



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

**Civil Appeal 191 of 2007**

**UMI KULTHUM ABDULRAHMAN HATIMY .....APPELLANT**

**VERSUS**

**MOHIDIN OMAR MOHAMED .....RESPONDENT**

**R U L I N G**

Umi Kulthum Abdulrehman, the appellant herein, took out a summons dated 5<sup>th</sup> February 2008 in which she prayed for an order of stay of execution of the Kadhi's judgment dated 25<sup>th</sup> October 2007 given in favour of Mohdin Omar Mohamed, the Respondent herein, pending the hearing and determination of this appeal. The summons is supported by the affidavit of appellant sworn on the 5<sup>th</sup> day of February 2008 and a further affidavit she swore on 9<sup>th</sup> April 2008. The Respondent resisted the summons by filing a replying affidavit and a reply to further affidavit.

The dispute started when the appellant herein filed a suit before the Kadhi's Court, Mombasa against the Respondent. In that suit, the appellant sought for restitution of the marital relationship between herself and the Respondent. She also prayed for an alternative order for reconciliation and provision of maintenance of the appellant and their daughter. The Respondent on his part denied the appellant's claim in a defence. He however counter-claimed against the Appellant for interalia payment of rent collected by the appellant since 1992. The Kadhi heard the suit and in the end he dismissed the appellant's action and the Respondent's counter-claim. Being aggrieved the appellant has now preferred this appeal.

The subject matter of this ruling is the summons dated 5<sup>th</sup> February 2008 in which the appellant is seeking for a stay of execution pending appeal. It is the submission of the appellant that the Respondent intends to execute the judgment by collecting rent from their mutual house yet she has a daughter whom the Respondent has refused to maintain. It is the submission of the appellant that unless an order of stay is given she will suffer substantial loss in the sense that the Respondent will interfere with the proceeds of rent she collects for their use and upkeep. She claimed the problem is compounded by the fact that she is unemployed. The Respondent contended on the other hand that the appellant will not suffer substantial loss because she collects rents from Plot No. 24/50 Chaani. The Respondent averred that he is ready to provide for the maintenance of his daughter. He prayed to this court to order for the appellant to provide security for the due performance of the decree. When the summons came up for interpartes hearing, Mr. Jengo, learned advocate for the Respondent indicated that the Respondent was not opposed for the grant of the orders but urged this court to allow the order on condition that 50% of the rent collected be given to the Respondent. I have considered the arguments for and against the summons. The application is largely undisputed save that the Respondent seeks to have 50% of the rent collected. There is no doubt that the application was timeously filed. It is also not in dispute that the appellant has been collecting rent for her own and her daughter's upkeep. It is obvious that if the rent collected and its subsequent use is interfered with, the appellant will suffer substantial loss. What remains to be decided is what form of security should the appellant give. I am alive of the fact that this is a family dispute which should be resolved expeditiously. Though the property in dispute is in the name of the Respondent, there is evidence that the same may turn out to be matrimonial property. The law requires that security must be given in order to sustain an order of stay pending appeal. It should be made clear that such conditions should not be made to make life so difficult for the appellant and without making it difficult for the decree

holder in the end to realize the fruits of his judgment. I am convinced that a fair order in the circumstances of this case is to grant the order for stay of execution which I hereby do on condition that the appellant deposit 40% of the monthly rent received in an interest earning account in the joint names of the parties and or advocates. In default the application shall stand dismissed and the interim order of stay deemed as discharged. Costs of the application shall abide the outcome of the appeal.

**Dated and delivered at Mombasa this 24<sup>th</sup> day of July 2008.**

**J.K. SERGON**

**J U D G E**

In open court in the presence of Mr. Khatib for the Respondent and the appellant in person.