



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**CIVIL APPEAL 158 OF 2009**

**AIMI MA KILUNGU ..... APPELLANT**

**VERSUS**

**CHARLOTTE JOYCE NZOKA( suing as legal representative of the estate of the CHARLES  
AMBROSE NZOKA .....RESPONDENT**

**RULING**

1. The Application dated 23.2.2009 seeks orders that there be a stay of execution of the ruling dated 25.8.2008 in CMCC No.422 of 2008 Machakos and the decree subsequent to it.
2. To put matters into perspective, the present Appeal is against a Ruling delivered by Hon. E. Nderitu, SRM on 25.8.2008 within CMCC 422/2008. The Ruling was based on a preliminary objection raised by the Appellant, (Defendant in that suit) as to the jurisdiction of the subordinate court to try the dispute between the parties. The learned magistrate overruled the objection and later dismissed an application similar to the present one. The Appeal before me is limited to whether the Ruling dismissing the preliminary objection was proper within the meaning of section 2 of the Companies Act, Cap 486 Laws of Kenya and whether the subordinate court thereby usurped the jurisdiction conferred on this court by that statute.
3. I have with that background in mind looked at the Supporting Affidavit sworn by one Josiah Katungwa, Treasurer of the Applicant Company on 23.2.2009. I have also read the Replying Affidavit of the Respondent sworn on 10.6.2009.
4. Firstly, I do not understand that there is any thing to stay save perhaps the proceedings in the subordinate court. When a ruling is delivered dismissing a preliminary objection, what execution proceedings can issue from that order of dismissal? I see none on my part and to that extent the first part of prayer 3 of the Application is incompetent and all the submissions by both advocates are in vain. Parties seem to have completely misunderstood the issue(s) to be addressed in the circumstances of the Appeal and Application. The second part of prayer 3 seeks to stay ***“the proceedings/trial in CMCC No.422/2008 Machakos ... pending the hearing and determination of this appeal.”***
5. It is argued that if the trial proceeds, the appeal before this court will be rendered nugatory and yet the appeal has got good chances of success. I have called for and I have examined the record in CMCC 422/2008 and I agree that once the issue of jurisdiction is raised on appeal, then it would be in the interests of justice to dispose of that question as quickly as possible. Should this court find that the subordinate court has no jurisdiction, then as far as that court is concerned, the matter rests. Should this court on the other hand find that the subordinate court has jurisdiction, then the matter will be remitted back to it for hearing and determination. If however, that court proceeds to hear the dispute and on appeal it is found not to have jurisdiction, injustice would be occasioned to all parties but more so the Appellant who takes the view that there is no jurisdiction.
6. In the event, pending the hearing and determination of the Appeal herein, I will exercise discretion and stay all the proceeding in CMCC No. 422/2008.
7. Costs shall abide the Appeal.

8. Orders accordingly.

Dated and delivered at Machakos this **9<sup>th</sup>** day of **October 2009**.

**Isaac Lenaola**

**Judge**

In the presence of; Mr. O.N. Makau for Applicant

Mrs Wambua for Respondent

**Isaac Lenaola**

**Judge**