



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI  
MILIMANI COMMERCIAL COURTS  
CIVIL CASE NO.1016 OF 2002**

**MRS. HELLEN OLIMA ..... PLAINTIFF**

**VERSUS**

**JOHN KIPKEMBOI KILEL ..... DEFENDANT**

**R U L I N G**

The Notice of Motion, dated 27/4/04, under Order 44 rules 1, 3, Order 21 rule 22 and Order 50 rule 1 of the Civil Procedure Rules; Section 3A, 63(e) and 80 of the Civil Procedure Act seeks orders that:

- 1. Already spent.**
- 2. The Court review and discharge its orders of Stay pending appeal that was granted to the Respondent on 13/6/03.**
- 3. In the alternative the Court do order Respondent to deposit the decretal amount in court pending the hearing and determination of the intended appeal.**
- 4. Costs of the appeal to be provided for.**

The application is supported by affidavit by Wilfred Riitho Njeru, and is on grounds that:-

- 1. The Plaintiff – Lakestar Insurance Co. was placed under liquidation on 27/6/03.**
- 2. Wilfred Riitho Njeru was appointed Interim Liquidator of Lakestar Insurance Co. on 27/6/03;**
- 3. The Liquidator has sought and obtained leave of this court to prosecute and/or continue with the prosecution of this suit.**
- 4. Material, important and necessary facts were not disclosed to the court thus misleading the court to granting the order of 13/6/03 as for instance;**
  - (i) that the Respondents misled the court into granting an Order of Stay of Execution pending appeal instead of pending inter parties hearing.**
  - (ii) the nature of the Orders obtained ex-parte is such that they should not have been granted on an ex-parte application.**

**(iii) the firm that presented the application has never been on record for the judgment debtor and neither have they ever sought or obtained leave to go on record for the Respondent.**

**(iv) no Notice of Appeal was ever filed in court by the firm of Advocates on record for the Judgement Debtor. Even worse, no appeal has been filed to date.**

**(v) the debt owed to the Plaintiff by the Defendant is yet to be satisfied.**

**(vi) The Respondent on the strength of the irregular Stay of Execution has succeeded in frustrating the execution of the judgment of this Court while not striving to expedite the appeal process. ce, as he cannot enforce the judgment to recover the outstanding debts owed to it while the Respondent continues to remove his assets from jurisdiction of this court so as to completely negate execution.**

**5. The Orders of Stay pending Appeal obtained before the court were improperly granted and are therefore irregular and ought to be vacated wholly or otherwise issued on condition that the Respondent deposits the entire decretal amount in court.**

Upon perusal of the pleadings herein by the Applicant, I have reached the following findings and conclusions:

**1. This court's Ruling on 8/6/04 that the hearing proceed ex parte at 10.30 a.m. was forced on the court because, as stated in the Ruling therein, because of Respondent's failure to appear and oppose the application despite proper service of the relevant document and hearing dates.**

It is clear now that the counsel and their law firm of Nancy Baraza Wamalwa could not appear for the Respondent because of the following:

**(a) That firm is not properly on record. The firm came on record without applying and obtaining the leave of this court, which is a mandatory requirement under Order 3 rule 9A of the Civil Procedure Rules.**

**(b) That Order of Stay the Respondent obtained was irregular and incompetent, the same having been applied for by an incompetent counsel.**

**2. The Stay of Execution was obtained through material and important non-disclosure of crucial facts, which misled the court in the issuance of the ex parte orders on 13/6/03.**

**3. The Notice of Appeal, further to (2) above on whose strength the irregular Order was issued has never been lodged and even if it were, it was incompetent because it was filed by a counsel not properly on record for the Respondent/Defendant.**

**4. By virtue of the irregular Stay of Execution order granted to the Respondent, the Plaintiff/applicant cannot enforce the judgment to recover the outstanding debts owed to it by the Respondent who continues to remove his assets from this court's jurisdiction.**

On the basis of the foregoing findings and conclusions, this Court is of the view that the Defendant/Respondent has intentionally and fraudulently avoided appearance before this court purposely to defeat the ends of justice.

Accordingly, this court rules as follows:-

**(a) Grants the application herein.**

**(b) Reviews and discharges its order of Stay pending appeal**

**granted to the Respondent on 13/6/03.**

**(c) Orders that the Defendant applicant do pay the costs of this application.**

The Liquidator to move with all due speed and diligence to recover all dues owed to Lakestar Company (now in liquidation) for the benefit of its creditors and shareholders, if any.

**DATED** and delivered in Nairobi this 29th day of April, 2005.

**O.K. MUTUNGI**

**JUDGE**