REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL APPEAL 26 OF 2009

THOMAS NGUTA KYANGO…….....APPELLANT/APPLICANT

VERSUS

AUSTINE MWONGELA MWEA……...……. RESPONDENT

RULING

1. The application dated 10.3.2009 is premised on the provisions of Order XLI Rule 4 of the Civil Procedure Rules. The Applicant, Thomas Nguta Kyangu seeks orders of stay of execution of the decree in Machakos CMCC No. 1068/2006 until the instant Appeal is heard and determined.

2. In his Supporting Affidavit sworn on 11.3.2009, the Applicant depones that he was the Defendant in the suit before the subordinate court and that the Respondent was involved in an accident while a passenger in the former's motor-vehicle. That when the suit came up for hearing on 5.6.2008, his advocate was unable to attend court and instead sent another advocate to seek an adjournment which application was rejected and the hearing proceeded with the result that judgment in the sum of Kshs. 204,700/= was entered against him on 20.6.2008.

3. He depones further that an application to set aside the judgment was dismissed on 25.7.2008 and the Appeal herein was filed on 12.3.2009 after leave to appeal out of time was granted by this court on 5.3.3009. That in the interim the Respondent moved to execute the decree and that he stands to suffer "***substantial loss as the Respondent is likely to attach [his] tools of trade thus bringing [his] operations to a halt which may not be compensable by way of damages in the event the Appeal is successful."***

4. The Respondent in a Replying Affidavit sworn on 25.3.2009 depones that the Applicant has failed to meet the conditions for grant of stay of execution pending appeal and has offered no security and is only intent on denying him the fruits of a judgment lawfully obtained. That the Respondent is able to refund any sums found due to the Applicant should the Appeal succeed. He adds that the Respondent is guilty of laches as judgment was entered against him in June 2008 and he only came to this court in March 2009 and that the Application should be dismissed with costs.

5. Order XLI Rule 4(2) of the Civil Procedure Rules provides as follows:-

"***No order for stay of execution shall be made under sub-rule (1) 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."

6. It has often been said that the discretion granted to a court by the above Rule is fettered by the conditions set out above. In this case, the Applicant although represented at the subordinate court never got a chance to properly defend his claim for reasons elsewhere set out above.

7. In the Appeal, he is challenging only the award and in all grounds of Appeal he has urged the point that the same was "***erroneous"*** and "***excessive".*** He then prays that this court should asses the damages payable and award the Respondent what it deems to be a reasonable figure in compensation. Before that is done, he is apprehensive that any attachment, particularly of motor-vehicle KJX 898, which he terms his "***tool of trade",*** will cause him substantial loss. I wholly agree with that proposition and I find that the decisions in Caneland Ltd vs Delphis Bank Civil Application Number 344/1999 (C.A.K) and Triton Petroleum Co. Ltd vs Kirinyaga Construction (K) Ltd H.C.C 830/2003 (Milimani) are not wholly applicable because these cases relate to the alleged inability of the Respondent to repay the decretal sum. In this case, that issue has not been canvassed and all that the Applicant is saying is that the move to attach motor vehicle registration KJX 898 will cripple his trade and I accept the argument that such a move will cause him substantial loss.

8. It has also been argued in opposition that the Applicant is guilty of laches but while I agree that equity does not aid the indolent, in this case, the Applicant has explained that since judgment was entered against him, he did not go to sleep but filed applications both in the subordinate court and in this court to secure himself and I see no need to hold that he should be penalized for deliberately delaying the finalisation of the matters in contest.

9. Lastly, since the Appeal is limited to the issue of quantum, no prejudice would be caused to either party if I grant the orders sought on conditions that I will shortly set out and thereafter fix the Appeal for hearing in the earliest.

10. Consequently, the Application is granted on condition that the Applicant deposits the entire decretal sum in this court within 21 days failure to which execution may proceed.

11. Costs shall abide the appeal.

Dated and delivered at **Machakos** this **1st** day of **July 2009.**

Isaac Lenaola

Judge

In the presence of: Mr. Kitonga h/b for Mr. Maleche for Applicant

Mr. Mungatta for Respondent

Isaac Lenaola

Judge