



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 86 OF 2012**

**JANE ANYONA OMUTSANI.....PLAINTIFF/APPLICANT**

**VERSUS**

**NASIBI AORE.....DEFENDANT/RESPONDENT**

**R U L I N G**

1. The applicant **Jane Anyona Omutsani** filed a notice of motion under the provisions of Section 1A 1B, 3 & 3A of the Civil Procedure Act Cap 21 Laws of Kenya seeking the following orders:-

**(a) That the stay of execution of judgment orders made on 22/10/2013 pending the hearing and determination of appeal be reviewed, varied and set aside.**

**(b) That the costs of the application be provided for.**

2. The respondent, **Nasibi Aore** who was duly served with the motion did not file any grounds of opposition or replying affidavit. The applicant contends that the respondent has taken long to fix the appeal for hearing and that he has neither served her with memorandum of appeal or record of appeal. The applicant further contends that the respondent is enjoying orders of stay of execution granted by the court to her detriment. It is on this ground that she prays for variation or review of the orders of stay which were granted by the court.

3. The applicant herein had filed an originating summons in which she sought orders of division of matrimonial property. The court ruled in her favour in a judgment delivered on 27/6/2013. The respondent filed an application for stay of execution pending appeal to the Court of Appeal against the judgment. The respondent was granted stay of execution pending appeal in a ruling delivered on 29/1/2014.

4. I have considered the applicant's application and the issue for determination is whether a court which has granted stay of execution pending appeal to a higher court can be asked to review its decision. When the respondent came to court seeking stay of execution, he demonstrated to court that he had filed a notice of appeal and he met the conditions for grant of stay pending appeal. Under rule 6(4) of the Civil Procedure Rules it is provided that for purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the rules of that court, notice of appeal has been given. In the present case, the respondent had filed a notice of appeal which was issued under the rules of Court of Appeal. It therefore follows that he had filed an appeal to the Court of Appeal. If the respondent has failed to serve the appeal documents as required or if he has failed to have his appeal fixed for hearing, the applicant cannot come to this court seeking to have the stay orders reviewed or set aside. The

applicant has an avenue of moving the Court of Appeal to have the notice struck out or the appeal itself dismissed for want of prosecution. She cannot move this court to set aside the stay orders.

5. For the reasons given hereinabove, I find that the applicant's application lacks merits. The same is hereby dismissed with no orders as to costs.

It is so ordered.

Dated, signed and delivered at Kitale on this **14th** day of **September, 2015**.

**E. OBAGA**

**JUDGE**

**COURT**

**Ruling delivered at 12.44 pm in the absence of parties who were aware of today's date.**

**E. OBAGA**

**JUDGE**

**14/9/2015**