

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET.
CIVIL APPEAL NO. 98 OF 2003

BENSON SONGOK SEREM.....APPELLANT

VERSUS

ESTHER CHELAGAT SEREM.....1ST RESPONDENT

LABAN KIPKURUI BWAMBOK.....2ND RESPONDENT

RULING

On 31.7.2003, an application by Benson Serem Songok in the subordinate court, for orders of stay of execution following formal proof in a matter in which, an interlocutory judgment had been entered was dismissed by the learned Principal Magistrate Kapsabet. Songok who I shall hereinafter refer to as the applicant was dissatisfied by the said order of dismissal and has accordingly preferred his appeal to this court. He has also filed this application which is taken out under orders XLI rule 4, XXI rule 22 of the Civil Procedure Rules and section 3A of the Civil Procedure Act, and in which the applicant seeks the following orders inter alia.

“- That there be a stay of execution of the ruling in Kapsabet P.M.C.C 88 of 2001 pending the hearing and determination of this application.

- That there be a stay of execution together with any subsequent orders thereto of the ruling delivered on 31 st July 2003 in Kapsabet P. M. C. C . NO. 88 of 2001 pending the hearing and determination of this appeal”.

Order XLI rule 4 of the Civil Procedure Rules, stipulates that: *“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 made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside”.*

(2) No order for stay of execution shall be made under subrule (1) unless -

(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.

Mr. Gicheru, learned counsel for the respondent who opposed the application, on the grounds that a court cannot issue an order for the stay of an order for dismissal, relied on Stanley Kamau Mbuca v Eldoret Municipal Council Eldoret H. C. C .A. 78 of 2001 (vr) in which Omondi Tunya J, relied on, Samross Investments Ltd v K.C.F Co. Ltd Eldoret H. C. C. C. No. 95 of 2001 (ur) where it was held that *“ a dismissal order which is not an executable order cannot be stayed”*. I find that holding quite persuasive and I will abide with it. Further, I need no reiterate the fact an order of stay can only apply where execution has issued or where proceedings are still ongoing. None of the two apply in the matter that is the subject of the appeal, herein.

In any event and as mandatorily required under order XLI, there is no evidence that the decree or order has been extracted, for if either had been extracted, it should have been attached to this application to enable this court to arrive at the most appropriate decision. Without the extracted decree or order, there is nothing really for this court to deal with and to base its decision on. In the premises, application is again bound to fail.

But even if I am wrong in the above findings, the applicant has again failed to meet the requirements of Order XLI rule 4 under which he has moved the court. An applicant is under an obligation to provide sufficient proof that he stands to suffer substantial loss, yet the pleadings reveal that none of the seven grounds upon which it is based allude to the fact that the applicant stands to suffer substantial loss unless the order being sought is made, nor has he offered any security as would be expected.

I do in the circumstances find that this application lacks in merit, and the same is dismissed with costs.

Dated and delivered at Eldoret this 29th day of April 2004

JEANNE GACHECHE

JUDGE

Delivered in the presence of:-