



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 233 OF 2010

HARRY KIMUTAI

KACHUWAI:.....:APPLICANT

VERSUS

**RICHARD KIPSANG:.....:1ST
RESPONDENT**

**DORCAS BOIT:.....:2ND
RESPONDENT**

RULING

This Motion on Notice brought under sections 3A and 63(e) of the Civil Procedure Act and Order XLI Rule 4 of the Civil Procedure Rules, seeks primarily stay of execution of the ruling and order in Civil Suit No. Eldoret CMCC No. 769 of 2005 pending the hearing and determination of this appeal. The application is by **Harry Kimutai Kachuwai** who was the defendant in the Lower Court. The principal reasons for the application are that the appeal has high chances of success and that unless an order of stay is granted the appeal will be rendered nugatory.

The application is supported by two affidavits sworn by the applicant who has deponed, *inter alia*, that his application to set aside an *ex parte* judgment in the lower court was denied thus provoking this appeal which has high chances of success and that unless there is a stay of execution, he will suffer irreparable loss and damage. The latter contention is made on the basis that the respondents may not be in a position to refund the decretal amount in the event the appeal succeeds and payment has been made to them.

The application is opposed on the basis of a replying affidavit sworn by **Mr. Morris Indakwa Buluma** the respondents' advocate. He has deponed, *inter alia*, that the applicant has no arguable appeal; that the applicant does not dispute the respondents' claim; that the respondents stand to suffer great prejudice if a stay of execution is granted and that the 1st respondent is a man of means and was driving his own car at the time of the accident.

In the submissions filed on behalf of the applicant, it is contended that if the decretal amount is paid to the respondents they may not be able to repay the same because the resources of the respondents are unknown. In the applicant's view substantial loss would therefore result to him. On their part the respondents contended that the appeal has no chance of success as the applicant had not and does not have a defence to the respondents' claim.

I have considered the application, the affidavits filed by both parties and the submissions made to me by counsel, including the authorities cited. Having done so I take the following view of the matter. What is

to be considered in an application such as the present one is found in Order XLI Rule 4 of the Civil Procedure Rules. Under the rule I am required to consider whether or not there is sufficient cause to warrant the stay of execution as the mere filing of an appeal does not operate as a stay of execution. The applicant is convinced that his appeal raises serious issues which should be settled by the court in this appeal. I have perused the grounds of appeal and cannot say that the same are frivolous or that they are not arguable.

With regard to delay, I note that the applicant's application was dismissed on 17th November, 2010. He then lodged his appeal on 1st December, 2010 and this application on 2nd December, 2010. The applicant therefore moved to this court for stay about 15 days after the ruling of 17th November, 2010. In my view it cannot be said that the applicant is guilty of unreasonable delay whatsoever. The applicant contends that his appeal may be rendered nugatory if the stay sought is not granted and the appeal eventually succeeds. His argument is that if the decretal amount is paid to the respondents they may not be in a position to repay the same in the event the appeal succeeds. The answer to that challenge was given by counsel for the respondents who swore that the 1st respondent, is a civil servant and was driving his own car when the accident occurred. Nothing was said about the 2nd respondent. With all due respect to counsel for the respondents, the respondents' means should have been given by themselves. Counsel did not in any event exhibit documentary evidence of any such means. Even the alleged employment by the 1st respondent in the Civil Service was not supported by any document to demonstrate the same. In the premises, I am satisfied that the applicant has demonstrated that if the decretal amount is paid over to the respondents, they may not be able to repay the same if the appeal succeeds. In my view that would constitute substantial loss.

The applicant had further to furnish security for the due performance of the decree herein. The applicant, has offered to furnish a bank guarantee. I am however not bound by that offer. The court retains its discretion as to the form of security, envisaged in Order, XLI Rule 4(2)(b).

In the end and for the reasons given herein, I allow the Notice of Motion dated 2nd December, 2010 in terms of prayer (d) thereof on condition that the applicant deposits the decretal amount into an interest bearing account in a reputable financial institution, in the joint names of the parties' advocates. The said deposit should be made within thirty (30) days from the date hereof failing which the respondents are at liberty to execute the decree. The costs of and incidental to this application shall abide the results of the appeal.

It is so ordered.

**DATED AND DELIVERED AT ELDORET
THIS 25TH DAY OF JULY, 2011**

**F. AZANGALALA
JUDGE**

Read in the absence of parties.

**F. AZANGALALA
JUDGE
25TH JULY, 2011**