





*appeal signed in the same manner as a pleading (2). The memorandum of appeal shall set forth concisely and under distinct heads, the grounds of objection to the decree or order appealed against, without any argument or narrative and such grounds shall be numbered consecutively.”*

This means that any processes relating to an appeal can only lie where there is an appeal in existence. Here in what the court has before it is a miscellaneous application and not an appeal.

The reliefs being sought under order 41 rule 4 have also to satisfy the ingredients under that rule.

The salient provision in that rule is found running from line 4 – 7 and it states..... *“the court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the court appealed from, the Court, to which such appeal is preferred shall be at liberty, on application being made to consider such application and to make such order thereon as may the court seem just....”*

It is therefore clear that in order to qualify for a relief under this provision the request for the relief must be directed either to the court appealed from or the Court appealed to. This court having neither been addressed as a court appealed from or appealed to has no jurisdiction to entertain the application.

The next point for consideration is whether the error is curable by provisions of Section 3 and 3A of the Civil Procedure Act. Section 3 Civil Procedure Act reads “in the absence of any specific provision to the contrary nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred or any special forms, or procedure prescribed by or under any other law for the time being in force”. Section 3 envisages a situation whereby all forms of procedure is provided for under the Civil Procedure Act. But where none exists under the Civil Procedure Act but that kind of procedure is provided for under any other written law, a court of law can invoke that procedure and that will be perfectly in order. This section cannot assist the applicant because the procedure for stay is already provided for under order 41 rule 4 of the civil Procedure rules. That order is exhaustive and no extraneous provisions can be called in to deal with any inadequacies, if any, more so when none has been cited to the court.

Section 3A on the other hand states that *“nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the Court.*

This section enshrines the inherent powers of the court which are called into play to do justice where no provision of law grants authority to do justice. It is not invoked where a laid down procedure is provided but has not been taken up by the litigant. Herein it is not available to the applicant because there is provision for him to seek stay in the first instance in the court appealed from or proceed to file an appeal and then seek stay from the Court appealed to. The applicant did not seek stay from the court appealed from. He sought stay from this court before filing of an Appeal. The application therefore has no legal basis. It is incompetent, and there is no need for this court to go into its merits. This Court sees no reason to depart from the holding in Nairobi HCCC 209 of 2005 CONTINENTAL CREDIT FINANCE LTD VERSUS ISAAC GATHUNGO WANJOHI & 2 OTHERS where at page 4, 2<sup>nd</sup> last paragraph the Court remarked that if there is no notice of appeal filed by the Defendants the application will fail. On the basis of the foregoing findings the application dated 5.12.2006 and filed the same date cannot stand. It is dismissed with costs to the Respondents.

**DATED READ AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> THIS DAY OF MARCH 2007.**

**R. NAMBUYE**

**JUDGE**