



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU

CIVIL APPEAL NO. 172 OF 2010

SAMSON ODIDA MALINYA

**THE CHAIRMAN KISUMU MUNICIPAL STAFF BURIAL & BENEVOLENT
ASSOCIATION.....APPELLANT**

**AND
JACK ODHIAMBO**

OWIRA.....RESPONDENT

R U L I N G

Appellant approached the seat of justice herein by filing a memo of appeal dated 21st day of October 2010 and filed the same date and on it anchored on interim application dated 26th day of January 2011 and filed on the 27th day of January 2011. Two reliefs are sought namely:-

(1)That this honourable court be pleased to order a stay of execution of the ruling and order made by the honourable Ezra Awino, Principal Magistrate on 21-9-2010 in Kisumu CMCC No. 56 of 2009 pending the hearing and final determination of the Applicant/Appellants' Appeal.

(2)That the cost of this application be provided for.

The grounds in support are setout in the body of the application, supporting affidavit, and oral submissions in court and the major ones are that:-

- They are desirous of exercising their undoubted right of appeal.

- The appeal is arguable.

- They have shown good faith by depositing the decretal sum into court.
- They will move with speed to dispose of the appeal.

The respondent opposed the application by filing a replying affidavit deponed on the 14th day of February 2011 and filed on the same date sworn by **Jack Odhiambo Owira**. The sailent features of the same are that:-

- Application is defective and lacks merit.
- There is no demonstration of loss and damages to be suffered if stay is not granted.
- There is no demonstration of inability to repay the amount on the part of the respondent should the appeal succeed.
- There is no demonstration as to how the appeal will be rendered nugatory should stay not be granted.
- The appeal has no chance of success and the applicant only wants to deny the respondent the enjoyment of the fruits of their judgment.

This court has given due consideration to the afore set out rival arguments and in its opinion the following are this court's findings on the same:-

- (1) Despite the respondent's non attendance to oppose the application, the court has jurisdiction to consider their pleading in the disposal of the application and it has duly done so.
- (2) Right of appeal is a fundamental right which any court of law should be slow to curtail.
- (3) Application for stay of execution is a relief provided for within the law and so the applicant is within his right in moving to seek the same.
- (4) When sought, all the court has to determine is whether on the facts before it the conditionalities set by the law have been satisfied by the applicant. These are:-

(a) That the application for stay has been presented promptly.

(b) That if stay is not granted the applicant will suffer substantial loss not compensable by was of damages.

(c) That the appeal will be rendered nugatory if the stay sought if not granted.

(d) That the appellant will not use the stay order both as a shield and sword against his opponent.

(e) The security to perform the resultant decree should the appeal fail has been furnished.

This court has applied the afore setout ingredients to the rival arguments herein and the court is inclined to grant the relief sought for the following reasons:-

(a) The application for stay was filed promptly upon the filing of the appeal.

(b) The applicant has demonstrated good faith by depositing the actual decretal sum into court.

(c) The depositing of the decretal sum in court is fair because it will be available to the successful party easily as opposed to initiate execution procedures to recover the same by either party.

(d) No prejudice will be suffered by the respondent as he will be at liberty to apply for the discharge of the stay order should the applicant abuse the same.

(e) The respondent will be adequately compensated by costs.

For the reason given in (a) – (e) above, the application dated 26-1-2011 and filed on 27-1-2011 be and is hereby allowed in terms of prayer (1). The said prayer (1) Granted to remain in force pending the disposal of the appeal on condition that the amount deposited by the appellant/applicant remain so deposited in court until the disposal of the appeal.

(1) The respondent will have costs of the application.

(2) There will be liberty to apply.

Dated, signed and delivered this 14th day of March 2011.

ROSELYN N. NAMBUYE

JUDGE

RNN/va