



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Appeal 457 of 2003**

**GRACE MUTHON KABUI ..... PLAINTIFF**

**VERSUS**

**JOSEPH KARUME NJENGA ..... DEFENDANT**

**RULING**

**1. PROCEDURES AND BACKGROUND**

1. The application before me is brought under Order 41 r 4 (1) Civil Procedure Rules and Section 3A and 63 (e) Civil Procedure Act. It seeks prayers of stay of execution of the subordinate courts orders against the applicant who has filed an appeal to this High Court.

2. Grace Muthoni Kabui (Original plaintiff respondent/respondent) sued Joseph Karume Njenga (the original defendant/appeellant/applicant) of alleged fraud. She removed timber/and or presumably trees from a forest worth Ksh.150,000/-. The applicant took the said bulk timber/trees and sold the same but did not pay Ksh.150,000/-. He failed to enter appearance and file defence even when he was aware that summons were left with his relative. When he rushed to court he found the respondent had obtained judgment against him *ex parte*.

3. An application to set aside the *ex parte* judgment was refused. The application before me indicates that the applicants former advocate failed to diligently persecute the same, a delay was therefore occasioned.

4. The respondent (Grace Muthoni Kabui) then executed the courts judgment. The applicant (Joseph Karume) was unable to pay. He was committed to civil jail on the 30.6.05.

5. On the very same day an application for stay of the trial magistrate orders was made. Namely, that the orders that committed the applicant to civil jail be stayed. Ojwang J stayed the magistrates orders on 30.6.05.

6. The parties appeared before me on 27.4.06 for an interparties hearing. The applicant "surprisingly" alleged that he in fact was NOT Joseph Karume Njenga. He was one Antony Karume Njenga. This, the respondent objected to as in the magistrates courts he actually swore an affidavit that he was one Joseph Karume Njenga on the 11.9.03.

7. The applicant nonetheless admitted that he had a good defence. This defence consisting of 5 paragraph/lines were denials to the plaint.

## II: FINDINGS

8. The question to ask should the appellant continue to serve 30 days imprisonment pending the appeal of his case? If the appellant was at all times Joseph Karume Njenga the answer would have been no and thus the application for stay of the court orders pending appeal would have been granted on grounds that a party has a right to be heard.

9. In this instance a new matter has arisen. That the trial magistrate had committed a stranger. These are serious allegations and raises questions to be considered in the appeal. The trial magistrate is alleged to have been aware of these questions.

10. I hereby find that the applicant has a right to be heard. That pending this appeal I order there be a stay of execution of the trial courts orders committing the applicant to 30 days civil jail.

11. I further order that the costs of this application be in the cause.

Dated this 28<sup>th</sup> day of May 2006 at Nairobi.

M.A. ANG'AWA

JUDGE

Mwangi Wahome & Co. Advocates for the plaintiff/respondent

Njomo Njenga & Co. Advocates for the defendant/applicant