

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Appeal 35 of 2009

CHARLES MUKABI SIHULI.....APPELLANT

VERSUS

MARINA LEONIDOVNA MUKABI.....RESPONDENT

R U L I N G

1. By a notice of motion dated 4th March, 2009 brought under Order XLI Rule 4(1) of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act, Charles Mukabi Sihuli, (hereinafter referred to as the applicant), seeks an order for stay of proceedings in Milimani CMCC No.8796 of 2007 pending the hearing and final determination of his appeal.
2. The applicant is dissatisfied with a ruling made by a Resident Magistrate in Milimani CMCC No.8796 of 2007 in which the court allowed the applicant's application for setting aside the judgment which had been entered against him, on condition that the applicant deposits the entire decretal amount in court within 14 days. The applicant has appealed against that order and maintains that unless an order for stay of execution is issued, his appeal will be rendered nugatory.
3. Mr. Mweseli who appeared for the applicant submitted that there was no decree issued in the lower court and therefore the order for deposit of the decretal sum was improper. In support of his application Mr. Mweseli relied on *Civil Appeal No.103 of 1994 Phillip Keipto Chemwolo and another vs Augustine Kubende*.
4. The application was opposed through a replying affidavit sworn by Marina Leonidovna Mukabi, (hereinafter referred to as the respondent). It was contended that the applicant has not met the conditions upon which an order for stay of proceedings can be granted as provided under Order XLI Rule 4(2) of the Civil Procedure Rules. It was maintained that the application has been brought more than one month after the order was made and that the applicant has not demonstrated any substantial loss that he is likely to suffer if the stay is not granted, nor has the applicant offered any security.
5. I have carefully considered this application, the affidavit in support and in reply, the submissions of counsel and the authority cited. The applicant is aggrieved by the order requiring him to deposit the decretal sum in court. That is the subject of his appeal and it would be premature at this stage to determine whether that order was proper or not. At this stage the court is only concerned with the application for stay of proceedings pending appeal. The applicant has not demonstrated to this court any substantial loss that he is likely to suffer or in what way that his appeal is likely to be rendered nugatory if the proceedings in the lower court are not stayed. All he needs to do is to deposit the decretal sum in court. I find no merit in this application and do therefore dismiss it with costs.

Dated and delivered this 5th day of June, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Advocate for the appellant absent

Appellant present in person

Advocate for the respondent absent