



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**CIVIL APPEAL NO. 84 OF 2014**

**JUBILEE INSURANCE COMPANY LTD ..... APPELLANT**

**VERSUS**

**WALTER TONDO SOITA ..... RESPONDENT**

*[Being an appeal from Bungoma CMCC case No. 832 of 2010]*

**RULING**

1. The applicant aggrieved by the order of the trial court in CMCC No. 832 of 2010 issued on 27.06.14 to close its defence case and desirous of calling witnesses, filed an application on the 8th of July 2014 before the same court seeking to re-open it's case. The said application was dismissed.
2. On the 8<sup>th</sup> October 2014, the applicant lodged an application under certificate of urgency in the lower court seeking for stay pending appeal. However between October, 2014 and February 2015, the lower court file could not be traced necessitating the application filed before this court for stay of the lower court proceedings pending hearing and determination of the appeal dated 8<sup>th</sup> March 2015.
3. It is the application dated 5<sup>th</sup> March, 2015 that triggered the preliminary objection on the respondent dated 10<sup>th</sup> March, 2015, on the following points
  - I. **The application offends Section 6 of the Civil Procedure Act.**
  - II. **The application offends Order 42 rule 6 (1) of the Civil Procedure Code.**
4. Section 6 does not allow a second court to determine a matter already in issue before another court, whereas Order 42 rule 6 (1) allows an application to be filed to the court where the appeal has been lodged.

All things remaining constant (read the file being available) the application before the trial court ought to have been disposed of first.

However the court file was not available, and in the circumstance and desperate the applicant came to this court. It will be against the overriding principles as set in section 1 A and B and equally against Section 3A to dismiss the application on such a technicality.

Agreeing that this court should first wait the outcome of the earlier application and in the interest of justice I will extend the temporary stay issued herein pending herein and determination of the application in the lower court and direct the said court to give a date for hearing the pending application.

The parties be at liberty to seek further orders.

Dated at Bungoma this 5th day of May 2015.

**ALI-ARONI**

**JUDGE.**