



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU**

Civil Appeal 140 of 2009

AGRO CHEMICAL SACCO SOCIETY LD APPELLANT

-VERSUS-

VINCENT WASONGA WANDEY.....RESPONDENT

Coram:

Ali-Aroni, Judge.

Mr. Olel Advocate for the Appellant

Mr. Aringo Advocate for the Respondent

Mr. George Diang'a Court Clerk.

R U L I N G

Before court is a Notice of Motion dated 10th January, 2010 brought pursuant to Section 3A, and 63(e) of the Civil Procedure Act and Order XLI Rule 4 of the Civil Procedure Rules. It is supported by the affidavit of **Lilian Achieng Oyeng** and on the grounds on the face of the application.

The application seeks for stay of execution pending an intended appeal. The respondent has objected to the application by filing a replying affidavit dated 21st January, 2010.

The applicant contends that if it pay out the decretal amount, it is likely to suffer as the respondent will not be in a position to repay the monies, as the respondent is a person of meager income. It has arguable appeal and is willing to deposit the decretal sum in a joint account. Applicant's counsel relied on **SAVINGS & LOAN KENYA LIMITED – VS- ODONGO** - Civil Appeal No. 6 of 1987 and **NDUHIU GITAHU AND ANOTHER –VS- ANNA WAMBUI WARUGONGO (1988)** 2 KAR.

On his part the respondent contends that the applicant does not have an arguable appeal and has not met the necessary conditions to enable the court grant the order for stay. The respondent also contends that the applicant failed to demonstrate that it is likely to suffer loss. Secondly, the application was brought late. Counsel for the respondent relied on. The Co-operative Act (No. 12 of 1997), **ODHIAMBO OWITI & COMPANY ADVOCATES –VS- NATIONAL HOUSING CORPORATION** – Misc. Civil Appeal No. 109 of 2007 and **JORAM THUO WAIREGI –VS- KENYA COMMERCIAL BANK LTD.**

Order XL1 Rule 4(1) gives the court the power to grant a stay as may seem just on two conditions as set out in subsection (2) namely; that the court has to be satisfied that substantial loss is likely to be incurred unless the order is made and the application was made without undue delay, secondly such security as the court orders in the due performance of such decree or order as may ultimately be binding on him has been given by the applicant. It is not the duty of the court at this stage to delve into the merit or otherwise of the intended appeal.

In the circumstances of the case, I do agree with the applicant that in the event or successful appeal, the respondent may not readily pay back the money, and this will no doubt cause loss to the applicant. I am in this guided next by the opinion of **Sir John Donaldson MR** in the case of **ROSENGRENS –VS- SAFE DEPOSIT CENTRES LTD (1984)** 3 All E.R 198 which was adopted with approval in **NDUHIU GITAHU AND ANOTHER –VS- ANNA WAMBUI WARUGONGO** supra he stated:

“ We are faced with a situation where a judgment has been given. It is subject to appeal. It may be affirmed or it may be set aside. We are concerned with preserving the rights of both parties pending that appeal. It is not our function to disadvantage the defendant while giving no legitimate advantage to the plaintiffs ... It is our duty to hold the ring even handedly without prejudicing the issue pending the appeal

...”

The applicant has offered to deposit the decretal amount in a joint account. The application was also filed soon about issuance of the decree. Having stated as above, I grant stay pending appeal on condition that the decretal sum be deposited in an interest earning account in the names of counsels on record for the parties pending hearing and determination of the appeal.

Dated and delivered on 29.01.2010 at 11.30 am.

ALI-ARONI

JUDGE

In the presence of:

..... present for Appellant

.....present for Respondent

AAA/hao