



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**

**Civil Appeal 127 of 2008**

**DANIEL MULWA KAMBUNI ..... APPELLANT**

**VERSUS**

**CHRISTOPHER MUSAU MBITI .....RESPONDENT**

*(Being an appeal from the Judgment of Honourable A.W Mwangi RM dated 4<sup>th</sup> June 2008 in Resident Magistrate Civil Case No. 103 of 2007)*

**RULING**

1.The Application dated 19/1/2009 seeks orders that the execution of the decree in Yatta RMCC No. 103/2007 be stayed pending the hearing and determination of the Appeal herein.

2.Having perused the same, I will dismiss the Application for the following reasons:-

Firstly, in exercise of powers conferred on this court by Section 79 B of the Civil Procedure Rules, I summarily rejected the Appeal and refused to admit it and therefore there is in fact no appeal to be heard and determined.

Secondly, even if there was an appeal left to be heard, I wholly agree with the advocate for the Respondent that the pre-conditions for grant of stay under Order XLI Rule 4 (2) of the Civil Procedure Rules have not been met. I say so because in the Affidavit of Daniel Mulwa Kambuni sworn on 19/1/2009 nowhere is there evidence of any substantial loss that the Applicant will suffer if the Application is not granted. I say so with respect because in all its 9 odd paragraphs the only relevant issue raised is in paragraph 7 where it is deponed that “if the stay is not granted and this appeal has arguable grounds and likelihood of success the same would be rendered nugatory.” I have in fact stated above that the appeal has been rejected and so that issue is moot. Without evidence of substantial loss to be suffered, the Applicant has failed to pass a crucial test set by Rule 4 (2) aforesaid and the court’s discretion is now wholly fettered.

Lastly, the Application as framed is wholly incompetent and misguided and is quickly dismissed with costs to the Respondent.

3.Orders accordingly.

Dated and delivered at Machakos this **28<sup>th</sup>** day of **May 2009**.

**ISAAC LENAOLA**

**JUDGE**

In presence of: **N/A for parties**

**ISAAC LENAOLA**

**JUDGE**