



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**Civil Case 45 of 2004 (OS)**

**JOSEPH CHESIRE SIRMA.....PLAINTIFF**

**=VERSUS=**

**ERICK KIPKURGAT.....DEFENDANT**

**RULING**

This is an application under the provisions of Rule 5 (2) of the Court of Appeal rules, order 56, Rule 1 Civil Procedure Rules and Section 3 and 3 A of the Civil Procedure Act for an order that there be a temporary stay of proceedings of Eldoret HCCC NO. 45 of 2005 pending the hearing and determination of Civil Appeal No.2 of 2007.

The Applicant contends that the intended appeal if successful will be rendered nugatory unless temporary orders of stay of any further proceedings in this case is granted. He also says that the appeal is arguable and has overwhelming chances of success.

The application was opposed by the Respondent. I agree that the application has been brought under the wrong rules i.e Court of Appeal Rules. This Court has no jurisdiction to hear any application under the said rules.

In exercise of this Court's inherent jurisdiction and discretion, I shall deem that the application has been brought under the provisions of Order 41, Rule 4.

For this Court to grant a stay of execution or proceedings, the Court must satisfy itself that:

(a) Substantial loss may result to the applicant unless the Order is made and that 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.

I have considered the Ruling dated 22/02/2005 being appealed, the application for stay and the affidavits. I have also taken into account the submissions by Counsel. The effect of the Court rulings is that the proceedings which had been commenced by way of Originating Summons is now to proceed as if it was commenced by way of Plaint. This means that there are no final orders or judgment against the Defendant / Appellant irrespective of some of the tentative findings, comments, observations, or otherwise of the Honourable Judge.

This is a 2004 case relating to movables whose conditions can deteriorate or their values diminished.

In what way would the appeal be rendered nugatory if the proceedings went ahead? The onus is on the Applicant to demonstrate this. In the case of DAVID MORTON SILVERSTEIN -V- ATSANGO CHESONI, CIVIL APPL. NO. NAI 189 OF 2001, the Court relying on another case K.C.B. -V- BENJOH AMALGAMATED LTD & ANOTHER – Civil Application No. NAI No. 50 of 2001 (29/2001 UR) observed:

**“ What will happen if we do not grant the stay sought in that the Appeal in the High Court will be heard and may well be determined. But when the appeal already lodged is heard, determined and, if it succeeds, what would automatically follow is that the proceedings in High Court will have been rendered unnecessary, but an appropriate order of costs can be made to remedy that. However, the appeal in this Court would not have been rendered nugatory.”**

I am bound to apply the said paragraphs which are apt and sound. This Court will grant stay of proceedings pending appeal in very exceptional cases.

In this case there will be no substantial loss. It would be more just to proceed with the trial and the evidence to be preserved also in case the appeal is unsuccessful.

I dismiss the application with costs to the Respondent.

**DATED AND DELIVERED AT ELDORET ON THIS 10TH DAY OF DECEMBER 2007.**

**M.K. IBRAHIM,**

**JUDGE.**

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**FURTHER ORDER**

Application dated 20<sup>th</sup> July, 2005 shall be heard on 26<sup>th</sup> February, 2008 at 9.00 a.m. before any Court. Interim Orders are to remain in force until then.

**M.K. IBRAHIM,**

**JUDGE.**