



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

**Civil Appeal 84 of 2005**

**ALBERT M'MBOGO ..... APPELLANT**

**VERSUS**

**CO-OPERATIVE BANK OF KENYA.....1<sup>ST</sup> RESPONDENT**

**KINYANJUI WANJULI T/A DALPHUI AUCTIONEERS..... 2<sup>ND</sup> RESPONDENT**

**RULING**

This application was argued *ex parte* after the respondent failed to attend court on the hearing date, having been represented in court when the date was fixed by consent.

The application brought under Order 41 Rule 4 of the Civil Procedure Rules seeks that execution of the decree in CMCC No.290 of 2003 be stayed pending the hearing of the application and in the alternative that *status quo* prior to the decree be maintained pending the hearing and determination of the appeal.

The application was drawn and filed by the applicant in person before he retained the present counsel. That may explain the manner the prayers are framed. From the provisions cited on the heading of the application and from the body of the application, the contents of affidavit in support as well as submissions by counsel, it is clear that the main prayer is stay of execution pending appeal. The grounds upon which the application is brought include the fact the applicant was aggrieved by the order of the lower court striking out the applicant's suit and has preferred an appeal against that order. That if the order of stay is not granted he stands to suffer loss as the suit properties are his only source of his livelihood and that of his family.

Although the respondents were not represented when the application was argued, the 1<sup>st</sup> respondent had filed a replying affidavit on 12<sup>th</sup> April, 20/07, which this court is bound to consider. In that affidavit it is deposed by the 1<sup>st</sup> respondent's counsel that although the applicant's suit was dismissed and appeal against that dismissal filed almost two years ago, he has taken no steps to prosecute the same. That by the nature of the applicant's claim and the dismissal thereof, the respondent can only execute for costs decreed in its favour and that such execution would not in any way render the appeal nugatory. An application for stay of execution will be granted if the applicant demonstrates that he will suffer substantial loss if the stay is not granted.

Secondly the court must be satisfied that the application for stay has been brought without unreasonable delay. Finally the applicant must be ready to comply with any conditions as to security as may be imposed by the court. But for these conditions to be considered there must be a decree or an order from which an appeal lies and which is capable of execution.

I consider that under Order 41 rules (4) and (6) of the Civil Procedure Rules, only three types of orders are envisaged, namely;

- (a) a stay of execution
- (b) a stay of proceedings

(c ) an injunction

What this application seeks to stay is an order striking out the applicant's suit. That order to my mind is not capable of being executed and therefore cannot be stayed within the meaning of sub rule (1).

To grant a stay of that order would have the effect of nullifying the said order before hearing the appeal challenging its grant. The prayer for maintenance of *status quo* prior to the grant of the orders in question, would similarly have the same implication.

The court has no jurisdiction to grant the orders sought in this application. It is also noted that no explanation has been offered why this appeal has not been heard 2 year since filing . I come to the conclusion that this application is incompetent and is struck out with costs to the respondents.

DATED AND DELIVERED AT MERU THIS 28<sup>TH</sup> DAY OF MAY 2007

W. OUKO

JUDGE