



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT KISUMU**

**Miscellaneous Civil Application 150 of 2008**

**OUMA NJOGA & CO ADVOCATES .....APPLICANT**

**VERSUS**

**KISUMU TEACHERS CO-OPERATIVE SAVINGS**

**AND CREDIT SOCIETY LTD.....DEFENDANT**

**RULING**

The applicants Notice of Motion dated 17<sup>th</sup> February 2012 prays for stay of execution of the Ruling made by this court on 3<sup>rd</sup> February 2012 pending the intended appeal. The said applicant equally prays for leave to appeal against the said Ruling.

The application is supported by the annexed affidavit of **Robert Ouma Njoga** sworn on 10<sup>th</sup> February 2012 as well as further affidavit sworn on 14<sup>th</sup> March 2012.

The respondent has filed a replying affidavit dated 28<sup>th</sup> February 2012 sworn by one **Joseph Oganga** as well as a supplementary affidavit by the same deponent.

The gist of the applicants Notice of Motion is that he is not happy with this court's decision demanding that he pays the sum of Kshs. 2,969,364 to the respondent who was apparently his client.

My duty for now is not to dwell on the merits or demerits of the intended appeal. I have read the lengthy submissions by both parties. They are both convincing. However, the duty of this court is to ensure compliance by the applicant with the provisions of Order 42 (6) (2) which states:-

**“(2) No order for stay of execution shall be made under sub Rule 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 due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”**

In **Butt =vs= Rent Restriction Tribunal [1982] KLR 417** at page 419 Madan J A held that:-

**“It is in the discretion of the court to grant or refuse stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal if successful from being nugatory, per Brett, LJ in Wilson =vs= Church (No. 2) 12 Ch D [1879] 454 at page 459.**

In the same case, Cotton L.J said at page 458:- **“ I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful is not nugatory”.**

The applicant herein has to bring himself within the above requirements. I have perused the further affidavit by the applicant which seemed to hold further evidence showing that had he been allowed to produce the court perhaps would have reached a different figures or decision from what it arrived at.

I however agree with the respondent that those are new evidence which ought to have been brought before the court during the substantive hearing of the application.

The appellate court shall nevertheless be at liberty to do whatever it deems necessary with those new pieces of evidence.

I am satisfied though that the application has been brought without undue delay and it is meritorious.

I shall therefore allow the same and order that the applicant do provide a bank guarantee of Kshs. 1 Million shillings within the next thirty (30) days from the reading of this Ruling. The applicant **Mr. Ouma Njoga** shall equally provide a professional undertaking over the said sum of Kshs.2,969,364 within fourteen (14) days from the date herein. The respondent shall have the costs of this application.

**Dated, signed and delivered at Kisumu this 13<sup>th</sup> day of July 2012**

**H. K. CHEMITEI  
JUDGE**

**In the presence of:**

**Njoga for Kopot Advocate for Applicant**

**Onyango for Bitingi Advocate for Respondent**

*HKC/ao*