



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NUMBER 60 OF 2013

**EDDISON HENRIE BARRY T/A BUSINESS
& ALLIED EQUIPMENT. ...APPLICANT/APPELLANT**
VERSUS
OLIVER NDICHU KIMANI. RESPONDENT

R U L I N G

The application before the court is a Notice of Motion by the Appellant and is dated 14th March, 2013. It seeks an order of stay of execution of the decree in Nairobi Milimani CMCC No. 6892 of 2006, pending the hearing and final determination of this appeal. The grounds upon which the application is based are that: -

1. *The appeal has overwhelming chances of success.*
2. *The appeal will otherwise be rendered nugatory.*
3. *The application was filed without undue delay and in the interest of justice.*
4. *Grant of orders made will not occasion prejudice as the subject matter is in the custody of the Respondent*
5. *The applicant offers to abide with any conditions imposed by the court on granting the stay.*

The application is opposed by the Respondent on the ground that the application is incompetent as it ought to have first been filed in court that passed the decree and that the certified copy of the decree or judgment was not annexed to the application. Finally the Respondent also averred that there was inordinate delay to file the application and that the applicant failed to demonstrate that a substantial loss

will be suffered by him if the stay sought is not granted.

I have carefully considered the above facts and grounds advanced by both sides. It is not denied that this application was not first made to the court from which this appeal was preferred. A careful reading of Order 42, rule 6 of the Civil Procedure Rules appear to state that an application for stay of execution shall first and foremost be made to the court that passed the decree before it can be made to the court to which the appeal is preferred.

Secondly, the application must always be accompanied by a certified copy of the Judgment or ruling appealed against and that is trite law.

In this case, neither was the application first made to the court that passed it nor was the application accompanied by a certified copy of the judgment appealed against. For either reason this court would strike out and dismiss the application for incompetence.

However, even on the merits of the application, this court finds that the applicant has failed to demonstrate that he would suffer irreparable or substantial loss if the application is refused. The decretal sum is only Ksh.23,000/- which the Respondent would easily refund if he loses the appeal.

I have also observed that the applicant did not explain the delay of 60 days until execution was threatened. It is likely that the application was therefore not originally intended but came as second thought.

I also have made a quick glance on the grounds of appeal in relation to the reasons given in support of judgment. The chances of success of the appeal may not be high.

In the above circumstances, this application has no merit and is hereby dismissed with costs. Orders accordingly.

Dated and delivered at Nairobi this 19th day of February 2014.

.....

D A ONYANCHA

JUDGE