



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**OF KISII**  
**Civil Appeal 111 of 2009**

**DANIEL MOGAKA.....APPLICANT/APELLANT**

**-VERSUS-**

**RONALD MOGUSU AYUBU.....RESPONDENT**

**R U L I N G**

This is an application made under *Order 41 rule 1 and 2 of the Civil Procedure Rules* for stay of execution in Ogembo SRMCC no. 3 of 2008 pending the hearing and determination of the appeal filed in the matter. There is a further prayer that the court orders Criminal investigations regarding documents that were produced in the subordinate court. This second prayer cannot be granted under the provisions relied upon and will therefore not concern this court.

The suit in the lower court was brought by the respondent against the applicant to recover Kshs. 121,000/= being amount due and owing to the respondent in respect of purchase of land situated at Ogembo township. The transaction was in 2004. The applicant filed defence denying the transaction and also denying that he owed the money. The court heard the case and decided in favour of the respondent by granting judgment in the sum together with costs. Judgment was delivered on 14/5/2009.

The applicant filed appeal on 11/6/2009, and this application on 25/9/2009. The application was prompted by a bill of costs which was served on the applicant on 9/9/1009. There was no explanation in the supporting and further affidavit filed by the applicant why stay was not sought earlier. No stay was sought in the subordinate court. *Order 41 rule 4(2) (a) of the Civil Procedure Rules* requires that application for stay be made without unreasonable delay. (See *New Stanly Hotel Limited .V. Arcade Tobacconists Limited [1986] KLR 757*).

Before making an order staying the execution of judgment, the court has to be satisfied that substantial loss may result to the applicant unless the order is made. This is a money decree. It has to be established that if the prayer for stay is not granted and the appeal is successful the applicant will experience great difficulty in recovering the money paid in satisfaction of the respondent's decree and thereby his statutory right of appeal will be rendered nugatory. (See *Halai & Another .V. Thornton Turpin(1963) LTD (1990) KLR 365*). In paragraph 10 of the supporting affidavit, the applicant deponed that the respondent was aman of straw who may not refund the decretal sum if the application is not granted. The respondent swore a replying affidavit in whose paragraph 7 he stated that he was employed by Kenya Tea Development Authority and has reasonable income to refund the decretal sum. The applicant swore a further affidavit. He did not challenge that statement. The closest he came to challenging it was when he stated as follows in paragraph 5:

5:“*THAT it is a cardinal principle in law that “he who asserts must proof” and therefore the burden of proof shifts from me to the respondent.*”

It was the applicant who alleged the respondent was a man of straw, incapable of refunding the decretal sun. Duty was on him to prove that. It was his responsibility to show substantial loss that will be occasioned. That burden did not shift to the respondent. When the respondent indicated he is employed by Kenya Tea Development Authority and can refund the money, the applicant was called upon to show that either the respondent was not so employed or that his salary cannot be expected to meet the decretal sum. In short, the applicant did not discharge his burden.

In the supporting affidavit, the applicant did not offer security for the due performance of the decree as is required under *Order 41 rule 4(2) (b) of the Civil Procedure Rules*. Instead, this is what he said in paragraph 15:

*“15. THAT I pray for stay of execution pending the hearing and determination of the present appeal without depositing the decretal amount in court together with costs.”*

In short, the application lacks merits and the same is dismissed with costs.

Dated, signed and delivered at Kisii this 9<sup>th</sup> Day of November, 2009.

**A.O.MUCHELULE**

**JUDGE**

**9/11/2009**

**9/11/2009**

Before A.O.Muchelule-J

Mongare court clerk

Mr. Anyona-present

Mr. masese-present

**COURT: Ruling in open court.**

**A.O.MUCHELULE**

**JUDGE**

**9/11/2009**