



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**

**Civil Appeal 505 of 2004**

**MARY WAHITO MBUGUA ..... APPELLANT**

**VERSUS**

**MARY WAIRIMU MATHENGE ..... 1ST RESPONDENT**

**BENSON MATHENGE GITARI ..... 2ND RESPONDENT**

**RULING**

This is an application under Section 3A of the Civil Procedure Act (Cap 21), Order XXI Rules 22 (1) and 91 and Order XLI Rules 4 (1) and 27 of the Civil Procedure Rules and other enabling provisions of the law. In it, the Appellant seeks to stay execution of the order and further proceedings in the lower court pending the hearing of her appeal.

The matters leading to the application are simple and straight forward. The Respondents instituted an action against the Appellant and another person in the lower court. In that suit, the Respondents successfully applied ex parte for an interlocutory injunction against the Appellant. The parties are not in agreement on the effect or application of that order. The Appellant's position is that the order - which in her view was negative in nature, could not be complied with as it was made after the event to which it was directed. The Respondents think otherwise. They are of the view that the Appellant is guilty of contempt and they instituted appropriate proceedings against the Appellant in the lower court. So the Appellant seeks to stay the order in issue and the contempt proceedings, pending her appeal to this Court.

The Respondents oppose the application mainly on grounds that the application is *res judicata* and that the Appellant has not satisfied the conditions for stay.

I have given anxious consideration to the application and I am of the following view.

I have not had the benefit of seeing the record of the Honourable Justice Aluoch who is said to have rejected a previous application for stay. However, I believe what Mr Gichuki said before me that Justice Aluoch did not have jurisdiction to deal with the question of stay as she was not at the time the matter was before her "an appellate court" because no appeal had been filed then. That Court, therefore, lacked jurisdiction to deal with the matter of stay of execution and proceedings which can only be dealt with by this Court to which the appeal has now been preferred.

Now, is this a proper case in which the court ought to exercise its discretion to stay further proceedings in and execution of the order of the lower court?

I was made to understand that if this court did not grant the stay sought, the lower court would proceed with the contempt proceedings and there was risk that it could convict and punish the Appellant for contempt. If that were to happen, and if that court imposed a

penalty involving incarceration, the Appellant would certainly lose her liberty before a decision can be made in the appeal. Upon that happening, the appeal itself would have been rendered nugatory since the penalty for the contempt which would arise if the appeal were not heard would have been satisfied and there would be no need to pursue the appeal. I am, therefore, satisfied that this is a case in which the appeal is likely to be rendered nugatory unless the stay sought is granted.

I, therefore, allow the Appellant's application dated 25th April, 2005 with costs.

Dated and delivered at Nairobi this 21st day of June, 2005.

**ALNASHIR VISRAM**

**JUDGE**