



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE 4283 OF 1992**

**PRISCILLAH NYAMBURA KAMANU ..... PLAINTIFF**

**VERSUS**

**PETER KARINA**

**JOHN GAUO MUKUNJI ..... DEFENDANT**

**RULING**

This is a Notice of Motion dated 30-1-03 filed under Order 41 rules 1 and 2 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act on 03-02-2003 that there be a stay of execution pending the determination of appeal and that the Order of Warrant of arrest made on 23-1-03 be set aside.

From the supporting affidavit of W.G. Mathenge, advocate sworn on 30-1-2003. He depones that judgment was entered on 15-03-1999 and Notice of appeal filed on 25-03-1999 and proceedings were ready by 5-09-2000. But he could not file the application because the file was lost until 5-02-2000 but then it got lost again after 9 months on 15-06-2001. It missed again and reconstruction was agreed to on 28-10-2002.

Secondly that Decree Holder has no means and cannot pay back the amount if given but the application is opposed by Mr. Kanyi Ndurumo relying on the grounds opposition that the application is incompetent and that the court has no jurisdiction under Order 41 rules 1 and 2 that application suffers from inordinate delay as judgment was delivered 4 years ago. Award plus interest is escalating. That there is nothing to show that appeal period which has expired is being renewed under Order 41 rule 4 of the Civil Procedure Rules the court exercises its discretion to stay execution of its orders where those orders are appealed from. But the court does so on sufficient reason being shown. The criteria to use are that there may be substantial loss to the applicant if the order is not made, that the application is made without unreasonable delay and such security as the court orders.

Here the applicant says that the Decree Holder is a man of straw who may not be able to recoup in the event of his appeal succeeding.

As for the delay the Respondent says there is nothing to show that the original court file was lost, but although even accepting the reasons set out by the applicant there were interludes of vast period when the file was not missing and no reason is shown. I think this is evidence of laches. It took the applicant over 4 years to make this application but the most important requirement is for the applicant to show that he will suffer substantial loss if stay is not granted he cogent submissions of Mr. Mathenge do not give cogent reason to show that they will suffer substantial loss. It is not enough merely to say that Decree Holder is a man of straw and whereas poverty of the Decree Holder may support an inference that he might not pay back the decretal sum nevertheless it must be shown by some evidence in affidavit the extent of his financial inadequacy and snot merely by mentioning it. Indeed the court has to consider that the appellant if successful should not have the result of the appeal nugatory but this must be considered against the principle that a successful litigant should not be kept from enjoying the fruits of his success in the case.

I find this application cannot succeed for the reasons set out above and I dismiss it with costs.

Perhaps I should observe that for intending appellant Notice to appeal when filed served purposes of

the applicant. But the right of appeal stated as on Notice here has expired by delay to file grounds and although counsel said the applicant will make application to file same out of time. This is yet evidence of laches as records were ready by May 2000.

Application dismissed with costs. Dated this 9th Day of May, 2003.

**A.I. HAYANGA**

**JUDGE**