



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**Civil Appeal 169 of 2009**

FARM & TRANSPORT TECHNICAL SERVICES.....1<sup>ST</sup> APPLICANT  
ATIN AGGARWAL.....2<sup>ND</sup> APPLICANT  
ASHOK AGGARWAL.....3<sup>RD</sup> APPLICANT

VERSUS

QUARK COUNSULTANT ENGINEER.....1<sup>ST</sup> RESPONDENT  
DHILLON SHAMSHER SINGH.....2<sup>ND</sup> RESPONDENT

**RULING**

This is an application for stay pending appeal. It is based on the grounds that the appeal has overwhelming chances of success and that if execution is allowed to go on the appeal will be rendered nugatory. Mrs Ndeda submitted that pending the hearing the determination of the appeal the appellants are ready to deposit the decretal sum in court.

Opposing the application Miss Muchungi for the respondents submitted that besides the application being defective for having been brought under the wrong provision, that is, **Order 40** instead of **Order 41** of the **Civil Procedure Rules**, there is no proper appeal before the court. The appellants should have appealed against the ruling dismissing his application to set aside judgment and not against the decree as this case has not been heard.

I have considered these submissions as well as the affidavits in support and in opposition to the application. The uncontroverted averments in the replying affidavit are that judgment was entered against the defendant in default of appearance. On realizing that the defendants got their advocates to enter appearance but did not file a defence. When execution ensued, the defendant applied to set aside the ex-parte judgment but their application was dismissed for non attendance. The defendants then made another application and eventually succeeded to have the ex-parte judgment set aside and they filed a defence. When the suit was fixed for hearing on 30<sup>th</sup> April 2009 the defendants and their counsel once again failed to attend court and the matter was heard ex-parte and judgment entered. This appeal arises from the order of 30<sup>th</sup> July 2009 dismissing their application to set aside the second ex-parte judgment.

The defendants are blaming their woes on their advocates. There is however nothing from those advocates to show in the first instance that they were indeed instructed to defend the defendants and why they failed to file a defence. After setting aside the first ex-parte judgment and filing defence, there is nothing from the defendants' advocates to explain why they failed to attend court for the hearing of the suit.

Besides the chronicled indolence, I have noted that the applicants' defence to the claim is general denial.

Taking all the above factors into account I am satisfied that the applicants have no defence to the claim and their unexplained indolence is a scheme intended to delay their day of reckoning. In the circumstances I dismiss this application with costs.

**DATED and DELIVERED this 27<sup>th</sup> day of April, 2010.**

**D. K. MARAGA**

**JUDGE.**