



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CIVIL APPEAL NO. 125 OF 2009**

**JOHN KOSGEI**

**KIPKABUS TEA FARM.....APPELLANTS**

**VERSUS**

**DUNCAN KIPLAGAT.....RESPONDENT**

**R U L I N G**

This Notice of Motion is taken out under the provisions of Order XLI Rule 4(1), (2) and (6) of the Civil Procedure Rules and section 3 and 3A of the Civil Procedure Rules. It prays that there be a temporary stay or execution or further execution pending the hearing and determination of the appeal. It is grounded on the basis that an appeal has been preferred and if there is execution the appellants/applicants will suffer substantial loss in the event that the appeal succeeds and that the application has been brought without unreasonable delay. The affidavit in support of the application is sworn by counsel for the applicant wherein it is explained that there was a delay of about a month in the handing over of the applicant's file once there was a change of advocate. Counsel swore further that the applicant would suffer substantial loss if payment was made to the respondent and then the appeal succeeds and the respondent is unable to refund the money. There was an offer to deposit the entire decretal sum into a joint earning account pending the out come of the appeal.

The application was opposed as lacking in merit and having been brought after undue delay and that should the court be minded to allow the stay of execution then it should order that the respondent be paid 50% of the decretal sum forthwith and then proceed with the hearing of the appeal.

Order XLI Rule 4(2) requires that a successful applicant will have shown that he brought the application without undue delay and that he would suffer substantial loss unless the order sought is granted and that such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant. The delay here of three months or thereabouts is sufficiently explained and I do not find it undue delay. Save for being mentioned in the replying affidavit there was no proof of the financial means of the respondent. Ordinarily a money decree will not be stayed and payment of the decretal sum may not cause substantial loss but only if the respondent is such in a financial position as to refund the decretal sum or such money as he may have been paid pursuant to the decree should the appeal be successful. Security in the payment of the decretal sum is offered. In the

premises I order that there will be stay of execution upon the terms that the decretal sum be paid into an interest earning account in a financial institution in the joint names of both counsel for the applicant and respondent within thirty (30) days of the date of the delivery of this Ruling and in default of which execution would issue. Costs will abide the appeal.

It is so ordered.

**DATED AND SIGNED AT ELDORET THIS 31<sup>ST</sup> DAY OF DECEMBER, 2010.**

**P.M. MWILU**

**JUDGE**

**DELIVERED AND SIGNED AT ELDORET THIS 25<sup>TH</sup> DAY OF JANUARY, 2011.**

**F. AZANGALALA**

**JUDGE**

**In the presence of;**

Advocate for Applicant  
Advocate for Respondent  
Court Clerk

**F. AZANGALALA**

**JUDGE**