

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL MISC. APPLI. 85 OF 2006

JOHN MWANGANGI APPLICANT

VERSUS

ROSE NDILEVE RESPONDENT

RULING

1. The Application dated 28/6/2006 is a Notice of Motion under Order XLIX Rule 5 of the Civil Procedure Rules and Section 75 and Section 79 G of the Civil Procedure Rules. The only substantive prayer left to address is prayer 3 thereof in which the Applicant seeks an order of stay of execution pending the hearing of the Appeal herein.

2. A party seeking such an order needs to appreciate that although discretion under Order XLI Rule 4 is wide, it is fettered by Rule 4 (2) thereof which provides as follows:-

“4 (2). No order of stay of execution shall be made under subrule (1) unless-

a) the court 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; and

b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

3. In his Supporting Affidavit sworn on 28/6/2006, the Applicant only says at paragraph 10 thereof that he will **“suffer a lot of injustice unless this court grants the prayers sought”** and at paragraph 12 that the Respondent **“can take out execution proceedings any time.”** No comment whatsoever is made as to what substantial loss he may suffer unless the order is made and I wholly agree with the Respondent in his Replying Affidavit sworn on 15/8/2008 that not one sufficient ground has been advanced to warrant grant of the Application and specifically the orders of stay of execution which is what presently in issue. I say this because substantial loss has often been said to be the cornerstone of any application for stay of execution and without that issue being properly proved in evidence, then the whole application will fail even if it was brought timeously – See – **New Stanley Hotel Ltd vs Arcade Tobacconists Ltd (1986) KLR 757.**

4. One other thing has to be said about the Application; the Applicant had previously applied and was granted an order to liquidate the decretal sum in monthly instalments of Kshs.5,000/=. It is in utmost bad faith to lead the Respondent down that path then turn round and seek a blanket order of stay of execution. If I made an order of deposit of security it would certainly prejudice the Respondent and without justification.

5. I see no reason whatsoever for granting the orders sought and will instead dismiss the Application with costs.

6. Orders accordingly.

Dated and delivered at Machakos this **11th** day of **November** 2008.

ISAAC LENAOLA

JUDGE

In presence of: **Mrs Mutua for Applicant**

Mr Musyoka h/b for Mr Mung'atta for Respondent

ISAAC LENAOLA

JUDGE