

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Appeal 848 of 2007

TOBIAS ODHIAMBO OKETCH.....APPELLANT

VERSUS

MARY ACHIENG.....RESPONDENT

R U L I N G

By a notice of motion brought under Order XLI Rule 4 of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act, Tobias Odhiambo Oketch (hereinafter referred to as the appellant), has come to this court, seeking inter alia an order for stay of execution pending the hearing and determination of his appeal, which he has lodged against the order made by the Principal Magistrate, Mrs Ongeru, on the 11th October, 2007.

The application is supported by grounds stated on the body of the application, and an affidavit sworn by the appellant. The appellant maintains that he has an arguable appeal with overwhelming chances of success. Pursuant to interim orders which were issued on the 12th of October, 2007, the appellant has deposited the decretal sum into court and urges the court to confirm the interim order of stay of execution.

Mary Achieng the respondent herein, strenuously objects to the application. She has sworn a lengthy affidavit in regard to the application. She maintains that no substantial loss will be occasioned to the appellant. She contends that she is a business woman financially able and capable of refunding the decretal sum if required to do so. She maintains that the appellant's appeal is frivolous and not arguable.

It is evident that under Order XLI Rule 4 (1) & (2) of the Civil Procedure Rules, the court can only grant an order for stay of execution where there is sufficient cause and where the appellant has satisfied the court that substantial loss may result unless the order for stay of execution is made. The application for stay of execution must also have been made without undue delay.

I have carefully considered this application. It is true that the appellant has filed a memorandum of appeal dated 12th October, in which it is indicated that she is aggrieved by the orders made by the learned magistrate on the 11th of October, 2007. A copy of that order or decree has not been availed and therefore it is difficult to assess the viability of the appeal. Be that as it may, what matters is that the appellant has filed an appeal which is pending in this court. In her replying affidavit the respondent deponed to various issues in an effort to show that the appellant's appeal was not merited. Those are however matters which are not of relevance at this stage. With regard to this application the main issue is whether the appellant has shown that he is likely to suffer substantial loss unless the orders for stay of execution is granted. At the time of his application the appellant was apparently in civil jail. That is not the position now as the appellant was released pursuant to a conditional order for stay of execution which required him to deposit the decretal sum into court. The appellant has not satisfied this court that there is any loss that he is likely to suffer other than loss of the decretal sum. The respondent maintains that she is a business woman and that she is able and willing to refund the decretal sum should this become necessary. I have no reason to believe that the respondent will not be able to pay this negligible amount of slightly over 40,000/=. For this reason I find no basis for denying the respondent the fruit of her judgment by granting an order for stay of execution. That is to say that I find no merit in this application and do therefore dismiss it.

I order that the decretal sum which was deposited into court be released to the respondent.

Dated and delivered this 15th day of May, 2008

H.M. OKWENGU

JUDGE