



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
OF KISII**

**Civil Appeal 36 of 2009**

**ZABLON OWIGO OLANG**

**T/A HOMELAND SERVICES.....APP/APPLICANT**

**-VERSUS-**

**STEPHEN NYAGE KARIRI.....RESP/RESPONDENT**

**RULING**

The applicant and another were jointly successfully sued by the respondent in the SRM Court at HomaBay for wrongful attachment and sale of the respondent's 4 heads of cattle and were ordered to pay Ksh.80,000/= in damages, together with costs and interest. The applicant preferred an appeal which is awaiting hearing and determination. In the meantime, he asks for stay of execution in an application brought under *Order 41 rule 4(1) of the Civil Procedure Rules*. The respondent filed Grounds of Opposition and Replying Affidavit in response to the application. The application was argued before me by Mr. Okoth for the applicant and Mr. Mbicha for the respondent.

In appealing, the applicant is exercising his undoubted right and care should be taken that the appeal is not rendered nugatory. The competing issue is that the respondent has a hard-won judgment which he is entitled to execute, and without delay.

The discretion of the court to grant stay of execution is fettered by conditions set out in *Order 41 rule 4*. The court must be satisfied that substantial loss will be occasioned if stay is not granted; secondly the application has to be brought without unreasonable delay; and, thirdly, the applicant must furnish security for the due performance of the decree as may ultimately be binding upon him. (See *Carter and Sons Ltd .V. Deposit Protection Fund Board And Others, Civil Appeal No. 291 Of 1997*).

The judgment complained about was rendered on 28/1/2009. The appeal was filed on 28/2/2009, and the application on 18/3/2009. There is no complaint that the application was not brought on time.

This is a money decree whose execution is sought to be stayed. The amount is not substantial. It was not deponed in support of the application that the respondent is not a man of sufficient means who would not be able to refund the decretal sum if the appeal ultimately succeeds. I say this because it is not normal for the court to grant stay of execution in monetary decrees unless it can be shown the amount involved is substantial and that the respondent has no known assets within the jurisdiction from which the applicant can recoup in the event that his appeal is successful. (See *Singh .V. Runda Estates Lt d [1960] EA 263*).

Regarding security, the applicant says he is willing to deposit a log book or title deed into court. None of them was exhibited. In court, the applicant's advocate indicated they could deposit into

court the decretal sum. Whichever may be the security, no substantial loss was demonstrated.

The result is that the application cannot be granted. The same is dismissed with costs.

Dated, signed and delivered at Kisii this 20<sup>th</sup> day of January 2010.

**A.O.MUCHELULE**

**JUDGE**

**20/1/2010**

Before A.O.Muchelule-J

Court clerk-Bibu

Mrs.Opanga for Appellant/Applicant

**Court:** Ruling in open Court.

**A.O.MUCHELULE**

**JUDGE**

**20/1/2010**