



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

Civil Appeal 90 of 2008

BECTON SABUNI MUNIALO APPELLANT

VERSUS

PAUL NGOME NALIANYA RESPONDENT

RULING

This is an application under Order XLI Rule 4 of the Civil Procedure Rules for stay of execution pending appeal. The application is premised on the grounds as stated in the body of the Notice of Motion and supported by an affidavit sworn by Becton Sabuni Munialo sworn on 9th January, 2009.

The application is opposed by the Respondent who has filed grounds of opposition. Mr. Momanyi learned Counsel appearing for the Applicants submits that Judgment in the lower Court was obtained ex parte and that the Applicant has a good defence. While Miss Chege learned Counsel appearing for the Respondent in opposition to the application submitted that the application is improper in that the appeal is challenging the dismissal order which dismissed the application to set aside the ex part judgment.

The Order to be stayed was not annexed and Mr. Momanyi submitted that it was not necessary to annex the decree. This is an application for stay of execution pending appeal. The principles applicable to an application for stay of execution are well settled.

Firstly, the Applicant has to show that the Appeal is not frivolous or that he has an arguable appeal.

Secondly, he must show that the appeal, if successful would be rendered nugatory if the applicant is not granted.

To satisfy the two conditions stated above it is necessary and it is a requirement that the Applicant annexes the order he intends to stay. In a discretionary matter like this the Court should take into account all the circumstances including the merits of the intended appeal.

In the case of ABOK ODERA V. KENYA POSTS & TELECOMMUNICATIONS CORPORATION – CIVIL APPLICATION NO. 206 OF 1996, the Court of Appeal held that there are two conditions which the Applicant must satisfy before he is granted stay of execution pending appeal.

- (1) That the intended appeal is not frivolous, that it has an arguable ground to canvas during the intended appeal; and
- (2) That the appeal if it is successful would be rendered nugatory if stay of the order is not granted.

Applying the above to this application I would say that the Applicant has not demonstrated that the

intended appeal is not frivolous or that the appeal if it is successful would be rendered nugatory if stay of the order is not granted.

Accordingly the Applicant's Notice of Motion is dismissed with costs.

DATED AND DELIVERED AT ELDORET THIS 21ST DAY OF JULY, 2009.

J. L. A. OSIEMO

JUDGE

In the presence of:-