



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

**Civil Appeal 192 of 2007**

**KYALO MUTAVI ..... APPELLANT**

**VERSUS**

**MARTIN MAILU MAKULE ..... RESPONDENT**

**R U L I N G**

The Appellant has applied by **notice of motion dated 14<sup>th</sup> November 2008** for stay of execution of the decree of the lower court pending disposal of the appeal herein. The appeal is against that decree passed on 20<sup>th</sup> September 2007. By the decree the Respondent, who is the grandfather of the Appellant, was awarded KShs. 30,000/00 as damages for defamation plus costs. The application is brought under **Order 41, rule 4** of the **Civil Procedure Rules** (the **Rules**). The Respondent has opposed the application by replying affidavit filed on 15<sup>th</sup> December 2008.

I have read the supporting and opposing affidavits. I have also given due consideration to the written submissions filed on behalf of the Appellant. No submissions, written or oral, were made on behalf of the Respondent. I note that the order for the application to be heard by way of written submissions was made in the absence of appearance for the Respondent, and there is no indication that he was served with the order.

By dint of sub-rule (2) of rule 4 aforesaid, no order for stay of execution may be made unless the court is satisfied that substantial loss may result to the applicant unless the order is made. It must also be demonstrated that the application has been made without unreasonable delay. Finally, the applicant must be prepared to give such security as the court may order for the due performance by him of such decree or order as may ultimately be binding on him.

As already seen, the decree herein was passed on 20<sup>th</sup> September 2007. The present application was filed on 14<sup>th</sup> November 2008, about one year and two months later. The Appellant had applied for and obtained before the lower court a conditional stay of execution. He was unable to meet the conditions imposed, all the more reason why he should have come to this court as soon as possible.

There is no explanation in the supporting affidavit why the present application was made one year and two months after the decree was passed. I find that the application has been made after unreasonable delay.

Regarding substantial loss, the supporting affidavit is totally silent. There is no allegation in it that the Respondent may be unable to refund the decretal sum if paid, in the event that the appeal succeeds. That allegation has only been raised in the submissions filed on behalf of the Appellant. Submissions are not evidence. There is no evidence of substantial loss placed before the court.

I also note that the sum awarded to the Respondent is fairly modest, only KShs. 30,000/00, with costs. No interest was awarded. So, the decretal sum will ultimately remain modest.

In the result I do not find any merit in the Appellant's application for stay of execution. The same is hereby dismissed with costs to the Respondent. It is so ordered.

**DATED AT MACHAKOS THIS 12<sup>TH</sup> DAY OF MAY 2010**

**H.P.G WAWERU**

**JUDGE**

**DELIVERED THIS 14<sup>TH</sup> DAY OF MAY 2010**

