



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 461 OF 2010

SAMUEL BEDE
OGEMBO.....APPELLANT

VERSUS

CHARLES KIMERIA
MWANGI.....RESPONDENT

R U L I N G

This is the Notice of Motion taken out by the Appellant/Applicant praying that there be a stay of execution of the decree and judgment in Milimani CMCC 662 of 2009 and all consequential orders thereto. It is based on the grounds that the appeal will be rendered nugatory unless the orders sought are granted and further that the Appellant will suffer substantial loss as chances of recovery if payment is made are minimal. The Applicant swore the supporting affidavit. He stated that he was willing to abide by whatever conditions that the court may set for the grant of the order sought and that the Respondent would not suffer any prejudice as he can adequately be compensated by an award of costs.

In opposition, there was filed a Replying Affidavit by the Respondent in which it was stated that the application is without merit, is frivolous, vexatious and an abuse of the process of the court. That he works and resides out of Kenya but has assets in Kenya and hence the Applicant cannot suffer any substantial loss as recovery of the decretal sum if paid to the Respondent can easily be recovered from Respondent. That the application is a mere afterthought and a half hearted delaying tactic.

Submissions before me by both counsel herein appearing on their rival positions were received.

I have carefully considered the application. Let me say at once that this is a money judgment. It is not normal in money decrees for the appeal to be rendered nugatory, if payment is made see **KENYA SHELL LIMITED –VS- KIBIRU & ANOTHER [1986] KLR, 410**. And the Respondent has shown that he would have no difficulty at all in repaying the decretal sum were the appeal to be successful. He has property in the jurisdiction of this court which could be attached in execution of any decree.

The Applicant has not proved the corner stone principle for the grant of a stay, that he would suffer substantial loss if the order sought is not granted. Without proof of substantial loss the application cannot stand. No such substantial loss has been shown to exist in this case. The application under consideration must therefore fail. I dismiss it with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JANUARY, 2011.

P.M. MWILU

JUDGE

IN THE PRESENCE OF:-

Mrs. Oduor Advocate for the Applicant

No appearance Advocate for the Respondent

Ezekiel Kiprono CourtClerk