



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 264 of 2008

JASON ONDABU T/A ONDABU & CO. ADVOCATES.....APPELLANT

VERSUS

DR. MOSES KINUTHIA.....RESPONDENT

R U L I N G

By a notice of motion dated 23<sup>rd</sup> September, 2008, brought under Order XLI Rule 4 of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act, Jason Ondabu t/a Ondabu & Co. Advocates, (hereinafter referred to as the appellant), is seeking *inter alia*, an order for stay of execution of the decree in Milimani CMCC No.6546 of 2007 pending the hearing and determination of his appeal. The appellant has filed an appeal in which he seeks to have the order made in Milimani CMCC No.6546 of 2007, striking out his defence and entering judgment for the respondent Dr. Moses Kinuthia for the sum of Kshs.100,000/=, set aside. The appellant contends that his appeal has high chances of success and unless the order for stay of execution is granted, the same will be rendered nugatory.

Following orders issued by Visram J. on 24<sup>th</sup> September, 2008, the appellant deposited a sum of Kshs.50,000/= as security. The appellant has annexed a copy of his bank statement to demonstrate that he is a person of means and will therefore have no difficulties in paying the decretal sum should that become necessary. The appellant maintains that although the respondent is a medical doctor, there is a complaint against him before the Medical Practitioners and Dentist Board, which might affect his ability to repay the decretal sum if paid to him. Counsel for the appellant relied on the following cases: -

(i) *Daima Bank vs Samuel Kamau Macharia HCCC No.628 of 1998;*

(ii) *Nuru Chemist Ltd & Another vs National Bank of Kenya Ltd Civil Application No.Nai266 of 2002.*

The respondent has filed a replying affidavit in which he denies the appellant's allegation, maintaining that he runs a successful medical practice at IPS Building along Kimathi Street, and that there is therefore no likelihood of his being unable to refund the decretal sum should that become necessary. Mr. Oluoch who appeared for the respondent submitted that the appellant had not satisfied the requirements of Order XLI Rule 4(2) of the Civil Procedure Rules as he has not established substantial loss nor has he demonstrated that the respondent is so impecunious as to be unable to refund the decretal sum if required to. Counsel relied on *Civil Application 26 of 1989 Vallbhadas Raghavji Jethwa vs Chashikant Zaverchand Vaghji Shah t/a Supreme Styles.*

I have carefully considered the application, the affidavits in support and the submissions of counsels as well as the authorities cited. Under Order XLI Rule 4(2) of the Civil Procedure Rules, an order for stay of execution can only issue;

(a) *Where the court is satisfied that substantial loss may result to the applicant unless the order is made and the application has been made without undue delay;*

(b) *Such security as the court orders for the due performance for such decree or order as may*

***ultimately be binding on him has been given by the applicant.***

In this case, the decree is slightly over 100,000/=. It is not disputed that the respondent is a medical doctor who has been in private practice. Although it is contended that a complaint has been lodged against him before the Medical Practitioners and Dentist Board, there is no evidence that the complaint is of such a grave nature as to be likely to lead to the respondent losing his practicing licence. The appellant has not demonstrated that he will suffer substantial loss if the order for stay of execution is not granted nor has the appellant demonstrated that the respondent will not be able to refund the decretal sum if required to, such as to render the appeal if successful nugatory. For these reasons, I find no merit in this application and do therefore dismiss it.

**Dated and delivered this 5<sup>th</sup> day of December, 2008**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Advocate for the appellant absent

Oluoch for the respondent