



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

**CIVIL DIVISION**

**HIGH COURT CIVIL APPEAL NO. 518 OF 2015**

**KAMILI PACKERS LTD.....APPELLANT/RESPONDENT**

**VERSUS**

**PAUL MUHABI MATERE.....RESPONDENT/APPLICANT**

**RULING**

1. The application dated 18<sup>th</sup> January, 2017 seeks orders that:

**1. That the appellant's Memorandum of appeal dated 17<sup>th</sup> September, 2015 and/or the Appeal herein be dismissed for want of prosecution with costs to the respondent/applicant.**

**2. That the sum of 200,000/= plus accrued interest deposited in a joint interest earning account of both law firms herein at I & M Bank 2<sup>nd</sup> Ngong Avenue Branch, under Account reference No. [particulars withheld] as security pending appeal be released to respondent's advocates herein.**

**3. That costs of this application be provided for.**

2. It is stated in the grounds the application is based on and the supporting affidavit that the appeal herein was filed on 3<sup>rd</sup> November, 2015 and yet the Respondent has not taken any steps to file the record of appeal and prosecute the appeal. It is further stated that the Applicant has been denied the enjoyment of the fruits of his judgment.

3. The application is opposed. The Respondent has filed grounds of opposition and a replying affidavit. According to the Respondent company, it has been in the process of obtaining the typed proceedings of the lower court and has now filed the record of appeal and is keen on setting down the appeal for directions. It is further stated that the Applicant has not been denied the fruits of the judgment as a substantial part of the decretal sum was released to the Applicant as a condition for orders of stay of execution pending the outcome of the appeal and that the balance was deposited in an interest earning account.

4. During the hearing of the application the parties opted to file written submissions. I have considered the said submissions.

5. Appeals to the High Court are governed by Order 42 of the Civil Procedure Rules. Order 42 rule 35 provides as follows in regard to dismissal of Appeals for want of prosecution:

**“35. (1) Unless within three months after the giving of directions under rule 13 the appeal shall have been set down for hearing by the appellant, the respondent shall be at liberty either to set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.**

**(2) If, within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal. “**

6. In the case at hand, the appeal has not been given directions as required under the provisions of Order 42 Rule 11 & 12. The appeal is yet to be admitted.

7. The lower court file is yet to be availed to this court. It is however noted that the record of appeal was filed on 2<sup>nd</sup> February, 2017, subsequent to the filing of the application at hand on 19<sup>th</sup> January, 2017. It is noted that the Respondent wrote to the Executive Officer on 16<sup>th</sup> November, 2015 requesting for the typed proceedings, judgment and decree in order to compile the record of appeal and that the letter stating that the same were ready for collection reached the Respondent’s Advocate on 23<sup>rd</sup> May, 2016. The exhibited correspondence between the Respondent’s advocate and the Deputy Registrar came in after the instant application was filed. However, the lower court file is yet to reach this court. Directions under Section 79B Civil Procedure Act have therefore not been given.

8. Although this court can exercise its inherent powers even in the absence of directions in order to forestall the abuse of court process by a party who files an appeal and goes to sleep, the case at hand is not suitable for dismissal. There was delay in the lower court in availing the typed proceedings and the lower court file has not yet reached this court. The Respondent therefore is not entirely to blame for the delay.

9. The Applicant has deponed that a substantial part of the decretal sum has been released to the Applicant. However, as a successful litigant the Applicant is entitled to the fruits of his judgment. The Respondent also has his undoubted right of appeal. This court will therefore focus on substantive justice without undue regard to technicalities of procedure.

10. On whether the appeal has high chances of success, under Order 42 Rule 6 (2) of the Civil Procedure Rules, the Applicant is seeking orders of stay pending appeal from the subordinate court to the High court. The applicant is not required to prove that he has an arguable appeal, unlike if it was an application in respect of an appeal to the Court of Appeal seeking stay of execution of decree of the High Court pending appeal to the Court of Appeal. (See for example **Nakuru HCCC 211/98- Martha Njeri Wanyoike & 3 others –vs- Peter Machewa Mwangi & 5 Others; Bake ‘N’ Bite (Nrb) Limited –vs- Daniel Mutisya Mwalonzi [2015] eKLR**).

11. The upshot is that the application is dismissed with costs in cause. Mention before the Deputy Registrar on 5<sup>th</sup> October 2017 for the lower court record to be availed.

**Dated, signed and delivered at Nairobi this 20<sup>th</sup> day of Sept., 2017**

**B.THUANIRA JADEN**

**JUDGE**