



**IN THE HIGH COURT OF KENYA AT KISII**

**Civil Appeal 262 of 2004**

**JAMES ACHEI NYABANDO ..... APPELLANT**

**VERSUS**

**T. O. (Minor sued through next of Kin & father GEORGE MORARA OMBOGO.....**

**RESPONDENT.**

**RULING**

The appellant seeks for stay of execution of the decree in Kisii CM. CC.NO.190 of 2003 pending the hearing and determination of the appeal. It was submitted that the appeal has high chances of success. Further it had deponed that the respondent is a man of strain and if the decretal sum is paid to him he cannot be able to refund if the appeal is successful.

Application was opposed mainly on the ground that the supporting affidavit in sworn by counsel and that he has sworn on contentious matter – that the respondent is a man of strain. Indeed the proper practice and the law is that an advocate cannot depone on facts which are contentious. However reading para.6 of the affidavit the counsel clearly states that his source of information is evidence on record. I have not seen the proceedings in the lower court but disclosure of source of information is important where an advocate is swearing to facts.

The Respondent has not attempted to rebut the fact raised that he is a man of strain. Shs.400,000/= is not small money. Appeal has already been filed and I feel that is only fair and just that there be a stay until its outcome. I therefore allow the application and order that there be a stay of execution of the decree until appeal is heard and determined. The applicant to deposit the whole of decretal sum in an interest accruing account in the joint names of counsel for the two parties within 30 days. Costs in the appeal.

Dated on 9th November 2004.

**KABURU BAUNI**

**JUDGE**

**9/11/04**

Mr. Agonya for Applicant.

N/A. for the Respondent.

**KABURU BAUNI**

**JUDGE**