



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 486 OF 2016**

**REBECCA ACHIENG.....APPELLANT/APPLICANT**

**- V E R S U S -**

**NASSEFU SAVINGS & CREDIT SOCIETY LTD.....RESPONDENT/RESPONDENT**

**RULING**

1. Nassefu Savings and Credit Society Kenya Ltd, the respondent herein, filed a suit in the Co-Operative Tribunal at Kisumu being Case No. 279 of 2014 against Rebecca Achieng the appellant/applicant, to recover a debt she owed the Co-operative Society that was advanced to her as a loan as its member. The suit was heard and in the end, judgment was entered in favour of the respondent in the sum of Ksh.43,432.35/= plus interest and costs by Hon. Alex E. Thuku learned magistrate on 14/07/16. The appellant was aggrieved consequently she preferred this appeal.

2. The appellant/applicant has now taken out the motion dated 10<sup>th</sup> October 2016, the subject matter of this ruling in which she sought for the following orders:

***1. This application be heard exparte in the first instance.***

***2. There be a stay of execution in the Co-operative Tribunal Nairobi(Tribunal case no. 279 of 2014 delivered on the 14/7/16 pending the hearing and determination of the intended appeal.)***

***3. The respondent be restrained by itself through its agents or servants from interfering in any manner with the applicant quiet possession and enjoyment of his goods and from any way attaching and/or selling her households goods and motor vehicle registration number KAV 586Z and KAP 126F till the hearing and determination of this application.***

***4. The costs and incidental to this application abide the result of the intended appeal.***

3. The motion is supported by the affidavit of Rebecca Achieng. The respondent filed a replying affidavit of Dzombo Malingi to oppose the motion. When the motion came up for interpartes hearing, learned counsels recorded a consent order to have the motion disposed of by written submissions.

4. I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the application. I have also considered the rival submissions.

5. The applicant avers that the respondent has caused clear Real Traders Auctioneers to proclaim her household goods and motor vehicles, to recover the decretal sum and the respondent has threatened to

attach and sell the applicant's household goods and motor vehicles, therefore there is need to maintain the *status quo* by granting an order for stay. It is also argued that unless the order is granted, the appeal will be rendered nugatory since the decretal sum if paid will be out of reach of the appellant.

6. The respondent opposed the motion arguing that the applicant's application is devoid of merit, frivolous, vexatious, an afterthought and an abuse of the court process, with the sole intention of preventing the respondent from enjoying the fruits of its judgment. The respondent also pointed out that the appeal does not raise any arguable point.

7. The principles to be considered in determining an application for stay are well stated under Order 42 of the Civil Procedure Rules. First, an applicant must show the substantial loss it would suffer if the order for stay is denied. Secondly, the application for stay should be filed without unreasonable delay. Thirdly that the court should consider the provision of security for the due performance of the decree.

8. On the first principle, the appellant/applicant is of the view that it would suffer substantial loss if the order for stay is denied in that if the execution of the decretal sum proceeds, the result would be that she would suffer irreparable financial loss, since her household goods and motor vehicles registration no. KAV 586Z and KAP 126F will be sold by the auctioneers to recover the decretal sum. The respondent on the other hand did not answer this issue in its reply to the motion, it however stated that attachment is a process of execution provided under the law and the auctioneers are entitled to execute any valid decree of the court. It did not demonstrate that the respondent is a party of means. With respect, I am convinced that the appellant has shown that she would suffer substantial loss if the order for stay of execution is denied.

9. The second principle is that the application should be filed without unreasonable delay. It is apparent on record that this appeal was filed on 21<sup>st</sup> July 2016 while the motion was filed on 10<sup>th</sup> October 2016. The motion was therefore filed timeously.

10. The third principle is the provision of security for the due performance of the decree. Both parties did not address the court over this issue in their affidavits. However they both recognised it in their submissions as a ground for grant of stay pending appeal. On my part, I think a fair order on the issue touching on security is, which I hereby direct, that the appellant deposits the decretal sum of ksh.624,260/= in an interest earning account in the joint names of the advocates and or firms of advocates appearing in the appeal within 30 days from the date hereof.

11. In the end, the order for stay is granted on condition specified within 30 days hereinabove. Costs of the motion to abide the outcome of the appeal.

Dated, Signed and Delivered in open court this 18<sup>th</sup> day of August, 2017.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent