



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT KAKAMEGA

Civil Appeal 5 of 2005

JOEL K.  
KOECH .....APPELLANT

V E R S U S

JEMIFA ISANGALO ISEMELE & 4  
OTHERS .....RESPONDENT

R U L I N G

The Applicant/Appellant, JOEL KOECH, applied to this court on 01.02.2005 for an order of stay of execution of the decree in Kakamega SPMCC No.1372 of 1995 in which judgment was delivered on 15-12-04. He submitted in support of the application that he had filed appeal which had chances of success, and that he would suffer irreparable loss if stay was not granted. The application was supported by the affidavit of Charles Lutta Kasamani, an advocate.

The Respondents, JENIFA ISANGALO ISEMELE & 4 OTHERS opposed the application by filing three grounds of opposition in which they contended that the application was defective and that the appeal had no merit and that the applicant had not met the criteria for the grant of the order for stay.

When the application came up for hearing before me, Mr. Ombaye, learned counsel who held brief for Mr. Kasamani for the Applicant, urged the court to grant the order sought and relied on the affidavit of Mr. Kasamani in support of the application.

The advocate for the Respondents who did not attend court on the hearing of the application.

I have duly perused the application and the grounds of opposition and given due consideration to the submission by the applicant's advocate.

The grant of stay under rule 4 of Order XLI of the Civil Procedure Rules on which the application was premised is discretionary on the court. An applicant for an order for stay under Rule 4 (supra) must satisfy the court:

- (1) that the applicant has already filed an appeal and***
- (2) that there is sufficient cause for the grant of the order and***
- (3) that substantial loss may result to the applicant unless the order is made, and***

**(4) that the application was made without unreasonable delay and**

**(5) that the applicant will furnish security for the due performance of the decree or order that may ultimately be binding on the applicant.**

The judgment of the lower court binds the applicant to pay to

the Respondents a total of Shs.350,000/= plus costs. Regrettably the advocate for the Plaintiff does not appear to have extracted a formal decree yet. Nor have I seen a Certificate of Taxation of the costs in this matter.

However, considering the application, I am satisfied that the Applicant has met the criteria set under Order 41 Rule 4 of the Civil Procedure Rules. I allow the application and order that there shall be stay pending appeal providing that the Applicant pays into a joint account to be in the names of the Advocate for the Applicant and the advocate for the Respondent the sum of Shs.150,000/= as security within thirty (30) days from the date of this order failing which the order for stay shall stand discharged without any need for an application to that effect. The costs of the application shall be borne by the Applicant.

*Dated at Kakamega this 24<sup>th</sup> day of February 2006*

**G. B. M. KARIUKI**

J U D G E