



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Appeal 231 of 2003**

**ISHMAEL GICHONGE MUTURI ..... APPELLANT**

**VERSUS**

**DIANA LASOI ..... RESPONDENT**

**RULING**

The Notice of Motion herein, dated 19/9/05 and filed the same day, under Order 41 Rule 4 of the Civil Procedure Rules seeks the following orders:

- 1. Already spent**
- 2. Stay of the proceedings in CMCC NO. 4541 of 1999, at Milimani, pending the hearing and determination of the appeal herein. Then costs to be in the cause.**

The application is on the grounds, inter alia, that

**a) Proceedings in the Lower Court is proceeding and the next day for hearing has been set for 21/9/05 despite the fact that there had been a stay granted by the lower Court that has gone missing with the original subordinate Courts file.**

**b) The appeal will be rendered nugatory if proceedings in the lower Court are allowed to continue.**

In opposition, vide the Replying Affidavit, by A. Simiyu Murambi, the Respondent avers that: the application is frivolous, misconceived and an abuse of the court process; the annexed copy of the purported proceedings is not authenticated by the Court Registry and cant be said to be the Court record; appellant did not extract the order and instead chose to keep the alleged handwritten copy of the proceedings; when Respondent filed application to reconstruct the lower Court file and served the appellant, appellant did not file copies of the handwritten proceedings of the missing file to aid the reconstruction process.

Having perused the pleadings herein, and considered the submissions herein, and considered the submissions by Counsel for both sides, I have reached the following findings and conclusions.

The application seems to have been brought under an Order which is not quite the appropriate one.

Order 41 Rule 4 deals with stay applications pending appeals. The conditions under that order are clearly spelt out in sub-rule 2(a)-(b) and these deal with stay of execution pending an appeal.

In the application before me, the application is not for a stay of execution, but stay of proceedings, pending appeal.

Execution can only be applicable where the lower Court has passed a judgment. That is not the case here.

The main problem here is a common ground that the file at the lower Court went missing and a reconstruction was necessary. There is no dispute that the lower Courts file went missing. If that is granted, there is no way that one can deny or confirm that a stay of proceedings had been granted, by the lower Court, by consent of the parties.

The Respondent has not denied that a consent to the above effect was indeed recorded on 3/4/03, but the file went missing before the said order was extracted. Mr. Simiyu, counsel for the Respondent then, could have cleared the matter in light of the missing original lower Courts file.

However, Mr. Musyoka is the one who appeared for the Respondent.

In, my view, I accept Mr. Owino's statement and supporting affidavit of Mr. Julius Orege, that there was indeed a stay order, staying the proceedings at the lower Court, in the file that went missing.

All in all therefore, and for the reasons given above, I grant the application as prayed in the Notice of Motion dated 19/9/2005.

DATED and delivered in Nairobi this 5<sup>th</sup> day of December, 2006.

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**O.K. MUTUNGI**

**JUDGE**