

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL CASE NO. 157 OF 1995

IBRAHIM NYONGESA HUSSEINPLAINTIFF/RESPONDENT

VERSUS

ALI BOYI WASHIYAMBIDEFENDANT/APPLICANT

RULING

[1] The applicant filed this notice of motion under Section 83 of the Appeal Rules(I presume the court of Appeal Rules) and Section 34 of the Civil Procedure act.

He prays that the Notice of Appeal dated 20th May 2013 be struck out and secondly that the stay of execution granted herein be set aside.

In his supporting affidavit he states that the judgement was delivered on 23rd May 2013 and the notice of appeal was filed on 28th May 2013. He argues that the notice was improper since it was filed by an advocate who was not properly on record. That the court issued a stay of execution on 12th June 2013. That since then the applicant has not done anything else. That the respondent then has abandoned the appeal and has abused the order for stay by letting it operate indefinitely. He therefore prays that the notice be struck out and the stay granted be discharged.

[2] The respondent filed a replying affidavit on 16th May 2016. He admitted that the judgment was delivered on 23/5/2015 and that his advocates were Khakula & Co. Advocates but that there was a notice of change for Akwala & Co. Advocates to come on record on 29/5/2013. That subsequently, a stay was granted on 12th June 2013. He contends that his advocate applied for proceedings on 29/5/2013. He swore and said that the proceedings were supplied to him on 12/11/2015. He swears that failure on the part of his counsel to file a record of appeal should not be visited on him. That, that issue was on the hands of the lawyers.

[3] This application for striking out the notice of appeal should be made not in this court but in the Court of Appeal. It is that court that can strike out a notice of appeal under that court's rules. Further Section 34 of the Civil Procedure Act does not deal with stay of execution. It deals with questions that may arise while executing a decree. Be that as it may, there is no dispute in this case as to whether or not the Appeal has been filed. Both parties agree that it has not been filed. In essence therefore, there is no Appeal to the Court of Appeal. A perusal of Rule 83 of the Court of Appeal Rules, states that if an appeal is not filed within 60 days (subject to the discounting the period taken in typing the proceedings for which a certificate should be given by the Deputy Registrar). The Appeal is deemed as withdrawn. My perusal of the court file which is the original record, does not show anyone applying for such a certificate. None is issued to the respondents for use in his Appeal in the Court of Appeal. Indeed, when justice Omollo was considering the application for stay of the suit in her ruling dated 25th September 2013, stated;

“I have read both the application and the replying affidavit. The applicant has filed a Notice of Appeal marked ABW 1. He has also applied and obtained copies of typed proceedings”.

[4] The respondent had all he needed to file his Appeal as early as 25TH September 2013. He admits todate he has not filed any Appeal to the Court of Appeal. He has sat pretty enjoying the stay. A stay informed on a non existent Notice of Appeal. The one filed having been withdrawn by operation of law

and while no appeal was ever filed.

[5] The stay herein must be vacated. It is the one that has ousted the applicant from the driving seat of his judgement. He must be allowed to enjoy the fruits of his judgement. I will therefore vacate the stay orders granted herein. The applicant herein cited the wrong Sections of the Civil Procedure Act in pursuing his application.

He is not worthy of any costs.

It is so ordered

Dated, signed and delivered at Bungoma this 27th day of July 2016

S.MUKUNYA - JUDGE

In the presence of

Gladys court assistant

Madam Nanzushi for Situma for the respondent

Mr. Murunga for Murunga for the respondent