



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

Civil Appeal 3 of 2012

WALTER ODHIAMBO NYANGORI

WILLY TANUI APPELLANTS

VERSUS

MCDONALD KANDORO KAIRESPONDENT

R U L I N G

1. The appellant's application dated 8th March, 2012 is brought under Order 42 rule 6 of the Civil Procedure Rules principally. It seeks to stay execution of the judgment/decree obtained in Kilifi's SRMCC 132 of 2010 pending appeal. The application is supported by the affidavit of Everylne Onzere. Like the replying affidavit of the respondent the supporting affidavit dwells at length on the merits of the appeal, whereas sub rule 2 of Order 42 rule 6 Civil Procedure Rules, defines the parameters to guide the court in an application of this nature. It provides:

“(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.”

2. An application for stay of execution in the Court of Appeal is governed by Rule 5 of the Court's Rules which requires inter alia that the applicant demonstrates an arguable appeal. This was the subject of the decision in **National Industrial Credit Bank Ltd. V Aquinas Francis Wasike (2006)e KLR**, upon which the appellant herein has placed reliance.

3. After reviewing the facts of this case, I am of the view that the appellant's application lacks merit. While there is no doubt that the appellant has come to court without any unreasonable delay and they have offered security, there is no evidence of the likelihood of substantial loss to the appellant. The appellants have disclosed that the respondent is gainfully employed as a chef, and thereby negating any assumption that he is a man of straw, incapable of refunding the decretal submission which at any rate is not a very large amount of money. There must be just cause for denying a successful litigant the fruits of his judgment. Such has not been demonstrated in his case.

The application is dismissed with costs.

Delivered and signed at Malindi on this **2nd** day of **October, 2012** in the presence of Mr. Shujaa holding brief for Mr. Njoroge for the respondent, Ms. Njebiu for the appellant.

C. W. Meoli
JUDGE