



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

**AT MERU**

**Civil Appeal 35 of 2000**

**((Being an appeal from the judgment by Mr. N. H. Oundu, RM in Civil CaseNo.438**

**of**

**1997 at Meru dated 4.4.1997**

**PAUL KAIMENYI NGUGI ..... 1S APPELLANT**

**KAARIA MBUI MAGAMBO ..... 2ND APPELLANT**

**VERSUS**

**ANTONY KIOGORA(suing thro' his father and next friend**

**RICHARD KITHINJI ..... RESPONDENT**

**RULING**

On 4<sup>th</sup> April, 2000 the court below (Mr. Oundu, R.M) gave judgment for the respondent and against the applicant in the sum of Kshs.90,000/= in general damages and Kshs.6,500/= for special damages.

The applicant was aggrieved by this award and filed an appeal to challenge it. He simultaneously filed an application for stay of execution in the trial court, which application was granted on condition that he deposits the decretal amount in a bank.

He subsequently filed this application once again seeking stay of execution of the decree of the subordinate court. In the application the applicant states that the respondent has threatened to execute yet he has filed an appeal challenging the decree. That the decretal amount is substantial and he is not capable of paying it as he is a primary school teacher. That what this means is that he either goes to civil jail or his property is attached.

That the appeal raises substantial issues, he argues further. The application is opposed by the respondent who avers in a replying affidavit sworn by his counsel that the applicant having been granted a conditional stay was estopped from bringing this application.

These arguments have duly been considered. Order 41 rule 4(1) of the Civil Procedure Rules allows an applicant to apply to the High Court for stay even where the court appealed from has granted or refused a similar application.

The application to this court is not, in view of that provision, *res judicata*. Order 41 rule 4(2) provides for three conditions for the grant of the order of stay of execution. First the court must be satisfied that the application for stay has been brought without unreasonable delay.

Secondly the applicant must demonstrate that he stands to suffer substantial loss if the stay sought is not granted. Finally the applicant must be ready to abide by any orders as to security.

The applicant maintains that either his property will be attached or he will be sent to civil jail. If his property is attached and sold, he will certainly suffer substantial loss as the property will be out of his reach and restitution will not be possible if the appeal succeeds. If he is sent to civil jail, the likelihood of him serving the term before the appeal is heard and determined is real. This is an eventuality that cannot be undone. I am therefore persuaded that substantial loss has been shown.

Regarding delay, judgment in the court below was delivered on 4<sup>th</sup> April, 2004. The applicants application for stay to the subordinate court was granted on 24<sup>th</sup> June, 2004, while the present application filed on 4<sup>th</sup> July, 2004 – less than ten days after the order of the subordinate court. I find that the application has been brought timeously. The applicant has not offered any security. As a matter of fact, he has argued that the conditional stay granted by the subordinate court is onerous.

Sub rule 2 (b) of order 41 rule 4 does not impose a duty on the applicant to give an undertaking to provide security. It provides;

*“(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 the court to place a condition as to security. If the applicant fails to comply with it the stay stands vacated and execution may proceed.

In the result I allow the application for stay and order that there shall be stay of execution pending the hearing and determination of the appeal herein. This order is subject to the applicant depositing in court the equivalent of costs for the appeal to be assessed by the Deputy Registrar of this court, on or before 31<sup>st</sup> May, 2007 failing which this order stands vacated and execution to proceed.

Costs to be in the appeal.

DATED AT MERU THIS 11<sup>th</sup> DAY OF May, 2007

W. OUKO

JUDGE