



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

Civil Suit 123 of 1991 (OS)

ILLIANA INGASIALI REGINA

FLORAH MAKOKHA KUNDU PLAINTIFFS

VERSUS

LIKHANGA SHIKAMI

**KIPNGENY KIPNGETICH
DEFENDANTS**

RULING

This is an application for stay of execution of a judgment and decree pending the hearing and determination of an intended appeal by **KIPNGENY KIPNGETICH**, who is the applicant herein and who was originally the 2nd defendant in the subordinate court. The 1st defendant is not a party to this application.

The applicant who claims to have moved in good time, and who is willing to comply with any conditions which this court may impose and to issue security for the due performance of the decree, bases his application on the grounds inter alia, that he has a good appeal, and that unless stay is granted, he will suffer substantial loss.

The application is however opposed by **ILLIANA INGASIALI REGINA and FLORAH MAKOKHA KUNDU** ('the respondents'), on several grounds, which are mainly that not only is he guilty of laches, but that he is in contempt as he has refused to comply with court orders; that his appeal which is nevertheless defective for failure to comply with Order L rule 15(2) of the Civil Procedure Rules, has no chances of success.

It is on record that this applicant filed a Notice of Appeal against the contentious judgment.

It is trite law, that '*an appeal is not automatically to operate as a stay of execution and the right to a decree- holder having been determined by a competent court it is not fair that he should be deprived of the fruits of his decree mainly because the debtor has preferred an appeal*' (**Carter and sons v Deposit Protection Fund Board CA (Nai) 291/1997**).

Therefore, in an application of this nature, the court is called upon to exercise its discretion, and it is for the applicant to satisfy the conditions of Order XLI rule 4 of the Civil Procedure Rules.

I have taken the submissions of both counsel into account, and do note that though he applies for an

order of stay of execution of a decree, he however concedes, and it is common ground, that the decree has yet to issue. It is also clear that the order which he refers to has not been extracted.

Order XLI is clear in its application in that the same can only be invoked where a decree or order has been issued, which would mean that execution is imminent and in which case, the applicant stands to suffer substantially.

It is my humble opinion that, since neither the decree has been issued and nor has the order which he refers to been extracted, this application is premature and it fails to meet the requirements of Order XLIV.

It is therefore dismissed with costs.

Dated at Eldoret this 18th day of July 2005.

JEANNE GACHECHE

Judge

Delivered at Eldoret this 26th day of July 2005.

GEORGE DULU

Ag. Judge

Delivered in the presence of:

Mr. Gicheru for defendants

Mr. Kigamwa for plaintiffs