WAMITHI MWANGI ……. APPELLANT

Versus

BERNARD NDERITU …….....…….....……. RESPONDENT

RULING

The Appellant has brought a Notice of Motion dated 1st July 2005. When the same came up for hearing the parties consented to proceed by way of written submissions. That application is brought under section 3A of the Civil Procedure Act, Order XLI Rule 4 and Order L Rules 1, 3, and 15 of the Civil Procedure Rules. The appellant by that application seeks stay of execution of the decree dated 8th June 2004 in Nyeri CMCC No. 535 of 1996 pending appeal. In his support of that application the Appellant stated that he was dissatisfied with the ruling of an application seeking to set aside judgment entered against him. Being so dissatisfied

he filed this appeal. That the lower court on 31st of May 2005 granted him 30 days stay of execution of that decree. That despite that order of stay the Respondent on the 27th June 2005 through a firm of auctioneers proclaimed the appellants goods with a view to attachment of the same. The Appellant said that that proclamation was unlawful because it took place during the period of stay. Lastly the Appellant said that he has an arguable appeal which would be rendered nugatory if stay was not granted. That application was opposed by the Respondent. The Respondent in opposing the application stated that the application should not have involved Section 3A of the Civil Procedure Act since there was specific statutory provisions for stay of execution. That reliance on section 3A the Respondent stated made the Appellant's application to be incompetent. In response to that opposition I make a finding that quoting the wrong provision does not necessary make an application to be incompetent. Looking at the Appellant's application it is clear that the Appellant seeks from the court an order for stay pending appeal. It ought also to be noted that the Appellant indeed in addition to relying on Section 3A also relied on Order XLI Rule 4. That is the correct order for

an application for stay pending appeal. My finding as above is

supported by the case of ***CHINA ROAD AND BRIDGE CORPORATION***

(KENYA) *vrs* ***D.M.K. CONSTRUCTION LIMITED CIVIL APPEAL NO. 325 OF 2000 (UNREPORTED)***. The Court of Appeal was considering an appeal from the superior court of an application for review, had the following to say in respect of reliance on the wrong provision of the law:-

"***The notice of motion was stated to have been brought under Order 44 Rule 1 and 2; Order 50 Rule 17 of the civil Procedure and section 3A of the Civil Procedure act. Even if the application was not brought under the correct provisions of the law, that would not be fatal to the application in view of Order L rule 12 of the Civil Procedure Rules which provides:-***

'***Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.'***

That being the position we are satisfied that although the appellant might have failed to state the correct provision of the law under which the application for review was made that omission was not by itself fatal to the application."

Accordingly that opposition to the Appellant's application is rejected. The Respondent did however state in his opposition that the Appellant has not satisfied order XLI Rule 4(2) of the Civil Procedure Rules. The Respondent argued and quite correctly stated that the Appellant had not satisfied the court that he would suffer substantial loss if stay was not granted. The Appellant in his application merely stated that the appeal would be rendered nugatory if stay was not granted. For the avoidance of doubt in an application for stay the court should consider the following provisions of Order XLI Rule 4(2):-

1. 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 reasonable delay; and

2. 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.

As can be seen Order XLI Rule 4(2) where the above requirements are to be found it does not show that the court has to consider whether an appeal would be rendered nugatory. It was therefore incumbent upon the Appellant to show the court that he would suffer substantial loss if stay was not granted. In failing to show that loss the application would fail. I am however of the view that the application for stay pending appeal was made within a reasonable time since the order subject of the appeal was delivered on 31st May 2005. In conclusion I do accept the submissions by the Appellant that in considering such an application as the court is required to, the court ought to balance the interests of the Appellant with those of the Respondent. The Appellant has not shown to this court reason why the Respondent should be denied to enjoy the fruits of his judgment. Indeed as correctly stated by the Respondent the judgment entered in favour of the Respondent was on 8th June 2004. That being the case it was necessary for the Appellant to show to the court why he should not enjoy that judgment. I find the appellants application not to be merited and I do hereby dismiss the Notice of Motion dated 1st July, 2005 with costs to the Respondent.

DATED AND DELIVERED THIS 21ST DAY OF JANUARY 2008

MARY KASANGO

JUDGE