



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**CIVIL APPEAL 67 OF 2008**

**MBURUGA MUCIRI NGURE.....APPELLANT**

**VERSUS**

**RUTH WANGARI MBURUGA.....RESPONDENT**

**RULING**

I have heard the application before me. I have considered the grounds on its face and the rival affidavits for and against the same. I have also considered the oral submissions by both counsel in court and the law applicable in this matter.

First and foremost, I agree with counsel for the Respondent that the said application is fatally defective. The same seeks for a temporary injunction under Order XXXIX Rule 1 and 2 of the Civil Procedure Rules. Although prayer 2 is one for stay of execution, it is noted that the application is not premised on Order XLI Rule 4 of the Civil Procedure Rules at all which is the only order dealing with stay of execution pending an appeal.

Order XXXIX on the other hand applies where there is a suit pending before the court. In this case the suit has already been dismissed and an appeal cannot be said to be a suit for purposes of order XXXIX rule 1 –because an appeal does not commence any civil proceedings. In any event, there is actually no decree here which is at a risk of being executed. My finding therefore is that this application lacks merit and the same is hereby dismissed.

**W. KARANJA**

**JUDGE**

**13/10/2008**

Delivered and signed in open court today in presence of Mr. Munene for Mr. Mwai and Respondent in person.

**W. KARANJA**

**JUDGE**

**13/10/2008**