



**IN THE COURT OF APPEAL
AT NYERI
(CORAM: TUNOI, O’KUBASU & NYAMU, JJ.A)
CIVIL APPLICATION NO. NAI. 165 OF 2010
BETWEEN**

IRENE NJOKA.....APPLICANT

AND

PETER NJERU NYAGARESPONDENT

(An appeal from the judgment of the High Court of Kenya at Embu (Karanja, J.) dated 13th May, 2010

in

H.C.C.A. NO. 77 OF 2009)

RULING OF THE COURT

This is an application under **rule 5 (2) (b)** of this Court’s rules.

It seeks stay against execution of the order of the superior court delivered on 13th May, 2010 in Embu pending appeal.

The application was triggered off by a judgment given by **SPMCC No. 233 of 2004** where the Resident Magistrate awarded damages to the respondent on 20th November, 2008 after concluding a negligence suit involving the parties to this application. The applicant herein being the aggrieved party filed an appeal against the said judgment in the superior court without leave.

When the application came up for hearing Mr. H.K. Mahan held brief for Mr. M. Njage for the applicant whereas Mr. Muyondi appeared for the respondent.

Although we have taken into account the affidavits filed both in support and against the application including the submissions of the counsel for the respective parties it was right at the outset pointed out to counsel during the hearing that the order against which a stay was sought was a negative order, a situation which in our view has been adjudicated upon in based on many past decisions of this Court. For this reason it is only this point which will be the focus of the ruling.

In her ruling (W. Karanja, J.) stated: -

“The only inference I am able to make in that “appeal” herein was filed out of time and without leave of the court. There is therefore no competent appeal before this court. That being the case, orders of stay pending the hearing and determination of the appeal cannot lie. In the circumstances, I make a finding that the application dated 17/8/2009 is totally devoid of merit and the same is hereby dismissed with costs to the decree holder/Respondent.”

The above is clearly a negative order and any stay would result in our reversing the order given by the superior court without hearing the matter on merit. We think that since there was no competent appeal in the superior court any order of stay would hang in the air in this Court. Our invocation of the overriding objective in the circumstances leads to the same conclusion namely dismissal.

In the circumstances what commends itself is a dismissal order.

The application is accordingly dismissed with costs to the respondents.

Dated and delivered at Nyeri this 8th day of July, 2011.

P.K. TUNOI

.....
JUDGE OF APPEAL

E.O. O'KUBASU

.....
JUDGE OF APPEAL

J.G. NYAMU

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR