

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 228 OF 2015

FREDRICK KITHYA KITUNGA.....APPELLANT

VERSUS

CHRISTOPHER MULWA MUNGUTI.....RESPONDENT

RULING

1. The Appellant herein took out the motion dated 21.05.2015 in which he

sought to be granted an order for stay of execution of the decree/judgment issued and or delivered on 29th April 2015 by Hon. M. Chesang, learned Senior Resident Magistrate vide Milimani C.M.C.C no. 7438 of 2008 pending appeal. The motion is supported by the affidavit of Christine Otieno. The Respondent filed grounds of opposition to resist the motion.

2. I have considered the grounds set out on the face of the motion plus the facts

deponed in the supporting affidavit. I have further considered the grounds of opposition filed by the Respondent. I have also considered the oral submissions of learned counsels. A critical examination of the motion will reveal that the Appellant is apprehensive that his assets may be attached in execution of the decree unless the order for stay is granted. He avers that he has an appeal with high chances of success. One of the grounds of appeal put forward is that the award is excessive and exorbitant. The Appellant further argues that he will suffer irreparable loss. The Respondent urged this court to reject the application because the same was filed to delay the expeditious disposal of the dispute. The Respondent accused the Appellant's advocate of filing an affidavit in which she deponed on contentious matters. He is of the view that the Appellant may not have given the advocate authority to file this appeal. It is also pointed out that the motion does not meet the conditions required before granting an order for stay.

3. There is no doubt that the learned Senior Resident Magistrate delivered

judgment on 29.4.2015 in which she gave an award which the appellant feels is excessive. The amount of the award is not mentioned by either side in this dispute. It is therefore difficult for this court to form an opinion as to whether or not the award is excessive. The Appellant was bound to bring out such facts but he failed to discharge the burden. The principles to be considered in deciding the application for stay are well settled. First, an Applicant must show that unless the order is given he would suffer substantial loss. On this principle, the Applicant merely averred that he would suffer irreparable loss. There was no description of the kind of loss the Applicant expected to be suffer so that this court can determine whether or not such a loss is substantial. Prima facie, I doubt whether the appeal has any chance to succeed.

4. The second principle to be considered is the provision for security for the due

performance of the decree. This principle kicks in when the first principle is satisfied. Since the Applicant did not meet the first principle, I am obliged not to take into account the provision of security.

5. In the end, I find no merit in the motion dated 21.05.2015. The same is

dismissed with cost to the Respondent.

Dated, Signed and Delivered in open court this 25th day of **September, 2015.**

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellants.

..... for the Respondent.