



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MISC.CIVIL APPEAL NO. 80 OF 2001**  
**KUGURU FOOD COMPLEX LIMITED.....1ST APPLICANT**  
**DAVID MUTUA KIMOTE..... .2ND DEFENDANT**  
**versus**  
**MIRIAM NJOKI KARANJA.....RESPONDENT**

**R U L I N G**

On 26th May 2000, an ex parte judgment was entered against the applicant in the lower court, due to the fact that no appearance or defence had been filed by this applicant. Subsequent thereto the applicants filed an application seeking to set aside that ex parte judgment, which application was dismissed on 14th September 2000. An application to stay the execution of the orders was dismissed by the same court on 1st February 2001.

The applicants have now moved this court under orders XXI rule 22, XLI rule 4, L rules 1 & 3 of the Civil Procedure Rules, section 3A of the Civil Procedure Act and all other enabling provisions of Law. They seek an order to stay the execution of the ex parte judgment, of the orders of 14th September 2000 and 1st February 2001 pending the hearing and determination of this application; similarly orders pending the hearing and determination of their intended appeal.

The applicants contend inter alia that their intended appeal has overwhelming chances of success and that their appeal will be rendered nugatory in the event that this application is not heard and determined urgently, and if a stay of execution is not granted.

The application is opposed. Counsel for the respondent urged the court to dismiss the application as it does not comply with the conditions laid down in order XLI rule 4. It was her submission that since no appeal had been filed, any orders of the court would be made in abstract and would thus be in vain.

Order XLI rule 4 of the Civil Procedure Rule requires that there be an appeal already filed before the applicant can move the court. Indeed the said rule clearly indicates that:

***“.....the court to which such appeal is preferred shall be at liberty, on application being made.....”***

Counsel for the applicant conceded that they could not have filed the appeal without certified copies of the proceedings and the judgment. It was however his submission that having attached a draft memorandum of appeal, they were properly before the court and that the application should not be dismissed on that account. The delay, he informed the court was due to the fact that the certified copies of the aforesaid documents were yet to be availed by the lower court.

The issue that arises then is whether the draft Memorandum of Appeal will suffice for an application of this nature.

To my mind, the issue is clear. The appeal must have been preferred. It must have been filed, otherwise how is this court supposed to assess its chances of success. The draft Memorandum of Appeal is a draft, which may be varied. I do therefore agree with the respondent's counsel that to grant the orders being sought herein in the absence of having filed the Appeal would be an act in futility. One would hate to imagine a situation where the orders being sought are granted but the appeal is not filed. What would happen to such orders.

In view of the above, the application cannot lie and the same is dismissed with costs.

Dated and delivered this 13th day of March 2001.

**JEANNE W. GACHECHE**

**COMMISSIONER OF ASSIZE**

Delivered \_\_\_\_\_ in \_\_\_\_\_ the \_\_\_\_\_ presence \_\_\_\_\_ of:  
Mr. Ombani for the applicant

No appearance for the respondent.