REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 554 of 2005

JUDSON ORIEMA OKOTH & ANOTHER T/A OKOTH & KIPLAGAT

**ADVOCATES…...…....
PLAINTIFF**

VERSUS

**NATIONAL HOUSING CORPORATION...…..……………
DEFENDANT**

RULING

This is an application expressed to have been brought under the provisions of Order III Rule 9A Order XLI Rule 4 of the Civil Procedure Rules Section 3A of the Civil Procedure Act and all enabling provisions of the Law. Prayers 1 and 2 have already been dealt with. What remain to be determined are prayers 3, 4 and 5 of the application. The primary prayer left for determination is however prayer 4. This is the prayer that has been brought under Order 41 Rule 4 of the Civil Procedure Rules. It is seeking a stay of execution of the judgment and decree herein pending the hearing and determination of an appeal.

The grounds upon which the application is made are that the applicant/defendant has lodged an appeal against the judgment and decree given on 8.12.2005 and shall suffer substantial loss unless a stay of execution pending appeal is granted, that the applicant has an arguable appeal with good chances of success; that the application has been made promptly without delay and that the applicant is willing to provide security for the due performance of the decree as may ultimately be binding on it. The application is supported by an affidavit sworn by one William K. B. Keitany the defendant's Senior Legal Officer. Exhibited to the said affidavit is a copy of a Notice of Appeal dated 21.12.2005.

The respondent/plaintiff objects to this application on several grounds. The chief grounds are that the applicant is acting with mala fides; that the intended appeal is not arguable; that the judgment entered and sought to be challenged arose from Bills of Costs that were taxed by consent; that an application for leave to file references out of time and for stay of proceedings was withdrawn paving way for the judgment that was subsequently entered; that the judgment sum has never been contested; that the applicant cannot suffer any prejudice, and that it is the respondent that stands to suffer serious prejudice if the stay sought is granted as the tax portion of the judgment sum will attract further interest and penalties.

For the applicant to succeed in this application it had to satisfy the provisions of Order 41 Rule 4 of the Civil Procedure Rules. Under this rule the applicant was required to show sufficient cause to warrant the order of stay of execution. In addition it should have shown that unless stay is granted, substantial loss may result to it and that the application has been made without unreasonable delay and finally it had to give such security for the due performance of the decree as may ultimately be binding on the applicant. These are the parameters within which this application should have been argued. But both counsels could not resist arguments on whether or not the intended appeal is arguable. In my view "**sufficient cause"** is not synonymous with arguable appeal or meritorious appeal. As to whether an appeal is arguable or not is a consideration when such an application is being considered by the Court of Appeal. In my view the reason for not considering merits or demerits of an appeal at this stage is obvious. It would put the trial judge in a bind and may even be embarrassing. In determining this application therefore, I will refrain

from considering the chances of the intended appeal.

The applicant in the application at hand moved to the court on 22.12.2005. This was 14 days after the judgment that is sought to be stayed. In my view the applicant is not guilty of unreasonable delay. The applicant says that it is not clear if the respondent would be able to repay any sums paid to him if the intended appeal is successful as the Kenya Revenue Authority has placed a lien over the respondent's income upto the sum of KShs.11,000,000/= and the appeal may therefore be rendered nugatory. This with respect to the applicant, is not evidence that the respondent is a man of straw. Indeed in my view it illustrates the exact opposite that the respondent is a man of means. In the replying affidavit filed on behalf of the respondent, it is deponed at paragraph 54 that as a dutiful tax payer the respondent declared to Kenya Revenue Authority as required by law that the sums in the said judgment were expected from the applicant and the tax portion thereof amounts to KShs.11,000,000/= which is the sum for which the lien has been levied. At paragraph 60 of the same affidavit the respondent has deponed that he has been recognized by Kenya Revenue Authority as the highest individual tax payer for the years 2002/3 and 2004/2005. Those averments have not been controverted. The averments in my view show that if the applicant succeeds in the intended appeal, the judgment sum will not be beyond the means of the respondent. This finding shows that I am not satisfied that the applicant will suffer substantial loss if the order of stay is not granted. Besides this finding, I ask myself what a successful appeal will mean to the applicant. It seems that the applicant would have had no complaint if the sums are payable to the firm of Kiplagat and Associates. The applicant if it succeeds in the intended appeal will not be protecting sums due to it but to another firm which firm has not lodged any claim against it. It is for these reasons that I find the offer to pay the judgment sum into a joint interest earning account of the advocates unattractive. It is also illustrative that on 8.12.2005, when the judgment in question was delivered counsel for the applicant applied for stay of execution for 30 days. The stay was not sought pending any intended appeal or the filing of a formal application. Stay of execution was sought to allow the Board or the applicant a state corporation to sanction payment. I granted 21 days stay as I believed the submission made to me by counsel for the applicant. It now appears as if the applicant was not altogether candid. Be that as it may, I cannot see any difficulties in the applicant recovering the judgment sum in the event of its intended appeal turning out to be successful. It is therefore my view that the application sought is not merited. Accordingly it is dismissed with costs.

DATED AND **DELIVERED** AT **NAIROBI** THIS **29th DAY** OF **MARCH, 2006.**

F. AZANGALALA

JUDGE

29/3/2006

Read in the presence of:-