



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

**Civil Appeal 422 of 2008**

**LEO MASORE NYANG'AU.....APPLICANT  
VERSUS  
ANNE NYANCHAMA OMBUNA.....RESPONDENT**

**R U L I N G**

1. What is before me is a notice of motion dated 8<sup>th</sup> December, 2009 brought under Order XLI Rule 4 of the Civil Procedure Rules and Sections 3A & 63(e) of the Civil Procedure Act. In the motion Leo Masore Nyangau (hereinafter referred to as the applicant) seeks an order of stay of execution of the warrant of attachment issued against him by the Disciplinary Committee of the Law Society, in Disciplinary Committee Cause No.37 of 2008. The applicant has lodged an appeal against the decision of the Disciplinary Committee delivered on 28<sup>th</sup> July, 2008.

2. In the decision the Disciplinary Committee found the applicant guilty of holding onto a sum of Kshs.2,000,000/= belonging to his client Anne Nyanchama Ombuna (hereinafter referred to as the respondent), without any authority. The Disciplinary Committee ordered the applicant to pay to the Law Society of Kenya the sum of Kshs.2 million together with interest at the rate of 12% from 1<sup>st</sup> November, 2007 within 30 days, and proceed to tax his bills before the High Court within 45 days.

3. The applicant has now paid a sum of Kshs.1.7 million to the Law Society and contends that the balance of Kshs.300,000/= is held on account of his fees which are yet to be determined through taxation. The applicant explains that his attempts to obtain an order of stay of execution before the Disciplinary Committee were frustrated by the non-availability of the Disciplinary Committee's file. In the interim period, the Disciplinary Committee issued Warrants of Attachment and Sale against the applicant for a sum of Kshs.650,000/=. The applicant contends that the amount indicated on the warrant is incorrect. The applicant depones that the respondent is unemployed and that her means of livelihood and residence are unknown. The applicant therefore fears that he may be unable to recover the money in respect of his bills if he deposits the balance of Kshs.300,000/= with the Law Society of Kenya.

4. The respondent objects to the application. She has filed a lengthy replying affidavit in which she has explained the history of the matter. The respondent has also annexed various documents in support of her averments. The respondent has further sworn a supplementary affidavit. In short the respondent confirms that the applicant has deposited a sum of Kshs.1.7 million with the Law Society of Kenya. The respondent objects to an order of stay of execution being issued contending that the amount outstanding to be paid by the applicant as at February, 2010 was a sum of Kshs.668,421/=.

5. I have give due consideration to this application, the affidavit filed in support and in reply thereto. I do note that although the application argued before me by the applicant's counsel was one for stay of execution pending appeal, the order sought by the applicant as stated in prayer 2 of his motion was:

***“That the Honourable Court be pleased to stay the execution of the warrant of attachment issued by the Disciplinary Committee of the Law Society of Kenya on 30.10.09 in Disciplinary Committee Cause No.37 of 2008, pending the hearing and determination of this application.”***

6. Thus the applicant did not seek any order for stay of execution pending appeal, and his application having been heard and being subject of this ruling, the order sought is spent. Secondly, assuming the orders sought were for stay of execution pending appeal, the applicant had to satisfy the requirements of Order XLI Rule 4(2) of the Civil Procedure Rules which are as follows:

(i) That the court is satisfied that substantial loss will result to the applicant unless the order of stay of execution is issued, and

(ii) That the application has been made without unreasonable delay, and

(iii) That the applicant has provided or is ready to provide such security as the court may order for the due performance of the decree.

7. Applying the above, the orders subject of the execution against the applicant was issued on 28<sup>th</sup> July, 2008. The application for stay of execution was made almost 1½ years later on 8<sup>th</sup> December, 2009. The applicant has not satisfactorily explained this apparent inordinate delay. With regard to the issue of substantial loss, the applicant explains that the respondent is unemployed and her means of livelihood and residence are unknown to him and he may therefore be unable to recover his costs if taxed. However, the applicant was ordered by the Disciplinary Committee to have his bill taxed within 45 days. To date, more than 1½ years later that has not been done.

8. The applicant has therefore only himself to blame for any loss that he may suffer. In any event, the order of the Disciplinary Committee was for the money to be deposited with the Law Society of Kenya and not to be paid to the respondent. The applicant has not exhibited any good faith, by depositing the money with the Law Society of Kenya. The applicant is in fact misleading this court by alleging that there is only a sum of Kshs.300,000/= outstanding from the amount which was to be paid to the Law Society of Kenya. That is not the correct position as the applicant was ordered to pay the sum of Kshs.2 million together with interest at 12% from 1<sup>st</sup> November, 2007.

9. For the above reasons, I find that the application cannot succeed because it is defective and also because the applicant has failed to satisfy the conditions of Order XLI Rule 4(2) of the Civil Procedure Rules. The application is accordingly dismissed with costs.

**Dated and delivered this 6<sup>th</sup> day of May, 2010**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Advocate for the applicant absent

Respondent present in person

Eric - Court clerk