



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA**

**AT KITALE.**

**CIVIL SUIT NO. 105 OF 2006.**

**ABDI MOHAMMED NOOR ::::::::::::::::::::::::::::::::::::::: PLAINTIFF.**

**VERSUS**

**ALFRED KIPNGETICH MC CLEAN )  
CHRISTINE CHEPCHIRCHIR ) ::::::::::::::::::::::::::::::: DEFENDANTS.**

**R U L I N G .**

1. By a Notice of Motion dated 10<sup>th</sup> November, 2010, the defendant/applicants are seeking for an order of stay of execution of the decree pending the hearing and determination of the appeal filed in the Court of Appeal. The Notice of Appeal was filed on 16<sup>th</sup> November, 2010 against the judgment by the learned trial Judge which was delivered on 27<sup>th</sup> October, 2010. The applicant is willing to furnish such securities as the court may direct for the due performance of the decree. It is further argued that if the stay of execution is refused, the appeal would be rendered nugatory as there are chances that the plaintiff may not be able to refund the decretal sum in the event that the appeal is successful. This application is also supported by the affidavit of Dinah M. Obura, sworn on 10<sup>th</sup> November, 2010. It is submitted that the applicant is ready and willing to deposit the entire decretal sum in a joint interest earning account in the names of both advocates. This way no party will suffer prejudice and it will also be in the interest of justice, equity and fair play.

2. This application was opposed by the respondent, Mr. Sagana, learned counsel for the plaintiff/respondent relied on the replying affidavit by Abdi Mohammed Noor sworn on 15<sup>th</sup> February, 2011. According to the respondent, the applicant has not shown that they will suffer substantial loss. Moreover, there was no material to support the allegation that the plaintiff cannot refund the decretal sum in the unlikely event that the appeal is successful. The plaintiff has attached a bank statement of his company which has colossal sums of money. The plaintiff is a transporter as evidenced by a number of copies of motor vehicle log books attached to the affidavit thus the court should take into account that the plaintiff should also not be denied the fruits of his litigation.

3. Under Order 42 rule 6 (2) of the Civil Procedure Rules, for a party to succeed in an application in stay of execution the party seeking for the order must satisfy the court that he will suffer substantial loss unless the order is made and the application must be made without unreasonable delay. The party also seeking the stay of execution must provide security for the due performance of the decree. In this case the applicant contends that the appeal shall be rendered nugatory unless the order of stay is issued. On the part of the respondent, he contends that he is a man of means because he has companies which are well to do and also own a fleet of motor vehicles. However, in the interest of proportionality, I am of the view that the entire decretal sum should be deposited in a joint interest earning account to be operated by the firms of applicant and respondent. That way no party will suffer prejudice as the decretal sum and interest will be available. The said sum be deposited within 30 days. In default the application for stay will stand dismissed. The plaintiff/respondent shall also have the costs of this application.

Ruling read and signed on 8<sup>th</sup> day of April, 2011.

**MARTHA KOOME.  
JUDGE.**