



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
MISC. CIVIL APPL. NO. 302 OF 2004**

**SPIN KNIT DAIRY LIMITED.....APPLICANT**

**VERSUS**

**MAIYU MITINDA**

**PATRICK KIOKO KIMILY**

**BENJAMIN KANGE ODERA**

**ELIJAH KABUE MURIITHI.....PLAINTIFFS**

**R U L I N G**

1. This is an Application by the intended Appellants for orders that: -

1. That this application be heard ex-parte in the first instance owing to its urgency.
2. That this Honourable Court be pleased to grant a stay of execution of the Judgment/Order/Decree dated 2nd March 2004 of the Honourable Magistrate's Court pending the hearing and determination of this Application.
3. That this Honourable Court be pleased to enlarge the time herein to enable the 1st Defendant lodge an Appeal.
4. That the Honourable Court be pleased to admit the 1st Defendant's Appeal out of time.
5. That there be a stay of execution of the Judgment/Order/Decree of this Magistrate's Honourable Court dated 2nd of March 2004 pending the Hearing and determination of the 1st Defendant's Appeal.
6. That costs herein be in the cause.

2. I have read the grounds in support and the Affidavits of Jackline Kwamboka and Martha Gachara in support. One of the frustrations that continuously follow practitioners of law is non-availability of court files when needed. The intended Appellants' counsel has detailed out with such clarity and repeated the same in her submissions, the attempts she made to procure the judgment which though on notice to parties was not brought to her attention as is the practice. One is bound to believe her. The delay in filing the instant Application and the Appeal are excused for these reasons.

3. As regards the loss that may be occasioned to the intended Appellants, I agree with counsel for the Respondents that this has not been shown at all.

4. As regards security, the intended Appellants are agreeable to the deposit of the entire decretal sum in court pending hearing and determination of the intended Appeal. Counsel for the Respondents was silent on this issue.

5. For my part and taking the position that the right of appeal should not be unduly denied and yet cognizance of the fact that injustice should not be visited on the successful litigant by allowing the exercise of that right, I should grant the Application on the following reasons; -

i) The intended Appellant, now Applicant herein should deposit the entire decretal sum in CMCC 2104/2002 (Milimani) in court within the next seven (7) days.

ii) The Intended appeal should be filed and served within the next forty-five (45) days

iii) Failure to abide with orders (i) and (ii) above will discharge the said orders and execution shall proceed.

iv) Costs of this Application shall be paid to the Respondents, in any event.

Orders accordingly.

**Dated and delivered at Nairobi this 24th day of September 2004.**

**I. LENAOLA**

**Ag. JUDGE**

**24/9/2004**

Coram: Makhandia, Ag. J.

Mrs. Munga for Kalava for Respondent

No appearance for the Applicant

CC: Ndung'u

Ruling delivered in court by Justice Makhandia on behalf of Justice Lenaola who is away on duty at Embu High Court.

**MAKHANDIA**

**Ag. JUDGE**