

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Civil Appeal 85 of 2006

GIKUNDI KAURUKO.....APPELLANT

VERSUS

THARACHI M'EMARA.....RESPONDENT

**(An appeal from the Ruling of Hon.Geoffrey Oyugi (RM) dated 22nd August, 2006
in Tigania, RMCC NO.112 of 2005)**

RULING

This application was argued *ex parte* as the respondent, having been served with the same and the hearing date failed to reply or attend the hearing.

It is an application for stay of execution of a decree in Tigania SRMCC No.117/2005. The grounds upon which the application is premised are that the respondent brought a suit against the applicant in Tigania Court. That the case proceeded *ex parte* after judgment was entered.

The applicant moved the court to set aside the said *ex parte* proceedings and judgment but the application was dismissed, prompting him to file the present appeal. In the meantime the court has issued notice to show cause against the applicant.

The applicant now prays that the notice to show cause dated 11th May, 2007 be stayed pending the hearing and determination of this appeal. He argues that if execution proceeds the appeal shall be rendered nugatory.

The application is based on the provisions of Order 41 rule 4 of the Civil Procedure Rules, among other provisions. Under Rule 4 of Order 41 aforesaid an order of stay will issue if:-

- (i) the court is satisfied that substantial loss may result to the applicant unless the order of stay is made.
- (ii) the application has been brought without unreasonable delay
- (iii) the applicant has given undertaking as to security.

For the court to be satisfied that substantial loss may result to the applicant, it is incumbent upon the latter to demonstrate the nature and extend of the loss. He must also show how the appeal if successful will be rendered nugatory if an order of stay is not granted.

The applicant was expected to show, for instance, that should execution proceed and the decretal amount paid over to the respondent, the latter would not be in a position to refund the same in the event the appeal succeeds. There is no evidence or averment to that effect.

Secondly, the applicant's application to set aside the *ex parte* judgment was dismissed on 22nd August, 2006. The appeal herein was filed promptly on 30th August, 2006, but the application for stay filed 10 months after the dismissal. That constitutes unreasonable delay. Finally the applicant makes no offer to abide by any orders as to security.

The application must fail and is dismissed.

I make no orders as to costs.

DATED AND DELIVERED AT MERU THIS 20TH DAY OF JULY 2007.

W. OUKO

JUDGE