



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT EMBU**

**Civil Case 29 of 2004**

**MWEA RICE GROWERS MULT-PURPOSE**

**CO-OPERATIVE SOCIETY LTD.....PLAINTIFF**

**VERSUS**

**HON. NGENYE KARIUKI.....1<sup>ST</sup> RESPONDENT**

**LOINGE LTD.....2<sup>ND</sup> RESPONDENT**

**RULING**

Notice of Motion dated 21/12/2007 seeks stay of execution of decree in this case pending hearing and determination of the Court of Appeal Civil Appeal No. 211 of 2007 and until further orders of this court on the grounds set out on application the decree is in the sum of Shs.3,293,465/=. The application is supported by Affidavit of Munene Muriithi showing that Respondent has already engaged auctioneer to execute decree and that the appeal raises substantial issues and if stay is not granted members of Applicant numbering about 3000 shall suffer and the Co-operative Society will be grounded and the appeal shall be rendered nugatory. The application is brought under Order. 41 Rule 4 (1) and Order XL V111 Rule 5 Civil Procedure Code.

On the part of Respondent it is sworn that interest will continue to escalate unless payment is made as soon as possible. Also that the Appeal has no chances of success. The applicants have not shown what substantial loss will occur if orders are not granted. The Respondent has showed that he can refund the money if appeal was to succeed (See paragraph 14 of Replying Affidavit.) Also that this application was not made without reasonable delay occasioning the increase in amount of interest and auctioneer expenses to the plaintiff/Respondent. Both parties have filed further affidavits which I have perused the Applicant offers security by deposits of motor vehicles already old and not valued with the respondent. A list of authorities is filed by Respondents Advocate.

1. In case No. HCC at Meru Civil Appeal No. 3 of 2007 the court ordered deposit of decretal sum in a joint Account.
2. In Case No. 1950/2000 Alibhai Shariff & Sons Ltd vs Technical Trading Ltd the application was dismissed.
3. In case of Lee Muthoga vs Habib Zerich Finance (K) Ltd. Application was dismissed.

I have considered all these authorities and the arguments advanced to support the decisions reached. Reading the Order 41 Rule 4 it is clear that the main ground is the prove of substantial loss and the ability

of the decree holder to repay the money if the appeal is successful. The decree holder has attempted to show that he is not a man of straw and he can refund the money. However I have come to the conclusion that the Applicant may be granted stay orders upon depositing Shs.1.5.million in an interest earning account with a reputable Bank in joint names of Applicant's Advocate and Respondents Advocates pending the hearing and determination of the appeal. The deposit shall be made within 21 days from today.

It is so ordered.

Dated this 8<sup>th</sup> May, 2008.

**J. N. KHAMINWA**

**JUDGE**

**8/5/2008**

**Khaminwa – Judge**

**Njue – Clerk**

**Mr. Kahiga -present**

Read in open court.

**J. N . KHAMINWA**

**JUDGE**