

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
MISCELLANEOUS APPLICATION NO. 719 OF 2003

CHARLES NYAWOUR.....PLAINTIFF

V E R S U S

1.EDI KURMAN

2.SAID ABEID

3.SEVERIN SEA LODGE.....DEFENDANTS

R U L I N G

The Applicant in this Miscellaneous Application says that he had filed an appeal on 1/12/03 but on 10/12/2003 this Miscellaneous Application was filed on the strength that there was an appeal to be filed.

It is correct to submit that Order 41(4) presupposes that an appeal has already been filed. In the present case it is true that there is an Appeal No.206 of 2003. I would not say this application is defective for that reason.

There will be only the issue of costs which has been incurred in this application which will be closed after these orders. These costs should have been in the appeal. I do not find that the court has no jurisdiction to hear this application.

On the issue of requirements under Order 41(2) this court is satisfied that substantial loss would be occasioned if the order was not granted. The Respondent/Defendant has failed to give clear evidence of the source of his income. It is said he is a money-lender but this is not sufficient to prove that he has regular income.

I am also satisfied that the Applicant has offered sufficient security in the matter by offering to deposit the decretal sum in an interest earning account to be held jointly by both Advocates. The decretal amount is now said to be Kshs.450,620/-.

In the circumstances, I grant stay pending determination of the appeal.

I order the Applicant to deposit with a reputable bank in the joint names of both parties' Advocates the sum of Kshs.470,000/- within the next 14 days failing which the stay granted shall lapse.

Costs of this application to the Respondent/Defendant.

Dated at Mombasa this 12th day of February, 2004.

JOYCE KHAMINWA

J U D G E