



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Appeal 754 of 2007**

**LEO B. MATUNDURA .....APPELLANT**

**VERSUS**

**TIMONAH MUTWIWA .....RESPONDENT**

**R U L I N G**

The Appellant herein, being dissatisfied with the decree of the lower court passed on 9<sup>th</sup> August 2007, appealed against the same timeously on 6<sup>th</sup> September 2007, Judgment was for general damages of KShs. 1 million, special damages and costs. The claim was based on negligence.

Pending disposal of the appeal the Appellant has sought by notice of motion dated 30<sup>th</sup> October 2007 stay of execution of decree.

There is a supporting affidavit sworn by one MARYANNE MUNG'ARA, the Appellant's learned advocate. It is deponed in that affidavit that the Appellant will suffer substantial loss unless stay is granted, the decretal sum being substantial. It is not apparent why the supporting affidavit could not be sworn by the Appellant himself.

Not unexpectedly, the Respondent (the decree-holder in the lower court) has opposed the application as set out in the replying affidavit filed on 12<sup>th</sup> November, 2007. It is sworn by the Respondent. The main grounds of opposition emerging from the affidavit are –

1. That the Appellant has not stated what substantial loss he may suffer by payment of the decretal sum.
2. That there has been unreasonable delay in bringing the application.

In order to grant stay of execution of decree pending appeal, the court is required by Order 41, rule 4 (2) of the Civil Procedure Rules (the Rules) to be satisfied, firstly, that substantial loss may result to the applicant unless the order is made, and two, that the application has been made without unreasonable delay. The applicant must also give such security as the court may order for the due performance by him of such decree or order as may ultimately be binding on him. I have considered the submissions of the learned counsels in light of these requirements.

Let us start with the issue of delay. As already observed, the decree was passed on 9<sup>th</sup> August, 2007 and the appeal filed on 6<sup>th</sup> September, 2007. But the present application was filed on 30<sup>th</sup> October, 2007, nearly two (2) months after the appeal was lodged. There is no explanation at all in the supporting affidavit for this delay. In the circumstances of this case this is an unreasonable delay that has not been explained.

Regarding substantial loss, beyond the bare statement in the supporting affidavit that the Appellant will suffer substantial loss on account of the decretal sum being substantial, there is no evidence how this substantial loss might occur. It was incumbent upon the Appellant, who as already observed, did not bother to swear an affidavit himself in support of the application, to place before the court appropriate evidence to that effect. It was not sufficient merely to allege substantial loss. There is even no allegation in the supporting affidavit that the Respondent is unlikely to refund the decretal sum should the appeal ultimately succeed.

In these circumstances I must refuse this application. It is hereby dismissed with costs to the Respondent. It is so ordered.

**DATED AT NAIROBI THIS ..... DAY OF MAY 2008.**

**H.P.G. WAWERU**

**JUDGE**

**DELIVERED THIS 30<sup>TH</sup> DAY OF MAY 2008**