



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**Civil Appeal 230 of 2004**

**SOUTH NYANZA SUGAR ..... APPELLANT**

**VERSUS**

**DALMAS A. MBOGO ..... RESPONDENT**

**RULING**

Applicants application is for stay of execution of judgment and decree in Kisii C. M. C. C. No.43 of 2002 pending the hearing and disposal of the appeal.

Mr. Okongo submitted that the applicant/appellant was dissatisfied by the judgment of the lower court and therefore has filed an appeal. He told court that a similar application was made in the lower court which ordered the applicant to pay ½ decretal sum to the advocate of the respondent and the other half to be deposited in an interest account in joint names of both Advocates. The applicant is not happy with that since the Advocate for the respondent is not a party to the suit. In case the appeal succeeds there be no interest earned on that money. The Respondent might even charge Advocates.

Application was opposed by Mr. Otieno who submitted that application is only meant to deny the Respondent fruits of his judgment. The lower court made a ruling on a similar application. That court had discretion to order herein the decretal sum should be paid. It did not apply the wrong principles of law in making the orders

Further it was submitted that there was no decree issued. Also it has not been shown that applicant will suffer any substantial loss if he deposit the money in the manner ordered by the lower court.

I have considered the application, Order 41 rule (1) CPR clearly provides that a party can make an application for stay of execution to the appellate court even if a similar application was made in the trial court. Application can be made even if the trial court allowed or rejected the application. As such the applicant had a right to make this application even though he had made a similar one in the lower court and certain Orders made. He was not satisfied with those orders and hence this application. The application is not an appeal against the orders made by the magistrate. The issue of discretion of magistrate or him applying the wrong principles of law are not what the applicant is contesting.

However court was told that the magistrate ordered ½ of the decretal sum to be released to counsel for the applicant and the other half to be deposited in an account. There is no logic in that. I quite agree with counsel that the Advocate is not a party to the suit. He may not be there when the appeal is finally determined. The Respondent may retain another Advocate. The Advocate is not a bank to be told to keep the money. He cannot award interest. There is therefore no good reason at all to order part of the money released to him. It would even have made more sense if court ordered the money to be released to the respondent. He is the one who is a party to the suit and not the Advocate. It therefore makes the assertion that the application is meant to delay the Respondent from enjoying fruits of the judgment suspended. If the money is released to his Advocate he would still not enjoy it unless if they collude and the Advocate release the money to him.

As for submissions that there is no decree annexed that does not make the application defective. There is no such requirement. In the case of Public Trustee VS. Mary Achitsalitswa Kisumu H.C.C.A.No.8 of 2003 my brother Justice TANUI clearly stated that he had gone through record of appeal filed. Record of appeal has not been filed in this appeal. The decree is only filed with Memorandum of Appeal.

All in all I find the application has merit and the same is allowed. There be stay of execution of the lower court's judgment until the appeal is heard and disposed on condition that the applicant deposit the decretal amount in an interest earning account in joint names of both Advocates for appellant and Respondent within the next 30 days.

Costs in the cause.

Dated 23rd May 2005.

**KABURU BAUNI**

**JUDGE**

cc. Mobisa

N/A for Applicant. )

Though away of today's date.

N/A for Respondent )

**KABURU BAUNI**

**JUDGE**