



REPUBLIC OF KENYA

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

**Civil Appeal 6 of 2008**

**(Arising from SRMCC No. 3603 of 2006 of the Senior Resident Magistrate's Court at Mombasa)**

**SHADRACK KWETA MALEVE .....APPELLANT**

**VERSUS**

**AGNES KAVATA MUTUA .....RESPONDENT**

**RULING**

The appellant herein, Shadrack Kweta Maleve, took out a motion under order XLI rule 4 of the Civil Procedure Rules in which he prayed for an order of stay of execution pending appeal. He swore an affidavit in support of the motion dated 24<sup>th</sup> January 2008. Agnes Kavata Mutua, resisted the motion by filing a replying affidavit she swore on 6<sup>th</sup> February 2008.

On the 7<sup>th</sup> day of December 2007, Mr. T.M. Gesora, learned Senior Resident Magistrate, granted the appellant conditional leave to defend Mombasa S.R.M.C.C. No. 3603 of 2006 by directing him to deposit the decretal sum of Kshs.177,200/- in an interest earning account in the joint names of Counsels appearing in the matter. Being aggrieved the appellant filed this appeal. He has now taken the motion dated 25.1.2008, the subject matter of this ruling seeking for an order of stay of execution of the order and the judgment pending the determination of this appeal.

The motion is taken out pursuant to the provisions of Order XLI rule 4 of the Civil Procedure rules. Before granting the order under the aforesaid provisions of law, an applicant must prove the substantial loss he would suffer if the order is not made. The application must be timeously filed and that security for due performance of the decree must be made.

The application was timeously filed hence the remaining two conditions are available for consideration. It is the submission of the appellant that he would suffer substantial loss if he deposits the entire decretal sum immediately. He annexed to the supporting affidavit a copy of his pay slip which shows that he earns a monthly sum of Kshs. 25,000/-. The record shows that the appellant was directed deposit a sum of Kshs.280,155/- as a contribution for the grant of stay of execution within 45 days. His net income is Kshs. 25,000/-. If such an order is made, the appellant will forego his monthly salary for 13 months to raise Kshs. 280,155/- The debt arose from a suit which was instituted against the appellant for damages for the injuries the Respondent sustained as a result of a road traffic accident involving the appellant's motor vehicle registration No. KAP 170X. I agree that the amount in which the appellant was directed to deposit at once is substantial. If ordered to deposit at once that he may end up losing his entire income. On the other hand the law requires that the issue of security should be considered necessary. I think a fair order is to grant the order of stay of execution pending appeal on condition that the appellant do deposit the decretal sum i.e. 280,155/- in an interest earning account in the joint names of the advocates within an extended period of 90 days as opposed to 45 days from the date hereof. In default the application shall stand dismissed.

**Dated and delivered at Mombasa this 8<sup>th</sup> day of April 2008.**

**J.K. SERGON**

**JUDGE**

In open court in the presence of Mr. Kibara h/b Ochwa for Appellant.

N/A for Respondent.