

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

Civil Appeal 4 of 2007

DR.EMMANUEL SIMIYU SIBALELI.....APPELLANT

VS

HARIK RUSHNA T/A RONAK PHARMACY.....RESPONDENT

RULING

The applicant herein has filed the application dated 18.2.2007 seeking the following orders:

1. *That there be a stay of execution of the order of 12.2.2007 in Bungoma SPM CC No.559 of 2005 and all other consequential orders pending the hearing and determination of this application inter-parties.*
2. *That the Ruling and Order of 12.2.2007 in Bungoma SPMCC NO.559 of 2005 be arrested pending the hearing and determination of this appeal.*

He is also seeking costs of the application. The application is based on the 5 grounds on the face of the application and on the supporting affidavit of Dr. Emmanuel Simiyu dated 19.2.2007. The same is opposed by the respondent vide his replying affidavit dated 16.4.2007. I have keenly considered the application along with the rival affidavits. In brief, the respondent herein had sued the applicant for Ksh.93,500/= before the subordinate court. The applicant is said to have failed to file any defence and so judgment was entered in favour of the respondent herein. The applicant then moved to court seeking for the setting aside of the said judgment. The learned Trial magistrate allowed the application but on condition that the applicant deposited the decretal amount in court within 7 days. He felt aggrieved by the said order and so he filed an appeal against it before this court. First and foremost, I agree with counsel for the respondent that this application is not properly before this court. The appeal against the magistrate's order does not lie as a matter of right under OXLII of the Civil Procedure Rules. Counsel needed to seek the leave of the court before he could file the appeal.

There is no evidence that such leave was sought and allowed. The appeal is not therefore properly before the court and it cannot therefore be said to have chances of success – let alone “*overwhelming*” ones as submitted by counsel. Even if we were to assume that the said appeal is properly before the court, let us see if this application has merit. The same is under OXLI r.4 of the Civil Procedure Rules. Before the court can allow any application under this order, the applicant must satisfy four (4) requirements:

- i) *He must establish sufficient cause.*
- ii) *He must show that substantial loss may result unless the order for stay is granted.*
- iii) *The application must be brought to court without unreasonable delay.*
- iv) *The applicant must give an undertaking to give security for the due performance of such decree or order as may ultimately be binding on him.*

The applicant herein has not even made an attempt however fickle to show the court that he has satisfied these requirements. He has not established sufficient cause whatsoever. He has not even attempted to do

so.

On the issue of substantial loss, he has not shown the court what substantial loss he is likely to suffer if the application is not allowed. It will be noted that the decree herein is a money decree – not a lot of money at that. The applicant has not shown the court that if the money is deposited in court as ordered by the learned trial magistrate, he will suffer any loss. The money will still be intact at the conclusion of the case and if he wins the case, the same will be released to him. Even if the money was to be paid out to the respondent, the applicant has not shown that the respondent is such a man of straw as not to be in a position to refund the same to him in case he wins the case. Whereas the application was filed without undue delay, the applicant has failed in the other test of offering security. He has not even mentioned the issue of security as required under OXLI r.4 (2). Having considered the application and the law applicable in this matter, my considered finding is that the applicant has dismally failed to convince this court that he deserves the orders he is seeking. This application lacks merit and the same is hereby dismissed with costs to the respondent.

W. KARANJA

JUDGE

DELIVERED, Signed and Dated at Bungoma this 13th day of June 2007.