



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**COMMERCIAL & TAX DIVISION**  
**CIVIL CASE NO. 108 OF 2010**

**DR. WILSON KIPKORRE.....PLAINTIFF**  
**VERSUS**  
**HILLARY ROTICH.....DEFENDANT**

**RULING**

In the Notice of Motion dated 24<sup>th</sup> August, 2010, stated to have been brought under **Sections 1A, 1B and 3A** of the Civil Procedure Act and **Order 41 Rule 4** of the Civil Procedure Rules, the Defendant/Applicant seeks orders of this court as follows;-

- 1. THAT the Honourable Court be pleased to grant an order for stay of execution of the Judgment and decree of the Court issued or to be issued herein pending the hearing and determination of an appeal lodged by the Defendant against the ruling and order of the Court made on 2<sup>nd</sup> July, 2010.**
- 2. THAT the costs of this application be in the cause.**

The application, which is supported by the applicant's affidavit sworn on 24<sup>th</sup> August, 2010, is made on the grounds that the Defendant/Applicant will suffer substantial and irreparable loss if the orders are not granted and that his appeal, which he has filed against the Ruling and Order of 2<sup>nd</sup> July, 2010, will be rendered nugatory.

The Ruling of 2<sup>nd</sup> July, 2010 was made in the applicant's application to set aside interlocutory judgment, previously entered against him, which was allowed and leave to defend the suit granted to him on condition that he deposits into court, a sum of Kshs. 9,990,687.20/= as security.

What I gather from my reading of the Ruling of Koome J. of 2<sup>nd</sup> July 2010, is that the conditions set out under **Order XLI Rule 4(2)** of the Civil Procedure Rules, as to the setting aside the interlocutory judgment and granting of leave to defend the suit, were not met. Neither did the court find any merit in the application. That notwithstanding, the court proceeded to grant the orders sought "**purely in the interest of proportionality**", and imposing the condition as to security.

The applicant depones in his supporting affidavit that he finds the conditions for security too onerous, hence the filing of an appeal against the Ruling. He swears he cannot meet the said conditions owing to the fact that he has no money. He offers instead to deposit a title deed in the name of a company

in which he is a shareholder together with his share certificates as security, in lieu of the sum ordered.

In the Grounds of Opposition filed on 18<sup>th</sup> October, 2010, the Respondent states *inter alia*, that the application has no basis in law and fact, is an abuse of the process of court and not maintainable; that the court is functus (ufficio) and that res judicata applies. In the oral submissions, made on behalf of the Respondent, learned counsel Mr Kipkorir told this court that the applicant has not demonstrated substantial loss as required under **Order XLI Rule 4**. He submitted also that it is not for this court to find whether or not the applicants appeal will be rendered nugatory if the orders sought are not granted. In reply, learned counsel for the applicant, Mr. Nyawara submitted that the pain of execution is in itself sufficient to demonstrate substantial loss. He further submitted that the Grounds of Opposition are not sufficient to rebut the facts as stated in the supporting affidavit.

I am not persuaded that the conditions for granting a stay of execution have been satisfied. Firstly, the application was filed almost two months after the Ruling of the Hon. Lady Justice Koome and about a month after the period fixed to furnish security had lapsed. That, in the circumstances of the case, constitutes unreasonable delay. Substantial loss has not been demonstrated either. With due respect to counsel for the applicant, the Notice of Motion appears, in all respects, to be an application to review and substitute the courts orders of 2<sup>nd</sup> July 2010, couched in the form of an application for stay. I find myself not able to allow the same for the reasons stated herein.

Accordingly the Notice of Motion is hereby dismissed with no order as to costs.

**DATED, SIGNED and DELIVERED at NAIROBI this 2<sup>ND</sup> day of DECEMBER, 2010.**

**M. G. MUGO**  
**JUDGE**

In the presence of:

Mr. Nyawara

For the Applicant

Ms Catherine Mungai

For the Respondent