



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**(MILIMANI LAW COURTS)**

**CIVIL SUIT 1130 OF 1996**

**LUCY WAIRIMU MWAURA .....PLAINTIFF**

**VERSUS**

**ASWINCHAND HIRJI SHAH .....1ST DEFENDANT**

**NAVICHAND HIRJI SHAH .....2ND DEFENDANT**

**MUKESH KUMAR HIRJI SHAH .....3RD DEFENDANT**

**ABDUL JANMOHAMED .....4TH DEFENDANT**

**R U L I N G**

The Applicant seeks to stay the order of Mr. Justice Mbaluto of the 7.3.2003 in which he gave judgement for the Plaintiff herein and the order of Mr. Justice Emukule of the 17.6.2005 in which he dismissed the Applicant's application to set aside the judgement of Mr. Justice Mbaluto.

It was Mr. Gautama's contention that the judgement of Mr. Justice Mbaluto was a nullity, as the proceedings had not been served on the Applicant but on their advocates and that under Order 5 Rule 9(2) judgement could not be entered in default of appearance.

He further submitted that as one of the Respondents had died the suit had abated. Miss Ngugi for the Respondent opposed the application and relied on the replying affidavit. It was her submission that the matters raised by Mr. Gautama were the subject matter of the ruling of Mr. Justice Emukule in respect of which he made his order.

I see no reason for a stay of these proceedings as the application is apparently against the judgement and order of Mr. Justice Emukule. It is not appropriate in a stay of execution for this court to call into question the decisions made by two eminent judges of this court. That is a matter for the Court of Appeal.

What I am concerned with is has the Applicant shown that it will suffer substantial loss if a stay is not granted.

The stay I am asked to make is that the suit premises are not transferred to the Respondent pursuant to the judgement herein. The subject matter of the suit was the Respondent's right to an order for specific performance of a contract to sell the suit premises to the Respondent by the Applicants. The Applicants wish to preserve the subject matter of the suit pending the hearing of the appeal.

The Applicants have however taken two months to bring this application after the order of Mr. Justice Emukule which delay has not been explained. The Respondent complains that this is unreasonable delay within the meaning of O 44 rule 4 (2) (a). The position in this matter is that the Respondent has a judgement in her favour and an order that the title to the suit premises be transferred to her. The Respondents are however in possession of the suit premises and I am informed are in receipt of rent.

Mr. Gautama's submissions were that the judgement was entered improperly contrary to O 5 rule 9 (2) that the suit has abated due to the death of the 2nd Defendant and that the title deed was not produced contrary to O 20 rule 5(a).

None of these matters are, however, matters for consideration in an application for stay. These are matters to be raised in the Court of Appeal against the judgement or ruling sought to be set aside.

The Applicants have not in my view demonstrated any substantial loss if the orders made in this matter are enforced.

That being the case I decline to grant an order of stay in this matter and dismiss this application with costs to the respondent.

Dated and delivered at Nairobi this 24th day of October, 2005.

**P. J. RANSLEY**

**JUDGE**