



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

**AT NYERI**

**Civil Appeal 53 of 2007**

**ZACHARY MACHIRA MWAI ..... APPELLANT**

**Versus**

**COOPERATIVE BANK OF KENYA LTD ... RESPONDENT**

**RULING**

The appellant has brought a notice of motion dated 22<sup>nd</sup> September 2008. The same is brought under XLI Rule 4(1)(2) and (3) of the Civil Procedure Rules. The appellant seeks an order of stay of execution of the decree issued on 6<sup>th</sup> June 2007 in Nyeri CMCC No. 95 of 2005 pending the determination of this appeal. In the supporting affidavit the appellant deponed that the lower court judgment was delivered on 24<sup>th</sup> January 2007. He was aggrieved by that judgment and after obtaining leave of the court to file the appeal out of time did indeed file the appeal on 2<sup>nd</sup> July 2007. That the respondent in the meanwhile was in the process of executing that judgment which was for kshs. 2,586,267.75. That the respondent was seeking the appellant arrest for failure to pay that amount. The appellant deponed that the respondent was holding as security title no. MWIYOGO/LABURA/BLOCK 11/18. The respondent opposed the application for stay. In opposition the respondent stated that the appellant had previously intended to settle the money advanced to him as an overdraft. He however failed to make the payment. In respect of the immovable property which was secured with the respondent it was stated that the respondent had made many attempts to sell the same but it had failed to attract reasonable bids. I have considered the application and the fact that the respondent not only has a judgment against the appellant but is also holding as security an immovable property. Order XLI provides that a court in considering whether to grant stay of execution should be satisfied that if stay was not granted substantial loss would be incurred and should also consider whether the application for stay was filed within reasonable time. The court can also order security for the due performance of a decree. The respondent has that security in the immovable property. It is considered that they have made attempts to sell it unsuccessfully. The appellant had secured the lower court's proceedings in typed form. The only impediment to the hearing of this appeal is the absence of the lower court file. I find that the just decision of this court will be that a stay be granted in CMCC No. 95 of 2005 to subsist up to 31<sup>st</sup> January 2009. I order that the lower court file No. 95 of 2005 be brought to the High Court with a view to this appeal being heard on 15<sup>th</sup> January 2009. The appeal shall be heard by way of written submissions. The costs of the notice of motion dated 22<sup>nd</sup> September 2008 shall abide with the outcome of the judgment.

***Dated and delivered this 15<sup>th</sup> day of December 2008***

**MARY KASANGO**

**JUDGE**