



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

**CIVIL APPEAL NO. 105 OF 2002**

**JOSEPH MUYA T/A FLAMINGO STABLES.....APPELLANT**

**VERSUS**

**MBUGUA NGURE.....RESPONDENT**

**RULING**

This is an application under Order XLI Rule 4 of the Civil Procedure Rules (hereinafter referred to as “the Rules”) and Section 3A of the Civil Procedure Act (Cap. 21). In it, the Appellant seeks in the main the following orders:

*“3. THAT the conditional order of stay of execution made by the Senior Principal Magistrate on the 17th July, 2002 in the subject suit be set aside.*

*4. THAT there be unconditional stay of execution of the Honourable Court’s judgment/decreed dated 12 th June 2002 pending the hearing and determination of t he instant appeal or stay of execution upon reasonable and justifiable condition(s).”*

At the outset, I would like to point out that I do not see the relevance of prayer three above. That prayer cannot be supported either by the procedure or practice of this Court since this is not an appeal from the order referred to. The application presently under consideration is independent of the order made in the Lower Court as can be seen from the provisions of Order XLI Rule 4 (1) of the Rules. Prayer three of the application is, therefore, refused.

The only matter left for determination in the application is, therefore, prayer number four above. The jurisdiction of this Court in dealing with applications for stay of execution is fully defined in Order XL Rule 4 (2) in the following words:

*“No order for stay of execution shall be made .... unless –*

*(a) the Court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; a nd*

*(b) such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”*

Going by the nature of the Submissions of Counsel, the only issue raised for determination before me was whether the Appellant was at substantial risk if the order for stay of execution was not made. By substantial risk is meant that the Appellant will be unable to recover the sum paid under the decree from the Respondent were he to succeed on his appeal. This has been said in other words as his appeal being rendered nugatory. (see *Indar Singh Gill Ltd. v. Njoroge Gichara HCCC NO. 2411 OF 1990*) and *N. M. Butt v. Rent Restriction Tribunal CIVIL APPL. NO. NAI 6 OF 1979*). On March 13, 2002 I had the opportunity to consider a similar question in *Kieni East Farmers Co. Ltd. v. Moses Mureithi Waiganjo & Others NAKURU HCCC NO. 66 OF 2000* in which I adopted the following words of my Learned Brother the Honourable Mr. Justice Kuloba:

***“Substantial loss said likely to result from a refusal of a stay must be demonstrated as a matter of fact; and not by a mere flat statement in an affidavit or at the bar.”***

The Appellant before me has not demonstrated by any material that the Respondent will be unable to refund the decretal sum were the Appellant to succeed on his appeal. That being the case, the application cannot succeed. On this conclusion, I do not find it useful to discuss the other authorities cited before as they do not affect the decision I have come to differently.

I, therefore, dismiss the Appellant’s application dated July 22, 2002 with costs.

**Dated and Delivered at Nakuru this 30th day of July, 2003.**

**ALNASHIR VISRAM**

**JUDGE**