



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

**CIVIL DIVISION**

**CIVIL APPEAL NO. 48 OF 2017**

**FAHARI WHOLSESALERS & RETAILERS .....PLAINTIFFS**

**AND**

**HENRY KIDULA**

**T/A NYALUOYO AUCTIONEERS.....DEFENDANTS**

**R U L I N G**

**Introduction**

1. The application for determination is the Notice of Motion dated 24.04.2017 brought under order 42 Rule 6 of Civil Procedure Rules. The application was certified urgent and a temporary injunction issued to the appellant restraining the respondent from attaching his property. The appellant now wants a temporary order of injunction restraining the respondents from attaching his property pending the hearing and determination of his appeal.
2. The application is based on the grounds on the face thereof and supported by the appellant's affidavit wherein he reiterates the ground in support of the application.
3. The application is opposed. There is a replying affidavit by Henry Kidula the 1<sup>st</sup> respondent and co-administrator of the estate of Francis Kidula Asiligwa. He explains therein the tenancy of Edward S. M. Juma in the suit premises at a monthly rent of Kshs.15,000/= which he has defaulted in paying and which led to the distress for rent. He states that Edward entered into the tenancy agreement in his personal capacity and not as a director of the Appellant Company. He contends that the application does not meet the legal requisites for the grant of orders of injunction.

**Determination.**

4. The application is brought under order 42 Rule 6 of the Civil Procedure Rules Rule 6(1) provides that no appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except as the court appealed from may order for sufficient cause .
5. Before proceeding further, I note from the reading of the said order, Rule 6 deals with stay of execution and not injunction which the appellant is seeking in his application.
6. Secondly, I find that even if the applicant was seeking a stay of execution, his application could not succeed for failure to comply with the conditions set out under Rule 6 of Order 42 of the Civil Procedure

Rules.

7. I find the appellant application fatally defective because the orders being sought for are not in line with the provisions cited to file the same. There is a big difference between an application for injunction and one for stay of execution. An injunction cannot be issued after a judgment. What issues is stay of execution, but as already noted above, the applicant has not met the conditions for grant of stay of execution order.

8. I therefore find the application to have no merit and the same is dismissed with costs to the respondent.

It is so ordered

Ruling delivered, read and signed in open court at Kakamega this 30<sup>th</sup> day of May, 2017

RUTH N. SITATI

JUDGE

In the presence of;-

Mr. Munyendo (absent).....for Appellant

Miss Khatshi for Abira .....For respondent

Polycap Mukabwa.....court Assistant