



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

Civil Appeal 27 of 2006

CYRUS GAKURU GITARI.....APPELLANT

VERSUS

MAGONDU GAKURU.....RESPONDENT

JUDGMENT

The applicant filed the instant application on 6/2/2008 – (dated 4/2/2008) where he is seeking the following order:-

*“That this Honourable court be pleased to grant a Stay of Execution of the orders/Judgment of 30/12/2005 and any other subsequent orders pending the hearing **and determination of the appeal herein**”*

The application is premised on the 4 grounds on its face and a short affidavit shown by the plaintiff which basically repeats the said grounds.

- (a) The Applicant has already filed an appeal, which has not been heard and determined.**
- (b) That the Respondent has commenced execution as per the lower court Judgment.**
- (c) That the applicants appeal has got high chances of success and if execution proceeds, then the appeal shall be rendered nugatory.**
- (d) That it is only fair and just that the court do issue an order of stay.**

The same is opposed by the respondent vide the replying affidavit dated 27/5/2008. The application is brought under order XXI Rule 22 of the Civil Procedure Rules. As rightly submitted by counsel for the respondent, this application is fatally defective as it is premised on the wrong provisions of the law. I agree with counsel on that aspect. Order XXI Rule 22 only applies to decrees which have been sent to another court in another jurisdiction for execution. This application is for a stay of execution of decree

from this jurisdiction and not one which has been sent here for execution. On that basis alone, this application should fail for being fatally defective.

On merit, I have seen the Memorandum of Appeal and I actually think that the appellant has good chances on appeal given. My previous Judgments on the interpretation of Section 40 of the Law of Succession Act. Unfortunately, the applicant needed to explain to the court why he took over 2 years to file the said application Order. XLI rule 4 (2) (1) which is the proper provision to have brought the application under provides as follows:-

***“No order for Stay of Execution shall be made under subrule 1***

***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”***

The applicant must therefore explain the delay. The delay must not be unreasonable. If it is unreasonable and unexplained, then the court would not grant the stay orders sought. It is not enough for a party to claim that the appeal will be rendered nugatory unless the Stay Orders are granted. So even on merit, this application is doomed to fail. For the foregoing reasons, my finding is that this application is not first bad in law, it is also devoid of merit the same is hereby dismissed with costs to the Respondent.

**W. KARANJA**

**JUDGE**

Delivered, signed and dated at Embu this...30<sup>th</sup> day of October, 2008.

In presence:-



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