

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL 113 OF 2005

(Being an appeal from the judgment/decree of Hon. A. B. M. Mongare – R. M. Nakuru delivered on 9th June, 2005 in Nakuru CMCC No. 2348 of 2003)

VALLEY BAKERY.....APPELLANT

VERSUS

PATRICK WAFULA MUDOGO.....RESPONDENT

RULING

By a judgment delivered on 25th May 2007 the appellant's appeal was dismissed with costs to the respondent. On 6th June 2007 the appellant filed a notice of appeal against that judgment. The appellant also filed an application by way of notice of motion seeking for orders of stay of execution pending the hearing and determination of the appeal preferred in the Court of Appeal. The reasons advanced by the applicant are stipulated in the body of the application and elaborated in further detail in the supporting affidavit of **Joseph Mongare Apondi** sworn on 11th June 2007. The gist of the matters deposed thereto is that the applicant's motor vehicle registration No. KAN 476Z was attached before a decree was issued. Secondly the appellant has preferred an appeal against the judgment which has overwhelming chances of success. Unless the decree is stayed the appeal will be rendered nugatory and the appellant will suffer irreparable loss as they stand to lose the motor vehicle which will be disposed of any time. The applicant averred that they were ready to deposit security to secure the decretal sum as indeed the decretal sum emanating from the first judgment by the Chief Magistrate's Court was deposited in the joint advocates account.

The application was opposed by counsel for the respondent who argued that should the court exercise its discretion to grant the stay the decretal sum of Kshs 64,700/- with interest should be provided as well as security for the costs in the High Court. Further more the execution became necessary when counsel for the applicant failed to release the sum held as security.

The principles to bring to bear when determining whether the court should exercise its discretion to grant the order of stay of execution are that the court must be satisfied that substantial loss, or the appeal would be rendered nugatory unless the order is granted. Secondly the court should order security for due performance of the decree. This must also be considered alongside other circumstances of each case including the fact that a successful party is also entitled to the fruits of his litigation. In this case, the decretal sum is a partly sum of Kshs 64,700/- with costs. This sum of money was deposited with counsel for both the appellant and the respondent. If counsel for the appellant had co-operated to release the sum deposited as security when the appeal was dismissed, it would not have been necessary for the respondent to execute the decree by way of attachment of the motor vehicle. If the counsel failed to comply with an earlier order to release the security, I do not see why this court should exercise its discretion to order for security once more, when the appellant failed with no reason to comply with the earlier order. I am not inclined to exercise my discretion in favour of the application which I hereby dismiss with costs to the respondent.

Ruling read and signed on 9th day of November, 2007

M. KOOME

JUDGE