



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 244 of 2001

ANDREW KURIA NJUGUNA..... PLAINTIFF

VERSUS

ROSE WAMBUI KURIA DEFENDANT

RULING

Coram: Mwera J

Mr Onindo for defendant/applicant

Ms Kimani for Respondent

Mr. Onindo for the defendant /applicant argued the notice of motion dated 3.06.09 brought under Order 41 rule 4 (1), (2), Order L Rule 1 and Section 3, 3A, 63 (e) of the Civil Procedure Act in that execution of the decree of the judgment delivered in this cause on 24.4.09 be stayed until an intended appeal against it is heard and finally determined. The court heard counsel submit on the grounds in the body of the motion and the supporting affidavit to the effect that the sum involved in the judgment was colossal and would constitute a substantial loss to the applicant unless the stay order sought is granted. That the applicant had filed the present application without undue delay and was willing to abide by any condition imposed by the court as regards security for due performance. That judgment was delivered on 24.4.09 for Sh. 1.15m and this application followed on 15.6.09. A notice of appeal had been filed. The decretal sum was so large that the applicant could not raise it. Mr. Onindo was unable to place before court any sum of money or other security for due performance. The applicant was said to have sold the subject land (in the suit) and expended the proceeds.

Mr. Ojienda opposed the application by stating that the applicant had not demonstrated the substantial loss she will suffer if a stay order is not granted. His position was that in the event that order is granted, the whole decretal sum be deposited in court as security. To this Mr Onindo responded by repeating that his client could not raise any security but would abide by whatever orders the Court made in that regard.

For a party to get orders of stay under Order 41 Rule 4 CPR, three conditions ought to be satisfied:

- i) the applicant is likely to suffer substantial loss;
- ii) the application is made without unreasonable delay; and

iii) the applicant provides such security for due performance of the decree as the Court orders.

Beginning with timeous filing of this application for stay, the court heard that after judgement was delivered on 24.4.09. This application was filed on 15.6.09. Yes. Two months went by between the two dates but this court is inclined to accept that, especially that the respondent did not question that time lapse, as not being unreasonable.

Coming to the substantial loss likely to be suffered by the applicant if the stay order is not granted, she was bound to place before the court such material and information that should lead this court to conclude that surely she stood a risk of suffering substantially moneywise or other, and therefore grant the stay. Here Mr Onindo simply said that the decretal sum was so exclusive and if paid it could constitute substantial loss to the applicant. In sum there was no demonstration of the substantial loss likely to be suffered.

As for security for due performance, the court should order one in the event it grants the stay order. But in many, if not most cases the applicant does make an offer first as a matter of having the respondents' interest/rights in mind and then also to guide the Court. Counsel said that the applicant could not raise any security because she spent all the money, proceeds of the suit land, paid to her but that she could abide by any court orders on this account.

All in all this court is not satisfied that the applicant deserves orders sought and her application is dismissed with costs.

Orders accordingly.

Delivered on 1st February, 2010.

J. W. MWERA
JUDGE