



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT MALINDI**

**Civil Appeal 38 of 2011**

**SHIDA NGUMBAO NDURYA.....APPELLANT**

**=VERSUS=**

**MARY KADZO KALUME.....RESPONDENT**

**RULING**

1. The appellant's notice of motion filed on 14/12/11 was disposed of by way of written submissions. It was an application for stay of execution pending appeal under order 42 rule 6 (1) and of the (2) Civil Procedure Rules. The appeal was filed in respect of the decision of the Chief Magistrate made on 28<sup>th</sup> September, 2011 respecting execution of the decree for vacant possession.

2. I have considered the affidavits filed in respect of the application as well as the written submissions. I note that the appeal herein is in respect of the ruling of the Lower Court regarding execution, but not against the actual decree for vacant possession. Hence the Respondents are entitled to question the efficacy of the present application as they have. Moreover, the judgment giving rise to the decree in the lower court was given in January 2009. Since then the appellant has made at least two applications to stay execution while not making any effort to set aside the said judgement, which he says was a culmination of exparte proceedings (See Supporting affidavit to Appellant's Chamber Summons filed on 12/2/09 in Malindi SRMCC No.264/04)

3. Be that as it may, under O42 r 6 (2) Civil Procedure Rule;-

***“No orders 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 delays; 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”.***

While the present application was brought within good time, the applicant has not demonstrated that he will suffer substantial loss if the orders he seeks are declined. Instead, he has deponed that his appeal has good chances of success and that the appeal will be rendered nugatory if the orders are denied. Nor has he offered any security for performance of the decree.

4. Clearly, the present application has been lodged in a rather casual manner, and in my view the material presented does not justify an order denying the Respondent the fruits of his judgement. The application is dismissed with costs for want of merit.

**Dated, signed and delivered at Malindi this 6<sup>th</sup> day of June, 2012**

**In the presence of Mr. Otara for appellant, Mr. Shujaa for respondent.**

**C. W. MEOLI  
JUDGE**