



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Appeal 479 of 2007**

**DEE-EEM INVESTMENT LTD.....APPELLANT**

**VERSUS**

**M/S UKULIMA CO-OP SOCIETY.....1<sup>ST</sup> RESPONDENT**

**M/S WANGAI T/A SANNEK ENTERPRISES..... 2<sup>ND</sup> RESPONDENT**

**R U L I N G**

Before me is an application by way of Notice of Motion brought by the appellant seeking stay of execution pending Appeal. The facts which gave rise to this litigation briefly may be stated. The firm of Mereka & Co. Advocates rented part of the Ukulima Co-operative House owned by the 1<sup>st</sup> Defendant.

The firm defaulted and were in arrears and the 1<sup>st</sup> Defendant instructed the 2<sup>nd</sup> Defendant a firm of auctioneers to levy distress for rent. The applicant filed this suit seeking injunctive orders to restrain the 1<sup>st</sup> and 2<sup>nd</sup> respondents from levying distress claiming that the distressed goods did not belong to the tenant but belonged to it which suit was dismissed. The applicant was dissatisfied with the decision and decided to appeal and in the meantime filed an application for stay of execution pending appeal which was also dismissed on 29<sup>th</sup> May 2007 hence this application.

Mr. Makumi appearing for the applicant submitted that distressed goods belonged to the applicant and not the tenant Mereka & Co. Advocates and relied on an agreement entered into between the applicant and the tenant on 2<sup>nd</sup> January 1998 which clearly provided that the goods in the offices of the tenant Mereka and Co. Advocates belonged to the applicant and that had been hired to the said tenant.

The application was opposed by Mrs Mbaabu for the respondent who submitted that the tenant Mereka & Co. Advocates was the Managing Director of the applicant and that there was no evidence that the applicant had purchased the said distressed goods and rented the same to the tenant Mereka & Co. Advocates.

This is an application for stay of execution pending appeal. It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution.

The principles on which the court grants a stay are well settled. Two conditions have to be satisfied by the applicant: first it must be shown that the intended appeal is arguable and, secondly it must also be shown that if stay is withheld the appeal will be rendered nugatory.

In **ABOK ODERA V. KENYA POST & TELECOMMUNICATIONS CORPORATION** – Civil Appeal No. 206 of 1999; the Court of Appeal held that there are two conditions which the applicant must satisfy before he is granted stay of execution.

(1) That the intended appeal is not frivolous that it has an arguable ground to canvass during the intended appeal, and

(2) That the appeal if it is successful would be rendered nugatory if stay is not granted.

In **WILSON v. CHURCH (No 2) 12 CH D (1879) 454 at p 459** BRETT LJ said:

**“It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal if successful from being nugatory.”**

Having considered the applicant’s application in light of the pleadings, the affidavit evidence on record as well as the submissions by both Counsel, the tenant being the managing director of the applicant did not tender sufficient evidence to prove on a balance of probability that he has legal or equitable interest in the goods distressed. There was no evidence that the applicant purchased the distressed goods and rented them to all tenants.

The upshot of this matter is that the application is dismissed with costs.

Delivered and dated at Nairobi this 23<sup>rd</sup> day of May 2008.

**J. L. A OSIEMO**

**JUDGE**