



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MACHAKOS  
Civil Appeal 33 of 2009**

**CHARITY MUTHOKI MULEI .....**  
**.....APPELLANT**

**WILLIAM MUTISYA MUINDI .....**  
**RESPONDENT**

**(Being an Appeal from the original Ruling in CMCC No. 1182/2008 of the Chief  
Magistrate's Court at Machakos by Mr S. G. Gacheru RM on 16.3.2009)**

**RULING**

1. The application dated 20.3.2009 is premised on Order XLI Rule 4 of the Civil Procedure Rules and the Appellant seeks orders that the execution of the judgment and decree in CMCC 1182 of 2008 be stayed pending the hearing and determination of the Appeal.

2. A party invoking the above Rule must heed the words contained in Rule 4(2) which provides as follows:-

**“(2) No order for stay of execution shall be made under subrule (1) unless-**

**a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and**

**b. such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”**

3. That is the threshold created and the hurdle an applicant such as the one before me must surmount. In the instant case, the Applicant in her Supporting Affidavit sworn on 20.3.2009 depones that the judgment against her was for Kshs. 40,000/= and that should there be no stay of execution, the Respondent **“cannot refund the decretal sum (as he is] well known to [him] and is jobless and has no means of earning and this means [that] he is a man of straw.”** The import of that Statement is that if execution proceeds, the Applicant will suffer substantial loss. I disagree.

4. Ringera, J in Lalji Bhimji Sanghani Builders & Contractors Ltd vs Nairobi Golf Hotels [k] Ltd HCCC 1900 [1995 [Nairobi], stated thus;

**“... he (the applicant) must persuade the court that the decree holder is a man of straw from whom it will be nigh impossible or at least very difficulty to obtain back the decretal amount in the event of the intended appeal succeeding. Such persuasion must spring from affidavits or evidence on record.”**

5. Save for the bare Statement that the Respondent is a man of straw, no credible evidence springs from the Affidavits in support of that contention. Instead, the Respondent has by his Replying Affidavit sworn on 30.3.2006 exhibited his motor-vehicle log-book and title deed showing that Kshs. 40,000/= is not so much that he cannot repay it should the appeal not succeed. That answer completely destroys the assertion by the Applicant and no substantial loss will be suffered in any event.
6. It has been said time and time again that substantial loss is the cornerstone of any application for stay of execution and once no evidence in that regard exists, the Application stumbles and falls.
7. Granted, the Application was brought timeously but again the sum in contention is paltry and I see no need to think of any order that security thereby be granted.
8. In a nutshell, the Application before me has no merit and is dismissed with costs to the Respondent.
9. Orders accordingly.

Dated and delivered at **Machakos** this **9th** day of **October 2009**.

**Isaac Lenaola**

**Judge**

In the presence of; Mr Ngolya h/b for Mr. Sila

Mrs Wambua h/b for Mr. Kamolo

**Isaac Lenaola**

**Judge**