



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

**Civil Appeal 465 of 2008**

**HON. PHOEBE ASIYO.....1<sup>ST</sup> APPELLANT**

**DR. AKINYI NZIOKI.....2<sup>ND</sup> APPELLANT**

**DR. JACQUELENE ODUOL.....3<sup>RD</sup> APPELLANT**

**MRS JANE OGOT (As the National Officials**

**of the Kenya Women's Political Caucus).....4<sup>TH</sup>**

**APPELLANT**

**VERSUS**

**MARTIN NJALALLEH.....RESPONDENT**

**R U L I N G**

By a notice of motion filed on 4<sup>th</sup> September, 2008, the applicants who are officials of the Kenya Women Political Caucus seek an order for stay of execution of the decree and or orders arising from the judgment delivered on 15<sup>th</sup> August, 2008 in Nairobi CMCC No.13530 of 2005. The application is supported by an affidavit sworn by Phoebe Asiyo.

Being aggrieved by the judgment of the lower court, the applicants have filed a memorandum of appeal raising 10 grounds.

The applicants maintain that should the orders of stay of execution not be granted, the organization stands to suffer substantial loss. This is because the respondent Martin Njalalleh in whose favour the judgment was given is a man of straw and the applicants are apprehensive that should they be successful on appeal, they will not be able to recover the decretal sum from the respondent.

In support of the application Miss Migiro relied on the following authorities: -

- 1. *New Stanley Hotel Ltd vs Arcade Tobacconist (1996) KLR 757.***
- 2. *Visram Ravji Halai & Another vs Thornton & Turpin (1963) Ltd Civil Application No.15 of 1990.***
- 3. *Lalji Builders Contractors vs Nairobi Golf Hotels Ltd HCCC No.1900 of 1995.***

#### 4. *Swapan Sahdan Bose vs Ketan Surendra Somaia*

***HCCC No.164 of 2004.***

She submitted that the apprehension of the applicant was not unfounded and that the burden was upon the respondent to demonstrate to the court the resources that he has. She maintained that the applicant had fulfilled all the requirements for an order of stay of execution.

The application was opposed by the respondent through a replying affidavit sworn by the respondent. The respondent maintained that the application was an afterthought intended to delay the respondent from realizing the fruits of his judgment. The respondent maintained that he was a man of means with a stable source of income and was fully capable of remitting the decretal sum to the appellant.

Miss Wambua who appeared for the respondent, relying on ***Jethwa vs Shah T/A Supreme Styles (1989) KLR 198***, submitted that the burden was upon the applicant to establish to the court what they contend that the respondent is not a man of means. Miss Wambua also relied on the case of ***Patani & Another vs Patani (2003) KLR 580***.

I have carefully considered this application. The conditions of granting an application for stay of execution pending appeal in the High Court are clearly provided for under Order XLI Rule 4(2) of the Civil Procedure Rules. These are well captured in the case of ***Visram Lavji Halai & Another vs Thornton & Turpin 1963 Ltd, Civil Application No.15 of 1990*** where it was held as follows:

***“The High Court’s discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly the applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay.”***

Substantial loss is defined in the same suit to mean that if the appeal succeeds the respondent will not be in a position to make full restitution. In this case, the applicants contend that the respondent is not only impecunious but is also a man of straw. The applicants have not stated the basis for their conclusion. The applicants’ counsel is however throwing the ball to the respondent contending that the burden is upon the respondent to demonstrate to the court the resources that he has.

The respondent on his part has deposed in his affidavit that he is a man of means with a stable source of income and therefore capable to remit the decretal sum to the applicants should that need arise. The respondent has not however, revealed his source of income nor has he demonstrated his capability to pay the decretal sum.

As was stated by the Court of Appeal in ***National Industrial Credit Bank Ltd vs Aquinas Francis Wasike & Another C.A. No.(Nai) 238 of 2005***, it is unreasonable to expect the applicant to know in detail the resources owned by the respondent. The applicants have expressed a reasonable fear that the respondent will be unable to pay back the decretal sum. The respondent ought to have gone beyond merely asserting that he is capable of refunding the decretal sum, by demonstrating that he is able and capable of refunding the decretal sum. I am satisfied that the applicants’ apprehension is not unfounded. It is however, also necessary to protect the interests of the respondent who has a judgment in his favour. For these reasons, I order that a stay of execution of the judgment delivered on 15<sup>th</sup> August, 2008 in CMCC No,13530 of 2005 (Milimani) shall issue on the following conditions: -

- (1) That the applicants shall deposit the decretal sum into an interest earning account in the joint names of the parties’ advocates within 15 days from the date hereof.
- (2) That the applicants shall file and serve a record of appeal within 90 days from the date hereof.
- (3) That the applicants shall take all necessary action to facilitate the speedy disposal of this appeal.

(4) If the applicants fails to comply with condition No. (1) and (2), the prayer for stay of execution shall lapse.

Those shall be the orders of this court.

**Dated and delivered this 13<sup>th</sup> day of October, 2008**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Miss Migiro for the applicants

Miss Wambua for the respondent