



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Appeal 751 of 2005

SIEGFRIED HEINZ RAUSCH

ROSELINE RAKII RAUSCH..... APPELLANTS

VERSUS

JEDIDAH WANJIKU KANYUA

IRENE WAMBUI KANYUA..... RESPONDENTS

R U L I N G

By their Notice of Motion filed on 11/11/05, under Order 41 rule 4 (1) & (2) of the Civil Procedure Rules, the appellants/applicants herein seek the following orders:

- 1. *Already spent***
- 2. *Already spent***
- 3. *Stay of Execution of the Decree herein pending the determination of the appeal herein.***
- 4. *Costs in the cause.***

The application, supported by the Affidavit of Roseline Rakii Rausch, of even date, is on the ground, **inter alia** that; the application has been brought expeditiously; the appeal has good chances of success; and if the stay is not granted the appeal will be rendered nugatory.

In opposition, the Respondents aver that the applicants failed to disclose that there was a similar application, dated 12/10/05, and that the Respondent is a person of means and therefore applicant has not satisfied Order 41 rule 4 of the Civil Procedure Rules in terms of showing that substantial loss would be suffered if stay is not granted.

I have perused the pleadings and considered the submissions by Ms. Waweru for the applicant, and Mr. Mburugu for the Respondent, respectively, and I have reached the following findings and conclusions:

The contention by the Respondent that there was a similar application which had not been disclosed seems overstretched. What the applicant did was to seek leave for supplementary affidavit. There is no evidence that the earlier application had been heard or what happened to it, if at all.

There is dispute as to whether the Respondent is a person of means or not. What has been deponed hovers on the balance and is not satisfactory to controvert the appellants contention that if paid, the decretal sum would be put beyond the reach of the appellants/applicants should the appeal succeed.

The application was brought without undue delay, and the applicant has offered to provide security as may be ordered by this court.

All in all, I am of the view that the appellants/applicants have met the requisite tenets of order 41 Rule 4(1) (2) of the Civil Procedure Rules.

Accordingly, and in the interest of justice for both sides, this court Rules as under:

- 1. Grants the prayers in the Notice of Motion herein and grants an order of stay of execution of the Decree of the lower court, pending appeal, on condition that the appellant deposits in court, the entire decretal sum, within 30 days from the date of this order.**
- 2. Costs of this application to abide the appeal herein.**

DATED and delivered in Nairobi, this 26th day of June, 2006.

O.K. MUTUNGI

JUDGE