

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA

CIVIL APPEAL NO. 168 OF 2010

JAMES OTARI MUHANJI.....1ST APPELLANT
ALFRED KHADAMBI.....2ND
APPELLANT
OBWOLI KAVELI OBWOLI.....3RD
APPELLANT
JOHN K. KIDAKE.....4TH APPELLANT
WILSON MATENDECHERE.....5TH
APPELLANT
ZABLON MUSUMBA.....6TH APPELLANT

V E R S U S

**VIHIGA TEACHERS SACCO
LTD.....RESPONDENT**

RULING

The appellants filed an application under the provisions of **Order 42 Rule 6(1) & (2)** of the **Civil Procedure Rules** seeking orders of this court to stay the execution of the decrees issued by the Co-operative Tribunal in Case Nos. 81, 82, 87, 90, 91 & 93 of 2010 pending the hearing and determination of the appeal. The application is supported by the annexed affidavit of James Otari Muhanji and on the grounds stated on the face of the application. The application is opposed. Isaiah Amuko, the chairman of the respondent swore a replying affidavit in opposition to the application. At the hearing of the application, this court heard oral submissions made by Mr. Anziya for the appellants and Mr. Fwaya for the respondent.

This court has carefully considered the said rival submissions. It has also considered the pleadings filed by the parties herein in support of their respective opposing positions. The application before this court is for stay of execution pending the hearing and determination of the appeal. **Under Order 42 Rule 6(2)** of the **Civil Procedure Rules**, for the appellants to succeed in their application, they must establish that they would suffer substantial loss if stay of execution is not granted. They must further be prepared to provide security for the due performance of the decree. Finally, the application seeking to stay execution of the decree must be presented to the court without undue delay. In the present application, this court is prepared to accept that the appellants would suffer substantial loss if stay of execution is not granted. It appeared that the Co-operative Tribunal rendered its decision without giving the appellants the opportunity to be heard. The appellants will therefore suffer substantial loss if the decree is executed before they have been given a chance to ventilate their appeal. Every litigant who is dissatisfied with the decision of a subordinate court, has the constitutional right of appeal to a higher court. However, for such a litigant to exercise his right of appeal, he must not do so as to prejudice the opponent. That is why there is a requirement that the appellant posts security for the due performance of the decree before the grant of stay.

In the present application, after evaluating the facts of this application, this court will exercise its discretion and grant an order staying the execution of the decrees issued by the Co-operative Tribunal in the cases mentioned above pending the hearing and determination of the appeal. Each appellant (save those who have compromised their cases with the respondent) will be required to deposit in a joint interest earning account in the names of counsel for the appellants and counsel for the respondents 30% of the decretal sum (including the advocates costs) within thirty (30) days of today's date or in default thereof, the order of stay granted by this court shall stand automatically vacated. The respondent shall be granted the costs of this application in any event.

DATED AT KAKAMEGA THIS 4TH DAY OF OCTOBER 2011.

L. KIMARU
J U D G E