



## **PRACTICE AND PROCEDURE**

· Stay of execution pending appeal (Order 42) can only be in respect of the decree or order appealed from.

### **REPUBLIC OF KENYA**

### **IN THE HIGH COURT OF KENYA**

### **AT MERU**

### **HIGH COURT CIVIL APPEAL CASE NO. 140 OF 2010**

**STANLEY NGEERA ..... APPELLANT**

**VERSUS**

**SARAH KABURO MBUI ..... 1<sup>ST</sup> RESPONDENT**

**NAOMI MWENDWA MBUI ..... 2<sup>ND</sup> RESPONDENT**

### **RULING**

Stanley Ngeera (appellant) has filed this appeal against the ruling delivered in Meru CMCC No. 68 of 2006 made on 30<sup>th</sup> November 2010. The appellant has filed Notice of Motion dated 2<sup>nd</sup> December 2010. By that Notice of Motion brought under order 42 of the Civil Procedure Rules 2010 the appellant seeks stay of execution of the lower court's decree. The appellant does not, for reasons that will become obvious later on, states the date of that decree. Sarah Kaburo Mbui the 1<sup>st</sup> respondent in her replying affidavit stated that the judgment in Meru CMCC No. 68 of 2006 was delivered on 9<sup>th</sup> March 2010. No appeal was filed against that decree. That the respondents sought to execute the decree by attachment and sale of the appellant's goods. An objection to the attachment was raised which objection stayed that execution. The appellant on obtaining that stay took no further action in the matter and the objection proceedings were also not prosecuted. When the respondent sought to execute the decree by issue of warrant of arrest of the appellant the appellant filed an application for review seeking to be allowed to reopen the case and to tender further evidence. That, it is the dismissal of that application that the appellant is appealing against in this appeal. It was argued by the learned counsel for the respondent Mr. Ondieki that the judgment which the respondent has sought to execute has not been appealed against and he argued that on that basis there cannot be stay of execution since there is no appeal against that decree. Order 42 rule 6 (1) indeed supports that submissions on behalf of the respondents. It provides as follows:-

***“42 6(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court***

***to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.***” (underlining mine).

From that rule, it is clear that stay can only be in respect of the order or decree which is appealed against. Perhaps to understand this better, I will say that even if the appellant does succeed in his present appeal, that success will not disturb the decree which the respondent wishes to execute. There is therefore no basis for the orders which are sought in the Notice of Motion dated 2<sup>nd</sup> December 2010 and it is dismissed with costs being awarded to the respondent. The stay order issued on 9<sup>th</sup> December 2010 is hereby set aside and vacated.

**Dated, signed and delivered at Meru this 13<sup>th</sup> day of April 2011.**

**MARY KASANGO  
JUDGE**