



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Appeal 1009 of 2007**

**REGINA MUKAI KITULA.....APPELLANT**

**VERSUS**

**HEIWA AUTO LTD.....RESPONDENT**

**R U L I N G**

Regina Mukai Kitula, the Applicant herein, is dissatisfied with an order made by the Principal Magistrate in Milimani RMCC No.4372 of 2007 on 5<sup>th</sup> December, 2007 in which the Principal Magistrate set aside the ex-parte judgment entered in favour of the Applicant on 9<sup>th</sup> August, 2007. The Applicant has filed a memorandum of appeal raising 5 grounds upon which she wishes to have the orders made on 5<sup>th</sup> December, 2007 set aside and the ex-parte judgment entered on 9<sup>th</sup> August, 2007 upheld.

By a notice of motion dated 13<sup>th</sup> December, 2007 the Applicant is now seeking orders under Order XLI Rule 4(1) of the Civil Procedure Rules and section 3A of the Civil Procedure Act for stay of the orders made on 5<sup>th</sup> December, 2007 and proceedings in Milimani RMCC No.4372 of 2007 pending the hearing and determination of his appeal. The Applicant also seeks a further order that the goods held by Whitestone Auctioneers in execution of the ex-parte judgment, should not be released to the Respondent Heiwa Auto Ltd pending determination of the motion.

Martin Mutisya Muthengi, and Nancy D. Akinyi Ouko, Advocates of the Applicant, have each sworn an affidavit in support of the application. The application is opposed through a replying affidavit sworn by George M. Mbeya the Advocate for the Respondent.

I have carefully considered the application, the submissions of both Counsels and the authority cited. It is a cardinal principle that an application for stay of execution or proceedings under a decree cannot be granted unless the court is satisfied that substantial loss may result to the Applicant if the order is not granted, and, that the application has been brought without undue delay. Two reasons have been given in support of the contention that the Applicant is likely to suffer substantial loss if the orders of stay are not granted. First, the danger that the Respondent may alienate or dispose of the goods which have been attached in execution of the decree, and secondly, the allegation that the defendant has several suits against it from other persons.

I am not however persuaded that the reasons given are sufficient to establish substantial loss. There is no credible evidence that the Respondent intends to dispose off its property. The allegation that there are various suits against the Respondent is also based on hearsay information. Moreover the Applicant is not likely to suffer any substantial loss if she is successful on appeal as she will be restituted to the position she was in before the order made on 5<sup>th</sup> December, 2007 i.e. that of a decree holder at liberty to execute.

For this reason I find no merit in the notice of motion dated 13<sup>th</sup> February, 2008 and dismiss the same. Costs shall be in the appeal. Orders accordingly.

**Dated, signed and delivered this 15<sup>th</sup> day of April, 2008**

**H. OKWENGU**

**JUDGE**