



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CIVIL APPLICATION NO. 166 OF 2001**

**ABOK JAMES ODERA T/A A. J. ODERA & ASSOCIATES ..... APPLICANT**

**AND**

**JOHN PATRICK MACHIRA T/A MACHIRA & CO. ADVOCATES .....  
RESPONDENT**

**(An application for stay of execution of the ruling and order of the High Court of Kenya**

**at Nairobi (Kuloba, J.) dated 24th May, 2001**

**in**

**H.C.C.C. NO. 183 OF 1998)**

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**RULING OF THE COURT**

By this application brought under rule 5(2)(b) of the Rules of this Court, the applicant, Abok James Odera, seeks an order for stay of execution of the orders made by Kuloba J on 24th May, 2001 releasing the security funds of Shs.10 million together with all accrued interest held at the Standard Chartered Bank, Kimathi Street, Nairobi, to the respondent pending the hearing and determination of the intended appeal.

On 30th July, 1998, Okubasu, J. (as he then was) entered summary judgment in favour of the respondent and against the applicant in the sum of Shs.19,681,581/35. A stay of execution was granted on condition that the applicant deposited Shs.10 million in a joint interest earning account. Thereafter, the applicant filed Civil Appeal No.176 of 1998, but the same was struck out on account of a technicality on 9th July, 1999. After securing the necessary leave to lodge an appeal out of time, the applicant did lodge Civil Appeal No.161 of 1999 which is currently pending for hearing.

One of the established propositions which must be satisfied if the applicant is to be granted the stay which he now seeks, is that his intended appeal, if successful, would be rendered nugatory, if we do not stay the execution of the order releasing the security funds to the respondent. Indeed, in the applicant's notice of motion dated 29th May, 2001 this ground is set out as follows:

"If the security funds held at the Bank are released to the plaintiff (the respondent), the applicant will suffer substantial loss and damage as the funds will be beyond his reach and recovering the same back if the appeal succeeds will be almost impossible or extremely difficult."

The respondent is a prominent Nairobi advocate of nearly 22 years standing. He owns two prime properties in Loresho estate, three at Nariobi South B and C and other major real properties in Kajiado, Naivasha and Nyeri. These have an estimated current value of about Shs.35 million or so and without any mortgage. The applicant certainly is not a man of straw. He is no doubt a wealthy Kenyan by any standard.

The averment by the applicant therefore that recovery of the decretal sum would be impossible in the event that his appeal succeeds is feeble. If anything, it demonstrates the applicant's lack of any just reasons why the respondent should be denied his right to enjoy the fruits of his success pursuant to the order of release made by the superior court. This being our view of the matter, the application must fail.

Further, we are unable to agree with Mr. K'Opere, Counsel for the applicant, in his novel submission that since the applicant had already lodged a subsequent appeal after the earlier one had been struck out, it must of necessity follow that the previous order of stay must be restored by this court.

The upshot of all this is that the application must fail and is accordingly dismissed with costs.

Dated and delivered at Nairobi this 6th day of July, 2001.

**J.E. GICHERU**

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**JUDGE OF APPEAL**

**P.K. TUNOI**

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**JUDGE OF APPEAL**

**A.B. SHAH**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**