



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**Civil Appeal 110 of 2006**

**PETER SUTHERLAND HUTCHENCE .....PLAINTIFF**

**VERSUS**

**RENATE WALTER HUTCHENCE .....DEFENDANT**

**R U L I N G**

The subject matter of this decision is the motion dated 1<sup>st</sup> august 2006 taken out by Peter Sutherland Hutchence, the appellant herein. In this motion the appellant seeks for an order of stay of execution of the judgment of the Senior Resident Magistrate's sitting at Kwale delivered on 19<sup>th</sup> July 2006 pending Appeal. The appellant filed an affidavit he swore on 1<sup>st</sup> August 2006 in support of the motion.

When the motion came up for hearing inter partes, Miss Osino, learned advocate for Renate Walter Hutchence, the Respondent herein, was permitted to submit from the bar in opposing the application despite the fact that the Respondent had not filed a response.

The history of this began when the Respondent filed a matrimonial cause before the Kwale Senior Resident Magistrate's court against the appellant. The learned Senior Resident Magistrate heard the matrimonial cause and gave his judgment on 19<sup>th</sup> July 2006. In that judgment the appellant was condemned to interalia pay the Respondent a sum of Kshs.50,000/- per month as maintenance. The appellant was aggrieved by the aforesaid decision hence this appeal. He has now filed the aforesaid motion pursuant to order XLI rule 4(1), (2) and (6) of the Civil Procedure Rules in which he seeks for an order for the stay of the judgment pending the hearing of the appeal.

It is the submission of Mr. Satchu for the appellant that he has an arguable appeal which will be rendered nugatory unless the stay order is given. The appellant has proposed to pay a monthly sum of Kshs.25,000/- to the Respondent pending appeal as security.

On her part, Miss Osino urged this court to dismiss the application because the same is unmeritorious. The learned advocate also urged this court to reject the offer on security on the ground that the same was offered from the bar.

When dealing with such an application, this court is guided by the provisions of order XLI rule 4(2) (a) and (b) of the Civil Procedure Rules which read as follows:

“2. No order for stay of execution shall be made under sub rule (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.”**

It is clear from the application that the motion was timeously filed. The applicant's advocate has heavily

dwelt on the arguability of the appeal. That is a fact will be taken into account so as the court is satisfied that the appeal is not frivolous.

I have perused the grounds of appeal set out in the memorandum of Appeal dated 1<sup>st</sup> August 2006 and I am satisfied that the issue as to whether or not the award of Kshs.50,000/- was proved is an arguable point. However, the conditions set out in order XLI rule 4 must be met before granting the orders. The applicant did not address me as to what substantial loss he would suffer if the order of stay is not given. It has not been demonstrated how the applicant would suffer loss at all. In the absence of such proof then I will not exercise my discretion in his favour. It has not been alleged that the respondent is a woman of straw so that if the appeal succeeds she would be unable to refund the amount paid.

It has been stated that the applicant should have proposed the kind of security he intends to offer in writing and not through a verbal offer from the bar. I do not agree with this argument. A careful perusal of order XLI rule 4(b) will reveal that the offer for security does not necessarily have to be in writing. The court has been given a wide discretion to fix the kind of security. Since the applicant has failed to show the kind of substantial loss he is likely to suffer if the order prayed is not given, the motion must fail. In that case, I do not need to consider the kind of security needed. The fact that an applicant is able to give security is not enough. An applicant must show that he is likely to suffer substantial loss which is missing in this matter.

The upshot is that the motion is ordered dismissed with costs to the Respondent.

**Dated and delivered at Mombasa this 9<sup>th</sup> day of February 2007.**

**J.K. SERGON**

**J U D G E**

In open court in the presence of Miss Osino for Respondent and Mr. Kinyanjui for the Applicant