



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**Civil Appeal 31 of 2005**

**ANTONY BACHIA ..... APPELLANT**

**VERSUS**

**JOHN M. WANJAO ..... RESPONDENT**

**RULING**

Order XLI rule 4 of the Civil Procedure Rules stipulates that:

*“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.*

*(2) No order for stay of execution shall be made under subrule (1) unless-*

*(a) the court is satisfied that substantial loss may result*

*to the applicant unless the order is made and that the 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.*

*(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.*

*(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the rules of that court notice of appeal has been given.*

(5) *An application for stay of execution may be made informally immediately following the delivery of judgment of ruling.*

(6) *Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”*

John Michael Wanjao obtained judgment against Anthony Bachia on 1/2/2005. His prayer in the subordinate court against Bachia in a suit which was filed on 24/10/94, was for judgment in the sum of K. Shs. 100,000/- interest thereon, costs and interest thereon at court rates. He based his claim on an advance made to Bachia but which the latter had failed/refused or neglected to refund.

Bachia who felt aggrieved by the said judgment, preferred his appeal and filed his Memorandum of Appeal. He also applied for stay of execution pending the hearing and determination of his appeal on 6/5/2005, which application was declined.

He has now moved this court under the aforementioned Order of the Civil Procedure Rules, in which he seeks “*a stay of execution and/or further execution of the decree*” in the aforementioned subordinate matter pending the hearing and determination of his appeal.

As I discern it, his main ground is that unless he is granted the order of stay which he now seeks, he stands to suffer substantial loss and the appeal would be ‘rendered useless’.

Wanjao, who I shall now refer to as “the respondent”, opposes the application on the basis of the grounds that he ought to be allowed to enjoy the fruits of his judgment. He has also deposed that he will be able to refund the decretal sum should the need ever arise and in support of that deposition, he has attached copies of several Certificates of Leases to show that he is the registered owner of at least nine parcels of land, all of which are located within the Municipality of Eldoret.

In an application of this nature, it is incumbent upon Bachia who I shall now refer to as ‘the applicant’, to satisfy the court that substantial loss may result to him unless the order is made. He should also show that the application has been made without unreasonable delay, and further that he will be able to offer any security as the court may require of him. Apart from the aforementioned conditions, all that I need to know is that there is an appeal on the record, which I have already found, already exists. It is not for me at this state to try and establish whether he has an appeal on the merits.

The next issue for my determination is whether or not this application is meritorious.

The applicant has shown his willingness to deposit the entire amount in an interest earning joint account, to be held in the names of both parties. The issue that comes to mind then is whether the appeal would be rendered nugatory if I were not to grant the order which he seeks.

It is trite that a party should be allowed to enjoy the fruits of his judgment unless it is shown that he is a man of straw and would not be able to pay the decretal sum in the eventuality of the applicant succeeding in his appeal.

The fact that the claim is over fourteen years ago has not escaped my attention, nor is the fact that the respondent has several properties which are situate within the jurisdiction of this court. He also has it under oath that he will be able to refund the decretal sum should the need arise.

Having taken the pleadings as well as the submissions of both counsel into account, I am of the humble opinion that the respondent can not be described as a man of straw. He has the means and would in the circumstances be able to pay the decretal sum back should the need arise. The applicant has not demonstrated that I ought to exercise my discretion in his favour.

I do in the circumstances dismiss his application with costs.

Dated and delivered at Eldoret this 11<sup>th</sup> day of April 2006.

JEANNE GACHECHE

Judge

Delivered in the presence of:

Mr. Kuloba for the appellant/applicant

Miss Rotich for the respondent/respondent