



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CIVIL APPEAL NO 473 OF 2004**

**KENYA ALLIANCE INSURANCE CO. LTD ..... APPELLANT**

**VERSUS**

**JOHN MUTUKU MUSYIMI ..... RESPONDENT**

**RULING**

This is an application for stay pending appeal made under Order 41 Rule 4 of the Civil Procedure Rules. The Appellant is challenging the lower court's decree on the grounds that it never insured the Respondent, and is, therefore, not liable to compensate him.

For the applicant to succeed in an Order 41 Rule 4 application, he must demonstrate to the satisfaction of this Court that substantial loss will ensue if the Order is not granted; that the application has been filed without delay; and that he is willing and able to give such security as is ordered by the Court for the due performance of the decree. That is the plain reading of the Rule, and the onus is on the applicant to satisfy all the conditions through his deposition, and not through bold statements from the Bar.

The Applicant has deposited the entire decretal sum in Court as security. There is also no dispute that this application was filed without delay. The only issue is whether the Applicant has demonstrated that it will suffer substantial loss if this Order is not granted. I am satisfied that it has. The applicant fears that if the decretal sum is paid to the Respondent, it will not be able to recover the same in the event of a successful appeal.

The Applicant says that the Respondent is a man of straw based on its inquiries from the Respondent's previous advocate. The Respondent, on the other hand, has averred that he has a business in Eastleigh from which he earns Kshs.80,000/= per month. He has not identified the nature of the business, or given details of its profit and loss statements, or annexed documents such as Income Tax Returns verifying its income. All this information is within his control, and could have been provided with ease. The applicant is not privy to that kind of information. It did what it best could to make inquiries. However, where information is in possession of the Respondent only, it is his duty to put forward the same, to disprove the applicant's allegation that the Respondent is a man of straw.

This court has a duty to protect the interests of both the parties pending appeal. I shall, therefore, allow the application dated 7th July, 2004 on condition that the decretal amount, having now been paid in court, continues to remain in such deposit pending final determination of the appeal. Costs shall be in cause.

Dated and delivered at Nairobi this 6th day of October, 2004.

**ALNASHIR VISRAM**

**JUDGE**