

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

Civil Appeal 59 of 2006

M'IKILANYA M'ITARU APPELLANT

VERSUS

ANDREW MICHUBU RESPONDENT

RULING

The applicant has filed an appeal to this court challenging the decision of the trial magistrate in Maua PMCC No. 149 of 2004. Simultaneously he has brought the present chamber summons seeking, among other relief, stay of execution of the decree in Maua PMCC No. 149 of 2004 and the release of the applicant from civil jail pending the hearing and determination of the appeal.

It is the applicant's case that his appeal has high chances of success and that he stands to suffer substantial loss if the decree is not stayed. It is also averred that the applicant is already in civil jail. Responding to these averments the respondent argues that the application is incompetent as the same is brought under the wrong provisions of the Civil Procedure Rules. Secondly, it is argued for the respondent that the decree sought to be stayed has not been annexed to the present application.

I have considered these rival arguments. The trial resident magistrate awarded Kshs. 186,180/= in general damages on 17th November 2005. The present application is brought pursuant to Order 9B Rule 8 and Order 21 Rule 22 of the Civil Procedure Rules and of course section 3A of the Civil Procedure Act.

As correctly pointed out by learned counsel for the respondent the application ought to have been brought under Order 41 Rule 4 of the Civil Procedure Rules. That is clear from the prayers sought and no prejudice has been caused to the applicant by that. Under Order 41 Rule 4 a stay will be granted where the applicant satisfies the court that substantial loss may result to him if a stay is not granted. The application for stay must also be brought without unreasonable delay and the applicant must give an undertaking as to security.

The applicant has deposed that he stands to suffer substantial loss if execution is not stayed. Apart from that plain statement there are no details as to the nature of loss he stands to suffer. The burden was upon him to persuade the court that should the decretal sum be paid to the respondent the latter would not be in a position to refund it in the event the appeal filed by the applicant succeeds. The applicant has also failed to declare that he was ready to offer any security.

Finally, the judgment was delivered on 17th November 2005, while this application was brought on 18th July 2006, some eight months later. It is apparent that the applicant only moved to court when he was threatened with civil jail. There was, in my view, unreasonable delay.

In a nutshell, I find no merit in this application which I hereby dismiss with costs to the respondent. It is noted that on 19th July 2006 the court (Sitati,J) issued temporary orders of stay and directed that the applicant be released from civil jail. It is therefore clear to me that the applicant is not in jail. Orders accordingly.

Dated and delivered at Meru this 3rd day of October 2008.

W. OUKO

JUDGE