



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**OF KISII**  
**Civil Appeal 198 of 2008**

**FLORENCE ACHIENG ABUORO .....**  
**APPELLANT**

**VERSUS**

**TOM STEPHEN MAUYA**

**DAVID OBARE OMWOYO T/A OMWOYO**  
**AUCTIONEERS.....RESPONDENTS**

**RULING**

The applicant filed a suit at the chief Magistrate’s Court, Kisii against the respondents which was struck out with costs. She has filed an appeal against the dismissal. In this application brought under **Orders XL1 rule 4** and **L rule 1** of the **Civil Procedure Rules** and **section 3A** of the **Civil Procedure Act**, the applicant sought an

**“Order of stay of execution of the Ruling and Order of**

**this court made on 27<sup>th</sup> October, 2008 pending the**

**hearing and determination of this appeal.”**

The ruling sought to be appealed from was made by the subordinate court and not **“this court”**. The application was filed on behalf of the applicant by **M/s. Bosire Gichana & Company Advocates** and argued by **Mr. Bosire**.

The respondents, through **M/s. Oguttu-Mboya & Company Advocates**, filed Statement of Grounds of Opposition which were urged by **Mr. Oguttu**, who also filed a list of authorities on which he relied.

The purpose of the application for stay is to preserve the subject matter in dispute so that the rights of the appellant, who is exercising his undoubted right of appeal, are safeguarded and the appeal, if successful, is not rendered nugatory (**Consolidated Marine v. Nampijja and Another, Civil Application No.93 of 1989 at Nairobi**). It has to be shown the appeal is arguable. The court has to review the proceedings of the subordinate court and yet not prejudge the appeal so as to make sure that it is not lightly interfering with the order of the court but on the other hand preserving the *status quo* so that the appeal will not be rendered nugatory (**Dan Crawford Serwadda v. Alphonse Odido, Civil**

**Application No.41 of 1987 at Nairobi).**

In the instant case, the court does not have copy of the proceedings or ruling appealed from to be able to estimate the chances the appeal may ultimately have. Where it has not been shown that there is an arguable appeal, the court does not have to consider whether the appeal will be rendered nugatory (**George Kihara Mbiyu v. Sifa International and Others, Civil Application No.41 of 2002 at Nairobi.**

**Mr. Oguttu** raised the issue that the order being appealed from was a negative one incapable of being executed. He relied on the decision in **Exclusive Estates Limited v. Kenya Posts and Telecommunications Corporation and Others, Civil Application No.62 of 2004 at Nairobi** to argue that the orders sought cannot be granted. In response, **Mr. Bosire** indicated that his client sought

**“to stay the ruling as regards costs only.”**

That would be a departure from the prayer in the application as indicated in the foregoing. In any case, where what is sought to be stayed is the order for costs, the same cannot be granted as the applicant, if she succeeds in her appeal, would be refunded her costs (**Francis Kabaa v. Nancy Wambui and Another, Civil Application No.298 of 1996 at Nairobi**).

It appears settled that where there is no positive order made in favour of the respondent which is capable of execution the application for stay is misconceived (**Venture Capital and Credit v. Consolidated Bank of Kenya Ltd, Civil Application No.349 of 2003 at Nairobi**).

In this case, if the application is not granted, the appeal will not be rendered nugatory because if the appeal succeeds the striking out order will be set aside and the suit will be restored to be prosecuted by the applicant.

For these reasons, the application is dismissed with costs.

Dated, signed and delivered at Kisii this **16<sup>th</sup>** day of July, 2009

**A. O. MUCHELULE**

**JUDGE**

**16/7/09**

A. O. Muchelule, J

cc. Mongare

Mr. Oguttu present

Mr. Bosire present.

**Court:** Ruling in open Court.

**A. O. MUCHELULE**

**JUDGE**