



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT BUNGOMA**  
**CIVIL APPEAL NO.146 OF 2010**

**PAMELA AWINYO t/a ALPHANO MEDICAL CENTRE.....APPELLANT**

**VRS**

**TOM SINDANI t/a SAMULIA PHARMACY.....RESPONDENT**

**RULING**

The Applicant/Defendant in her application dated 26/11/2010 and brought under section 3A of the Civil Procedure Act and O.41 r.4 of the old Civil Procedure Rules which seeks for orders for stay for execution pending hearing and determination of this appeal.

By consent of the counsels for the parties the application was to be heard by the affidavits of the applicant and the grounds of opposition filed by the respondent.

The facts leading to this application are that the Resident Magistrate Bungoma entered judgment in favour of the Plaintiff/Respondent in CM CC NO.548 of 2006 for Ksh.139,536/= plus costs of the suit and interest at court rates from the date of filing the suit. The Applicant was dissatisfied with the said judgment and lodged this appeal. The grounds relied in this application are that, the appeal is arguable, meritorious and has high chances of success. The Applicant avers that she is likely to suffer substantial loss if the orders sought are not granted. In his grounds of opposition the Respondent opposes the application on grounds that this is a money decree and stay of execution should not be granted. Secondly, that the Applicant has not demonstrated that she is likely to suffer substantial loss and that the appeal has no chances of success.

Order 41 requires that an application of this nature be brought without delay. The Applicant depones that she obtained leave to appeal out of time in CM CC MISC. APPL. NO.127 of 2010 and filed this application on the 29/11/2010. It has not been explained why the Applicant did not file his appeal within time. However, there was no delay between the time that leave was obtained and the time that the application was filed.

The Applicant is required to demonstrate that in the event that the orders are not granted she is likely to suffer substantial loss. In paragraph 8 of the supporting affidavit, the Applicant states that she is likely to suffer substantial loss if the judgment/decree of the lower court is executed. The only reason given is that the appeal is likely to be rendered nugatory. In my considered opinion the Applicant ought to have demonstrated the kind of loss that she is likely to suffer as required by Order XLI which she has failed to do in her application. It is not enough just to state in the affidavit that she is likely to suffer substantial loss. It must be clearly shown what loss is likely to be suffered. It has not been suggested that the respondent is a man of straw who will not be able to refund the decretal amount if the same is paid to

him. It was held in the case of **ORUBA MATERNITY AND NURSING HOME AND OTHERS V PURSHOTAM N. PATEL CIVIL APPLICATION NUMBER NAI 133 OF 1996 (GICHERU, TUNOI AND SHAH ON 19 JUNE 1996)**. That there is need to proof that the decree holder will not be able to refund the sum. The respondent is said to be a businessman running a pharmacy in Bungoma and it is unlikely that he will not be in a position to refund the decretal amount of less than Ksh.200,000/=.

The Applicant is required to offer security for the judgment in favour of the plaintiff in an application of this nature. I note that no such security has been offered in this application.

I have perused the proceedings of the lower court and I agree with the applicant that the appeal is arguable. The issue of whether the appeal is meritorious and has high chances of success may not be guaranteed at this stage.

It is my finding that the Applicant has not shown that she deserves the order sought in this application. I therefore dismiss the application with costs.

**F. N. MUCHEMI  
JUDGE**

Ruling dated and delivered in open court this 11<sup>th</sup> day of May 2011 in the presence of Mr. Juma for Ombaye for the Appellant and Mr. Luchivia for Sichangi for the Respondent.

**F. N. MUCHEMI  
JUDGE**