

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 14 OF 2013

KHAMIS BAKARI MWARIALE.....APPELLANT

VERSUS

ASHA HAMISI ZANIRESPONDENT

RULING

Before court is the Notice of Motion dated 7th May, 2013 which was filed under certificate of urgency. The applicant/appellant sought inter alia orders

“That there be a stay of execution pending the hearing and determination of the appeal.”

The application arises from the judgment of the Senior Kadhi in Kadhi’s case No. 203 of 2011 in which the Kadhi entered judgment in favour of the applicant in the sum of Kshs. 150,000/=. The respondent has moved to execute the said judgment through the sale of the defendant’s house. The applicant has already filed an appeal against the decision of the Kadhi and is seeking a stay of execution pending the hearing and determination of his appeal.

The application which was opposed was disposed of by way written submissions. I have carefully considered the submissions of both parties on record. I am mindful of the conditions guiding grant of injunction as set out in the case of **GIELLA – VS – CASSMAN BROWN (1973) E.A. 358** which are

1. An applicant must show a *prima facie* case with a probability of success.
2. An applicant must prove that he stands to suffer live parable harm if the injunction sought is not granted.
3. Where the court is in any doubt the balance of probability must prevail.

I have no doubt that the loss of a house for a sum of Kshs. 218,000/= does amount to irreparable harm. However, the court must balance this as against the rights of the respondent to enjoy the fruits of his judgment. It is my considered view that the present application is meritorious. I therefore do grant a stay pending the hearing and determination of appeal **SUBJECT TO** the applicant depositing in court the decretal sum of Kshs. 150,000/= within thirty (30) days of today’s date. Failure to deposit this sum in the time specified will lead to the immediate execution of the judgment. It is so ordered. Costs in the cause.

Dated and delivered in Mombasa this 31st day of March, 2014.

M. ODERO

JUDGE

In the presence of:

Ms. Mwatu h/b Respondent