



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CIVIL MISC. NO. 43 OF 2003**

**ELIZABETH MWIKALI KITHUKA.....APPLICANT**

**VERSUS**

**FRANCIS KYALO MAITHA.....RESPONDENT**

**R U L I N G**

By an amended notice of motion dated 6.3.2003 the applicant seeks an order of stay of execution of the decree in PMCC no. 211/02 pending hearing and determination of the appeal on the ruling and order of the lower court dated 24.2.2003.

The grounds upon which the application is made are that the applicant is aggrieved by the said ruling and has appealed and the appeal has high chances of success and appellant stands to suffer substantial loss if the execution is not stayed and lastly that the application has been brought without delay. Kamau Mwangi advocate swore an affidavit in support of the application and so did the applicant swear a further affidavit in which she offered security of land parcel no. LR 74060 situate in Athi River town and motor vehicle Reg. No. KAC 963T Mitsubishi canter or that she be allowed to deposit decretal sum in court in instalments.

Though the respondents were present when the hearing date for the application was taken there was no appearance by the respondents but they had filed a replying affidavit dated 10.3.2003 and filed in court on 11.3.2003 in which it was deponed that the 1st application dated 26.2.2003 was not served on respondents, that the amended notice of motion was done so without leave of court; there is no evidence that applicant will suffer irreparable loss if stay is not granted. That there is no evidence that the plaintiff is impecunious and not able to repay the decretal sum if money is paid out.

On 6.3.2003 when the parties were before this court, it was ordered that the applicant do amend their application. The respondent cannot therefore say that the amendment was done without leave of the court. The lower court delivered its ruling on 24.2.2003 dismissing the applicants application to set aside judgement. This application was filed on 28.2.2003 [www.kenyalaw.org](http://www.kenyalaw.org)

soon thereafter and the amendment filed by 6.3.2003. It was done within a reasonable time as per provisions of order 41 rule 4 (2). The applicant has already filed the record of appeal. Infact the appeal is ready for hearing showing their seriousness in having the appeal heard. On 15.1.2002 the decretal sum stood at about Kshs.435,000/=. In their affidavit the applicant depones that the respondent depended on the deceased who worked as a loader to give him 200/= per month and that if given the decretal sum the Respondent will not be able to repay. Applicant offered security in the form of a vehicle and land or payment in instalments. There was no evidence adduced by the respondents to the contrary and in the circumstances the court will allow the application dated 6.3.2003 and order stay of execution in PMCC 211/2002 pending hearing inter parties but it will be conditional. The condition is that the applicant do deposit Kshs.300,000/= in an joint interest earning account of both counsels for applicant and respondent within 21 days from todays date failing which the order of stay will be vacated.

The applicant will bear costs of this application.

Dated, read and delivered at Machakos this 11th day of March, 2004.

**R. WENDOH**

**JUDGE**