

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

Civil Appeal 189 of 2008

LEVI OMONDI AMEKA.....APPLICANT

VERSUS

SOUTHERN CREDIT BANKING

CORPORATION LTD.....RESPONDENT

R U L I N G

By a notice of motion filed on 20th June, 2008, Levi Omondi Ameka seeks orders of stay of execution of the decree in Milimani CMCC No.10508 of 2007 pending the hearing and determination of his appeal which he has filed against the said decree. The applicant contends that he will suffer substantial loss if the order for stay of execution is not granted as chances of recovering the amount from the respondent are minimal.

The respondent Southern Credit Banking Corporation Ltd objects to the application. A replying affidavit has been sworn by James Mutua, the respondent's legal officer, averring *inter alia*, that the applicant has not demonstrated the substantial loss that may result to him if the order for stay of the execution of the decree in Milimani CMCC No.10508 of 2007 is not granted. The deponent further swears that the respondent is a banking institution having nine branches across the country, holding deposits from members of the public and account holders and also having assets. It is therefore maintained that the respondent is capable of easily refunding the decretal amount should the applicant be successful in his appeal. The applicant also contends that the application has not been filed without undue delay as required.

I have carefully considered this application. Under Order XLI Rule 4(2) of Civil Procedure Rules this court can only grant an order for stay of execution if it is satisfied that substantial loss may result to the applicant unless the order is made, and that the application has been made without unreasonable delay. It is also necessary that such security as the court may require be provided by the applicant. In this case, the applicant maintains that he will suffer substantial loss and prejudice if execution is allowed to proceed. This is because he will be required to pay the decretal sum, and if successful on appeal, he would have to go through the onerous process of commencing proceedings for recovery or refund of the money paid to the respondent whose future financial position and standing cannot be guaranteed or ascertained. I do note that the respondent is a financial institution. The applicant has not demonstrated that the respondent is incapable of refunding the decretal sum which is an amount less than Kshs.300,000/=. It is not enough merely for the applicant to aver that he may have difficulties in securing refund of the decretal sum should he be successful on appeal. The applicant must show that he has reasonable grounds for this apprehension. Such grounds have not been revealed. For this reason, I find that the applicant has not satisfied this court that he will suffer substantial loss if the order for stay of execution is not granted. I find no merit in this application and do therefore dismiss it with costs.

Dated and delivered this 15th day of October, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Mrs. Githaiga for the applicant

Mwaniki for the respondent