



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CIVIL APPEAL CASE NO.130 OF 2009**

**BENSON MACHARIA**  
**MUHORO.....APPELLANT**

**VERSUS**

**UPENDO SELF HELP**  
**GROUP.....RESPONDENT**

**RULING**

**Benson Macharia Muhoro**, the appellant herein, took out, the Motion dated 4<sup>th</sup> March 2010 in which he applied for an order of stay of execution of the decree of the trial court dated the 1<sup>st</sup> day of October 2009 pending the hearing and the determination of this appeal. He swore and filed an affidavit in support of the Motion. **Upendo Self Help Group**, the Respondent herein, filed the replying affidavit of Lucy Mumbi to oppose the Motion.

When the Motion came up for interpartes hearing, the Appellant was granted leave to prosecute the Motion *ex parte* when it became apparent that the Respondent and its advocate had failed to attend court despite having notice. I am aware that despite the Respondent's absence, this court is enjoined to consider the responses filed by the Respondent. It is the submission of the Applicant that unless the order for stay of execution is given, the decree may be executed to the utter detriment of the Appellant. The Applicant averred that he may suffer substantial loss before the appeal is heard and determined. In the replying affidavit, the Respondent stated that the appeal is so hopeless that it will not see the light of the day.

The matter before this court is simple. The Appellant is simply seeking for an order for stay of execution pending Appeal. The material placed on record shows that the Respondent herein filed a suit before the Kangema Senior Resident Magistrate's Court vide Kangema S.R.M.C.C.C. No. 115 of 2009 claiming for payment of Ksh.124,000/= from the Appellant. The Appellant filed a defence to deny the Respondent's claim. The Respondent applied for the Appellant's defence to be struck out and for the entry of summary judgment. The Respondent's application was allowed, leading to the striking out of the defence. The Appellant was aggrieved hence this appeal. He has now come to this court seeking for an order for stay of execution pending appeal. The principles applicable in such applications are well settled. First, an applicant must show the substantial loss he would suffer if the order is denied. Secondly, the applicant must show that the application was filed without unreasonable delay. Thirdly that security for the due performance of the decree should be provided.

To begin with, this is a monetary decree for Ksh.124,000/=. Usually in monetary decrees, a stay order may not be given save in exceptional cases. It was incumbent upon the Appellant to show the substantial loss he would suffer if the order is denied. I have looked at the application plus the facts deposed in affidavits for and against the Motion. There is an allegation by the Appellant that he would suffer substantial loss if he is denied the order. The kind of loss he anticipated is that he will have been condemned unheard. In my view that is not the kind of loss the law envisaged. I am convinced the Appellant has failed to show the substantial loss he would suffer if he is denied the order. Having failed to establish the first condition, there is no need to go into the other conditions because they are dependent on the success of the first condition. The Motion is hereby ordered dismissed with no order as to costs.

*Dated and delivered at Nyeri this 17<sup>th</sup> day of June 2011.*

**J. K. SERGON**

**JUDGE**

In open court in the presence of Mr. Maatwa holding brief Muchiri for the Plaintiff.