



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CIVIL APPEAL 217 OF 2008

BEATRICE MUTUO NZIRU APPELLANT/APPLICANT

VERSUS

JOHN MISYILI IKULI 1ST RESPONDENT/ RESPONDENT

SAMMY KATHUKU 2ND RESPONDENT/RESPONDENT

(Being an appeal from the Judgment of Honourable D.M. Ochenja dated 8th March 2009

in Mwingi Senior Resident Magistrate Civil Case No. 240 of 20079)

RULING

1. The Application before me seeks orders under Order XLI Rule 4 of the Civil Procedure Rules that the execution of the judgment and decree passed on 10/12/2008 be stayed pending the hearing and determination of the Appeal herein.

2. I have read the Supporting Affidavit sworn on 20/4/2009 by the Applicant, Beatrice Mutuo Nziru. I have also read the Replying Affidavit sworn on 24/4/2009 by the 2nd Respondent. It is clear to me that the Application is without merit for the simple reason that what is in issue is the paltry sum of Ksh.7,525/= being costs awarded to the Respondents at the conclusion of **Mwingi PMCC No. 240/2007**. The Applicant depones at paragraph 8 of her Affidavit:-

“8. That I am likely to suffer irreparably if the costs are paid to the respondents since they represent an unregistered society and there are no chances that upon the money being released to the respondents I will be able to recover it from them should my appeal succeed.”

3. The record would show that the Respondents are sued in their personal capacity and not on behalf of

any society, registered or unregistered and therefore recovery of the said sum, should the Appeal succeed, will be a matter directed at them and not anyone else. In any event, at paragraph 7 of the Replying Affidavit, the 2nd Respondent states as follows:-

“7. That the amount involved is so small which I undertake to pay in the event her appeal succeeds since I am a teacher in government employment.

4. That assertion has not been challenged and crucially I see no substantial loss to be occasioned to the Applicant if the orders sought are not granted – see **New Stanley Hotel Ltd vs Arcade Tobacconists Ltd (1986) KLR 757**. Even with the offer to deposit the said sum in court, without evidence of substantial loss, I see no reason to say more.

5. The Application dated 20/4/2009 is without merit and is dismissed with costs to the Respondents.

6. Orders accordingly.

Dated and delivered at Machakos this **1st** day of **July** 2009.

ISAAC LENAOLA

JUDGE

In presence of: **Respondents present**

N/A for Applicant

ISAAC LENAOLA

JUDGE