



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**CIVIL APPEAL 88 OF 1999**

**ROSE GATHIGIA W. KIRATHE )**

**MICHAEL MBAE ).....APPELLANTS/APPLICANTS**

**DANIEL KIAMA WAMITI )**

**Versus**

**DUNCAN KANYUA.....RESPONDENT**

**RULING**

Notice of Motion dated 18th January 2005 praying for “stay of execution in this appeal Nyeri High Court Civil Appeal No. 88 of 1999 and Nyeri Senior Principal Magistrate’s Civil Case No. 185 of 1997 pending the hearing and determination of the applicant’s Civil Appeal No. 204 of 2004 pending before the Court of Appeal.”

The Respondent opposes the application. There was a decision in Nyeri Senior Principal Magistrate’s Court Civil Case No. 185 of 1997 from which there was an appeal to this court in High Court Civil Appeal No. 88 of 1999. Both courts dismissed the Applicant’s case and he has now appealed in the Court of Appeal Civil Appeal NO. 204 of 2004. While the appeal in the Court of Appeal is pending, the Applicant is now in this court praying in this application for a stay of execution.

From what has been brought to my attention during the hearing of this Notice of Motion, I hold the view that the said Notice of Motion should be dismissed and the same is hereby ordered dismissed with costs to the Respondent for the following reasons: Firstly, none of the prayers in the application specifies the particular order of this court or the court below sought to be stayed. The date of the order in question is very important.

Secondly, the Applicants have not persuaded me to agree with them that the appeal will be rendered a nugatory. The sum is said to be Ksh.130,000/= and a part from mere allegations, it has not been proved that the Respondent is not able to refund that sum of money in case the Applicant’s appeal succeeds.

Thirdly, the Applicants give me the impression that they are not people who will prosecute the appeal once they obtain a stay as they have twice obtained temporary stays which instead of using to pay the decretal sum as agreed, they used the stays to prolong denying the decree holder the fruits of the decree.

Fourthly, there has been inordinate delay in filing this application for a stay.

**Dated this 10th day of March 2005.**

**J. M. KHAMONI**

**JUDGE**

**Present:**

**Mr. T. Mwangi for the Appellant**

**Mr. Mwangi Waiganjo for Mr. Mahinda for the Respondent**