

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO. 180 OF 2010

MUNICIPAL COUNCIL OF NANYUKI.....APPLICANT/APPELLANT

VERSUS

SAMUEL MUTHEE BERNARD.....RESPONDENT

JUDGMENT

In the Notice of Motion dated 25th October 2010 Nanyuki Municipal council, the Appellant/Applicant sought for an order for stay of execution of the decree pending appeal. The Motion is supported by the affidavit of Lucy Nyaga sworn on the same date. **Samuel Muthee Bernard**, the Respondent herein, opposed the Motion by filing a replying affidavit he swore on 20th January 2011.

On 29th September 2010, Hon. S. Muketi, learned Chief magistrate, entered Judgement against the Appellant vide **Nyeri C.M.C.C. No. 323 of 2005**. The Appellant is aggrieved hence this appeal. The Appellant has now sought for an order for stay of execution of the decree pending Appeal. It is the submission of the Appellant that it would suffer substantial loss if the order is not granted, in that it would be extremely difficult to reconstitute the appellant if the Appeal succeeds. The Appellant further beseeched this court not to order it to provide security as a condition because it is in a position to satisfy the decree in the even the appeal sails through. The respondent was of the view that the Appellant should be given a conditional order of stay in terms of the provisions of *Order 42* of the Civil Procedure rules. The Respondent pointed out that the Appellant may not be able to satisfy the decree in full at once at the end of the Appeal.

It is clear from the submissions and the material placed before me that the combatants agree that there is need to issue the order of stay pending appeal. I am also convinced that if the order for stay is not given the Respondent may not be in a position to refund the decretal sum if the appeal succeeds. This means that the Appellant will suffer substantial loss. On the other hand it is also a matter of common notoriety that local Authorities all over the country have been unable to meet their financial responsibilities on time hence it is necessary for the Appellant to be given a conditional stay.

I hereby grant orders in terms of prayer (a) of the Motion dated 25th October 2010 on condition that the Appellant deposits the decretal sum in an interest earning account in the joint names of learned advocates appearing in this Appeal within 45 days. In default the Motion shall automatically stand dismissed and the Respondent will be at liberty to execute the decree. Costs of the Motion to await the outcome of the Appeal.

Dated and delivered at Nyeri this 29th day of July 2011.

J. K. SERGON
JUDGE

In open court in the presence of Mungai h/b Mwangi for Respondent and Ombachi h/b for M. Kariuki for Applicant.

J. K. SERGON
JUDGE

