



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

Civil Appeal 204 of 2009

YAKO LIMITED.....1ST APPLICANT
VEERAL SURESH CHANDRA SHAH.....2ND APPLICANT
VERSUS
DR. PETER OKINS RAKWACH.....RESPONDENT

RULING

The applicants have filed this appeal to challenge the decision of the court below in Nakuru C.M.C.C.No.1169 of 2004 in which the court awarded to the respondent Kshs.269,393.98 with costs. In the meantime, the applicants have brought the present motion for temporary orders of stay of execution pending determination of this appeal. The application is grounded on the fact that the court below declined to grant a similar application; that the respondent has now threatened to execute; that the applicants will suffer substantial loss; that the applicant is willing to furnish security as may be ordered.

The respondent opposed the application arguing that he has the capacity to refund the decretal sum if paid over and in the event the appeal was to succeed.

These grounds were argued before me by counsel for both parties who also cited authorities in support of their respective cases. It was submitted before me that the sum due is Kshs.542,780.98.

An order of stay in terms of **Order 41 rule 4** of the **Civil Procedure Rules** will not be granted unless:

- i) the court is satisfied that substantial loss may result to the applicant
- ii) the applicant offers to provide security as may be ordered, and
- iii) the application for stay is brought without unreasonable delay

Starting with the last ground, it has been conceded that the application was brought timeously. I find that that is so. The applicants have expressly stated that they are willing and able to abide by any condition as to security.

On The substantial loss, the concern in an application for stay is to ensure that the party who has appealed is not made to lose before the appeal is determined while at the same time bearing in mind that the successful litigants are not unnecessarily kept away from the enjoyment of the fruits of their judgment.

The evidential burden is upon the respondent to rebut the applicant's claim that he will not be able to refund the decretal sum if the appeal was to succeed. In **National Industrial Credit Bank Limited Vs. Aquinas Francis Wasike & Another**, Civil Appeal No.NAI.238 of 2005, the Court of Appeal explained the law as follows:

“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has.”

The respondent has deposed that the appeal cannot be rendered nugatory or ineffectual since he has undertaken to refund the decretal

sum should the appeal succeed. The respondent has also confirmed that he owns a private hospital in Nakuru town with a bed capacity of 50 patients.

In my view, the respondent has discharged the evidential burden. He cannot by any standards be described as a man of straw. There cannot be any loss to the applicants should the decretal sum be paid over to the respondent and in the event this appeal succeeds.

In the result, the application fails and is dismissed with costs to the respondent.

Dated, Signed and Delivered at Nakuru this 29th day of June, 2010.

W. OUKO

JUDGE