



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

**AT EMBU**

**Civil Case 107 of 2005**

**DAVID WACHIRA WAMBUGU.....PLAINTIFF**

**VERSUS**

**CO-OPERATIVE INSURANCE CO. LTD.....DEFENDANT**

**RULING**

The application dated 4/12/2007 has been filed by Defendant/decree debtor seeking orders for stay of further proceedings and execution of decree in respect of Judgment and decree made on 27/9/2007 pending appeal on the ground that the applicant has arguable appeal with high chances of success and that the appeal will be rendered nugatory and that substantial loss will result to the applicant unless the orders are granted. This application is made without delay.

The application is supported by affidavit of Robert Thiringi an employee of the Defendant who swears that the decretal amount is manifestly excessive and if the same is paid the appeal will be rendered nugatory and it will be difficult to recover the amount paid to the plaintiff/respondent. The Respondent in reply opposes the application saying decree holder is entitled to enjoy the fruits of his Judgment. And that he has to seek treatment as ordered and he needs funds for such treatment. He further states that there is no sufficient cause to order stay, substantial loss is not demonstrated. The applicant he has offered no security for the due performance of any order that may ultimately be binding on him. It is submitted that these conditions are not demonstrated here. Further more the Respondent has gone into great lengths under paragraph 18, 19 and 20 to show that he is not a man of straw and that he can easily repay the decretal amount if the appeal was successful.

I have considered the submissions made by both counsel. The applicant has not shown that it is not able to pay the amount of decree. It has not shown that if the execution was carried out the decree holder would be unable to pay in case of success of appeal. Furthermore the Applicant has not shown that it would suffer substantial loss if orders were not granted and it is not indicated what security it can offer. It is not disputed that this application was filed without unreasonable day. I have perused the newspaper report of the decision of court of Appeal in the application of **Vishram Raji Halai and another Vs Thonton and Tuspil (1963) Ltd.** Although the court is not obliged to go by newspaper reports which are not authenticated the points of law stated in that decision are correct law as written under Order 41 rule (4). This is the order applicable in the High Court but when the application is made in the court of appeal, court of appeal rules apply. As the court of appeal said the discretion of high court under order 41 (4) is limited by the requirements under 41 (4) (2). The court has to be satisfied that the conditions have been complied with.

It is my finding that the Applicant has not demonstrated that they will suffer substantial loss and the Respondent has demonstrated that he is able to repay the money if the appeal is successful, amount being liquidated sum. In the circumstances I find there is no sufficient case shown to warrant making the orders of stay. The application has no merit and the same is dismissed with costs to the applicant.

Dated this 28<sup>th</sup> January, 2008.

**J.N. KHAMINWA**

**JUDGE**

**Khaminwa – Judge**

**Njue – Clerk**

**Mr. Muraguri**

**Ms Ndorongo.**

**J. N. KHAMINWA**

**JUDGE**