



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**CIVIL APPEAL NO. 57 OF 2015**

**JOHNSTONE NYAGA T/A**

**GERISH HOTEL.....APPELLANT**

**V E R S U S**

**PURITY NJAGI.....RESPONDENT**

**R U L I N G**

1. This is an application dated 10/10/2017 seeking for orders for stay of execution of the decree in Embu HCA No. 57 of 2015 pending hearing inter partes of this application. It is supported by the affidavit of Johnstone Nyaga and the grounds on the face of the application.
2. The applicant states that he has already lodged an appeal in the Court of Appeal Nyeri which may be rendered nugatory in the event that the orders sought herein are not granted. It is also stated that the applicant is likely to suffer substantial loss for his appeal is good and arguable with a probability of success.
3. The applicant states that he has appealed against the judgment of this court delivered on 2/10/2017. A notice of appeal dated 10/10/2017 is annexed to this application together with a letter of request for typed copies of proceedings for purpose of appeal. Also annexed are a notice of taxation by the respondent dated 6/10/2017 and the bill of costs attached thereto.
4. A supplementary affidavit sworn on 14/11/2017 by the applicant states that he stands to suffer massive loss if stay is not granted as the subject matter lacks ownership documents. He has summoned the respondent severally to come and pick the disputed items without success. The items cannot be legally owned and as such the respondent cannot prove ownership. He further states that he is capable of paying the decretal amount in the event his appeal does not succeed.
5. The application was opposed by the respondent on the grounds that it lacks merit. It is contended that the application raises issues which were dealt with in the judgment and had not shown that he has satisfied the conditions for granting stay pending appeal. It further argued that the applicant's statement in the supplementary affidavit that he should not be ordered to deposit security is a misdirection under the rules guiding stay pending appeal.
6. Both parties filed submissions in support of the arguments herein.
7. This application is brought under Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules. Order 42 deals with appeals to the High Court as it is expressly stated in Rule 1 of the Order:-

*42(1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.*

It goes without saying that Order 42 Rule 6 deals with stay of execution in relation to appeals in the high court. Stay of execution relating to appeals filed in the court of appeal is governed by Rule 85 of the Court of Appeal Rules.

8. The applicant has annexed a notice of appeal worded as follows:-

*Take notice that the appellant herein being dissatisfied with the decision given at Embu High Court on 2/10/2017 intends to appeal to the Court of Appeal against the whole of the said decision.*

9. It follows that stay of execution in the Court of Appeal is governed by a different regime of rules and as such the conditions that the

applicant may requires to satisfy are totally different from those provided for under Order 42 Rule 6.

10. This application ought to have been filed in the Court of Appeal and not in the High Court. This court lacks jurisdiction to grant the orders sought herein.

11. I find this application incompetent it is hereby struck out with costs.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 6TH DAY OF JUNE, 2018.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Mr. Mugambi for applicant**

**Mr. Kamunda for Fatuma for Respondent**