It was maintained that the lower Court properly exercised its discretion in granting the order for stay of execution pending appeal, as the appellant maintains that the decree has already been satisfied.

8. I have carefully considered this application and the submissions made before me. I note that Order XLI Rule 4(1) states as follows:

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”(emphasis added).

It is apparent that the applicant who is aggrieved by the order which was made by the lower Court granting the appellant an order for stay of execution, has properly moved this Court for setting aside of the order of stay of execution which was granted by the lower Court as this Court has powers under the above rule to hear such an application and set aside the order.

9. The question is whether the order for stay of execution was properly granted. The trial Magistrate in his ruling did not give any reasons for granting the order for stay of execution. The mere fact that a party has appealed against an order of the Court is not sufficient ground for granting an order for stay of execution. The trial Magistrate ought to have considered whether the appellant had complied with the conditions provided under Order XLI Rule 4(2) of the Civil Procedure Rules. In this case the appellant maintains that the decree has already been satisfied. He has exhibited a copy of a proclamation as evidence of the execution of a warrant of attachment and sale against him. The appellant's averments have however not been responded to by the applicant. I do note that the appeal filed by the appellant is against an order of the lower Court dismissing the appellant's application objecting to his arrest and committal to civil jail on the grounds that the decree had already been satisfied. Therefore the issue as to whether the decree has been satisfied is one that will have to be determined during the hearing of the appeal. In the circumstances, it is fair and just that an order for stay of execution do issue. It is however, necessary to also protect the interest of the applicant who has a lawful decree in his favor and who maintains that the decree has not been satisfied. In the circumstances, I do order that a stay of execution pending appeal shall issue on the following conditions:

(i) That the appellant shall either deposit a sum of Kshs.700,000/= into Court or provide a bank guarantee of Kshs.1,000,000/= as security for the due performance of the decree.

(ii) That the appellant shall file and serve a record of appeal within 90 days from the date hereof and take all necessary action to facilitate the speedy disposal of the appeal.

(iii) In the event that the appeal is not disposed of within 12 months from the date hereof, the order for

stay of execution pending appeal shall lapse unless otherwise extended by the Court.

(iv) Costs of the application shall be costs in the appeal.

Dated and delivered this 1st day of July, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Miss Watsama for the appellant/respondent

Advocate for the respondent/applicant, absent

Erick, court clerk