

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

Civil Appeal 952 of 2007

TABITHA KEMUNTO MASENGEAPPELLANT

VERSUS

DR. WALTER KONYA.....RESPONDENT

RULING

The issue to be eventually decided in this appeal is whether or not the Appellant, TABITHA KEMUNTO MASENGE, is the same person as the defendant/judgement-debtor in the lower court, TABITHA OUMA. The Appellant asserts that she is not; the Respondent, who is the plaintiff/decree-holder in the lower court, asserts that she is. It is an issue that cannot be decided in the present application (by notice of motion dated 21st December, 2007) in which the Appellant seeks the main orders, in effect, that execution against herself of the decree of the lower court be stayed pending disposal of her appeal. The Respondent has opposed the application.

I have read the supporting and opposing affidavits. I have also given due consideration to the submissions of the learned counsels appearing. No authorities were cited; but hardly any are necessary. The stay sought will not be granted unless the court is satisfied that substantial loss may result to the Appellant unless the order is made, and that the application has been made without unreasonable delay. The Appellant must also give such security as the court may order for the due performance of such decree or order as may ultimately be binding on her. See **Order 41, rule 4(2)** of the **Civil Procedure Rules** (the Rules).

The appeal was prompted by the dismissal by the lower court of the Appellant's objection to attachment of her property in execution of decree. That dismissal was on 13th November, 2007. She filed the appeal on 21st November 2007, well-within time, and the present application on 24th December, 2007. Before she filed the application she appears to have made, through her counsel, the false start of filing in this court notice of objection to attachment under **Order 21, rule 53** of the Rules. In the circumstances of this case, I do not consider that there has been any unreasonable delay in bringing the application.

Regarding substantial loss, all the Appellant has stated is that she will suffer irreparable loss; there is no evidence of this loss. But, considering that her case is that she is not the judgement-debtor, the court will facilitate her to exercise her undoubted right of appeal without the requirement that she pays the decretal sum first. However, this being a money decree, the funds should be readily available to the Respondent in the event that the appeal is dismissed.

I will therefore grant stay of execution of decree as against the Appellant pending disposal of the appeal upon the condition that the Appellant deposits the principal sum awarded in the decree (KShs. 150,168/00) within fourteen (14) days of delivery of this ruling in an interest-earning account to be opened in the joint names of the advocates for the parties. The account shall be opened in a bank or financial institution to be agreed by the parties. If there shall be no agreement in that regard, the court shall appoint the bank or financial institution. In default of deposit as above, the stay of execution now granted shall stand revoked, and the Respondent shall be at liberty to proceed with execution against the Appellant. Costs of this application shall be in the appeal. It is so ordered.

DATED AT NAIROBI THIS 11TH DAY OF JULY 2008.

H.P.G. WAWERU

JUDGE.

DELIVERED THIS 11TH DAY OF JULY 2008.