

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Case 79 of 2008

GEORGE MORARA BARAKE.....APPLICANT

VERSUS

INSURANCE COMPANY O & E AFRICA.....DEFENDANT

RULING

This is an application by the defendant brought under **Order 41 Rule 4** of the **Civil Procedure Rules** as well **Section 3A** of the **Civil Procedure Act** for stay of execution pending appeal to the Court of Appeal against my judgment delivered in this case on 21st January 2010. It is based on the ground that with no known assets, if stay is not granted, the applicant will not be able to recover the decretal sum from the respondent if the appeal is allowed. In such an eventuality the applicant will not only suffer irreparable loss but its appeal will also be rendered nugatory.

The application is strongly opposed. Mr. Morigori for the respondent contended that the respondent will find no difficulty in repaying the decretal sum if the appeal is allowed as he has a thriving business. In the circumstances he urged me to dismiss the appeal with costs.

Other than the trade license for an unspecified business, the respondent has not shown what assets, if any, he has that will enable him reimburse the applicant with the decretal sum if the appeal is allowed. In the circumstances I agree with counsel for the applicant that if stay is not granted and the decretal sum is released to the respondent, the applicant will not be able to recover it if the appeal is allowed. In such an eventuality the applicant will not only suffer irreparable loss but its appeal will also be rendered nugatory. The applicant having deposited the decretal sum in an interest earning account in the joint names of counsel for the parties, the respondent will suffer no prejudice if the appeal is dismissed.

In the circumstances I allow this application and order that the decretal sum shall remain deposited in the joint account until the applicant's appeal to the Court of Appeal is determined. The costs of this application shall be costs in the appeal.

DATED and DELIVERED this 7th day of July, 2010.

D. K. MARAGA
JUDGE.