REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL 116 OF 2001

CECIL K. KEINO ……………………………………………………………… APPLICANT

VERSUS

LEAH S. KIPLELEI ………………………………………………………… RESPONDENT

R U L I N G

Cecil Keino who is the applicant in this matter prays for an order of stay of execution of judgment pending the hearing and determination of his appeal, against the Judgment which was delivered by the P.M.C.C Kapsabet on 13/8/2001,

He bases his application on the grounds that the matter proceeded ex-parte, on a day when he had indicated that his counsel and he would not be able to attend court; that his lorry which has been attached is due for sale and also that he stands to suffer irreparable harm and loss, should the order that he seeks be denied.

His earlier prayer for stay was rejected by the subordinate court. The application is however opposed by the respondent whose contention it is, that the grounds as laid down in the application are not sufficient to warrant the granting of the order which he seeks. It is also the respondents ground the appeal has yet to be admitted.

It is important that I point out at the outset that one of the requirements in an application of this nature, is that there be an appeal on the record. There is no requirement that the appeal should have been admitted. In my mind, a party, such as this applicant who has filed her Memorandum of Appeal before filing this particular application qualifies to seek the orders that she now seeks.

Order XLI rule 4, of the Civil Procedure Rules, which is pleaded by the applicant and stipulates that:

> *4. (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 may be the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.*
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> *(2) No order for stay of execution shall be made under subrule (1) unless-*
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> *(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 or 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."

It is evident from the above provisions of the law that in an application of this nature, it is for the applicant to satisfy the court that he stands to suffer substantial loss unless the orders which he seeks are granted. It also worthy of note that in addition to the above, the applicant should offer security as the court orders.

It is not for me at this stage to establish whether or not the applicant has an arguable appeal.

I have considered the pleadings on record and the submissions of both able counsel. An issue which was raised by the applicant, and which has not been denied is that he was given only 2 days notice of the hearing and that though his advocates had received the said hearing notices under protest, the matter still proceeded, ex-parte. I am therefore convinced that the applicant stands to suffer substantially mainly because the manner in which the trial was conducted appears to be flawed, in that it proceeded ex-parte, despite the protest note and the fact that hearing notices were served only two days before the hearing in my humble opinion was not sufficient notice.

I would and do therefore grant him an order to stay the execution of the decree of the subordinate court.

He shall however be required to give a bank guarantee to satisfy the decree. Such a decree must be in place within the next 7 days.

It is so ordered.

Dated and delivered at Eldoret this 26th day of September 2005.

JEANNE GACHECHE

JUDGE

Delivered in the presence of:

Mr. Birir holding brief for Chemitei for the applicant

Mr. Chumo for the respondent