

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 416 of 2008

DIAMOND SYSTEMS LTD..... APPELLANT

VERSUS

ROSE MUTHONI NDEGWA.....RESPONDENT

R U L I N G

Diamond Systems Ltd the applicant herein seeks an order for stay of execution pending the hearing and determination of the appeal. Although the application does not state which order it is sought to be stayed, the application is supported by an affidavit sworn by Lazarus Njagi Migwa, the appellant's managing director from which it is apparent that the applicant seeks to stay the judgment and decree entered against it in Nairobi CMCC No.4731 of 2004. The applicant maintains that Rose Muthoni Ndegwa the respondent is not a woman of means and would not be able to refund the decretal sum should the applicant succeed in its appeal. Pursuant to orders issued on 12th of August, 2008, the appellant has deposited the decretal sum of Kshs.388,998/= into court.

The respondent objects to the application. She has sworn a replying affidavit contending that she is currently employed as an Assistant Registrar at the Jomo Kenyatta University of Agriculture and Technology where she is earning a gross salary of Kshs.127,666.50. She is also a part-time lecturer at the Kenya College of Accountancy where she earns a gross salary of Kshs.55,133/=. The respondent also belongs to Fundi Lima Sacco Society Ltd where she has shares worth Kshs.244,140/=. She has also other assets including a piece of land registered as LR No.11407/485. the respondent therefore maintains that she is able and willing to refund the decretal amount if required to. Relying on *HCCA No.430 of 2002 Shares Supermarket ltd vs Bandbond Clark Kenya Ltd* and *HCCA No.548 of 2004 Allan Kiman Mburu vs Franklin Mugeni Mati*, counsel for the respondent urged the court to find that the appellant has not demonstrated that it will suffer substantial loss if the order for stay of execution is not issued.

I have carefully considered the application before me and the affidavits sworn in support and in reply. Under Order XLI Rule 4(2) of the Civil Procedure Rules an applicant for an order of stay of execution has to satisfy the court that unless the orders of stay of execution is issued the applicant will suffer substantial loss. In this case, the applicant contended that it will suffer substantial loss as "*the respondent is not a lady of means and once she lays her hands on the decretal amount the appellant might not be able to recover the same once he succeeds on appeal*" That allegation has however completely been negated by the respondent who has produced evidence showing that she has a steady source of income as an employee of Jomo Kenyatta University of Agriculture and Technology and also as a part-time lecturer at the Kenya College of Accountancy. The respondent has also shown that she has other investments. In the circumstances the applicant's apprehension that the respondent will not be able to refund the decretal sum if the appellant is successful in his appeal is completely unfounded. I find no reason therefore to deny the respondent the benefit of the judgment which was entered in her favour. Accordingly, the notice of motion dated 12th August, 2008 is dismissed with costs.

Dated and delivered this 21st day of November, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Kimathi H/B for Muriuki for the appellant

Advocate for the respondent absent