



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

**Civil Appeal 96 of 2009**

**1. MOMBASA CLUB LIMITED**

**2. JOEL MUTHEE.....APPELLANTS**

**VERSUS**

**SAMUEL MUINDE KIMULI.....  
RESPONDENT**

**RULING**

This is an application for stay of execution pending a determination of the appeal filed herein. The applicants, who were the defendants in SRMCCC No. 3374 of 2007, were, on 24<sup>th</sup> April 2007, ordered to pay Kshs. 90,000/= as general damages. They are the appellants herein and have lodged this application essentially under Order XLI Rule 4 of the Civil Procedure Rules.

This application is based upon the main grounds that the applicants will suffer irreparable loss and damage unless the stay of execution is granted; that unless the stay is granted this appeal will be rendered nugatory; that the application has been filed without delay and that the applicants are willing to deposit the decretal amount in a joint interest earning account. There is a supporting affidavit sworn by one Peter Maina Gitonga, the Claims Manager, Jubilee Insurance Company Limited who took over the rights of the applicant's under the principle of subrogation. The affidavit elaborates the above grounds.

The application is opposed and there is a replying affidavit sworn by the respondent, who was the plaintiff in the lower court. The main objection to the application is that the respondent is seized of the means to refund the decretal amount in the event the appeal succeeds and this application is meant to deny the respondent the fruits of his judgment.

When the application came up for hearing before me on 10<sup>th</sup> June 2009, counsel agreed to file written submissions which were duly filed by 1<sup>st</sup> July 2009. I have considered the application, the affidavits filed and the submissions of counsel. Having done so, I take the following view of the matter. What is to be considered in an application such as this is found in Order XLI Rule 4 of the Civil Procedure Rules. Under the rule, I am required to consider whether or not there is sufficient cause to warrant the stay of execution as mere filing of an appeal cannot operate as a stay of execution. The applicants are convinced that the success of their appeal will be rendered nugatory if the stay is not granted and that they will thereby suffer irreparable loss and damage as the respondent may not have the means to repay the decretal amount in case the appeal succeeds and funds have been paid over to the respondent. The applicants contend that the possibility of losing their money should the appeal eventually succeed and the respondent fails to pay back amounts to irreparable loss and damage. But does that amount to sufficient demonstration of sufficient cause and substantial loss? The applicants are not sure of the financial strength of the respondent. They are actually speculating as to his means. In my view, that is not sufficient demonstration of substantial loss. The applicants had to persuade the court that the respondent is a man of straw from whom it will not be possible to recover the decretal amount if it is paid over to him and the appeal succeeds.

It cannot be over emphasized that it is the substantial loss which is to be prevented by a stay of execution. The respondent has deponed that he is **“seized of the means to refund the decretal sum in**

**the unlikely event the appeal succeeds and the present application is meant to deny”** him the fruits of his judgment. The applicants did not challenge that position in a subsequent affidavit. I am therefore not satisfied that substantial loss would ensue from a refusal to grant a stay of execution. The applicants have therefore failed to satisfy one of the conditions set out in Order 41 Rule 4 (2) of the Civil Procedure Rules. It is immaterial that the applicants are prepared to deposit the decretal amount by way of security. It is also immaterial that the application has been lodged without unreasonable delay and that the appeal is not frivolous.

In the result the applicants’ application dated 25<sup>th</sup> May 2009 is dismissed with costs. It is so ordered.

**DATED AND DELIVERED AT MOMBASA THIS 29<sup>TH</sup> DAY OF JULY 2009.**

**F. AZANGALALA**

**JUDGE**

Read in the presence of:-

Kinyanjui for the Applicant and Owino holding brief for Nyabena for the Respondent.

**F. AZANGALALA**

**JUDGE**

**29<sup>TH</sup> JULY 2009**