

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL SUIT NO.65 OF 2002

WILSON CHANGTOEK.....PLAINTIFF/APPLICANT

VERSUS

DAVID KIPNGENOH NGETICH.....DEFENDANT/RESPONDENT

RULING

The subject matter of this ruling is the Motion dated 19th December 2013 taken out by Wilson Changtoek, the Plaintiff herein in which he sought for an order of stay of execution pending appeal plus costs. The Motion is supported by the affidavit of the Plaintiff. David Kipngenhoh Ngetich the Defendant herein, filed a replying affidavit to oppose the Motion.

When the Motion came up for interpartes hearing, learned counsels recorded a consent order to have the Motion disposed of by written submissions.

I have considered the grounds set out on the face of the Motion plus the facts deponed in the affidavits filed in support and against the Motion. I have further taken into account the rival written submissions. The background of the application is largely straightforward. The Plaintiff filed the Plaint dated 2nd September 2002 in whereof he sought for judgment against the Defendant in the following terms:

- a. *An injunction to restrain the defendant by himself, his agents or servants or otherwise howsoever from remaining or continuing in the occupation of the plaintiff's land.*
- b. *Costs of this suit plus interest thereon.*

The Defendant denied the Plaintiff's claim the suit by filing a defence. The suit was heard by Lady Justice Ang'awa and dismissed on 17th June 2009 pursuant to the provisions of Order 18 rule 8 (1) of the Civil Procedure Rules. Being aggrieved with the aforesaid order, the Plaintiff filed the notice of appeal to express his intention to challenge the dismissal before the Court of Appeal. The Plaintiff has averred that he has now been served with a proclamation notice by the Defendant through Hegeons Auctioneers claiming a sum of Ksh.571,181/= failure to which the Defendant would attach the Plaintiff's property. It is the submission of the Plaintiff that unless the order for stay of execution is given, the appeal will be rendered nugatory in that if the amount is paid the same may never be recovered from the Defendant if the Appeal turns successful. The Defendant is of the view that the Motion is misconceived and without merit. The main ground argued in support of the Defendant's contention is that there can never be a stay of recovery of taxed costs. It is also argued that the Plaintiff has not shown the substantial loss he would suffer if the order is denied. The defendant further argued that the Motion only filed after the Defendant expressed his intention to recover costs by executing. The Plaintiff was accused of delaying to file the actual appeal.

The matter before me is an application for stay of execution for recovery of costs pending appeal. The law envisages the existence of an appeal. It is trite law that a party has filed a notice of appeal within the time frame fixed by Rule 74 (2) of the Court of Appeal Rules, is prima facie considered to have filed the substantive appeal. The Plaintiff's suit was dismissed on 17th June 2009. He filed the notice of appeal on 16th July 2009. In essence he lodged the notice of appeal 30 days after the order dismissing his suit was pronounced. Under rule 74 (2) of the Court of Appeal Rules, a notice of appeal must be lodged within 14 days from the date the decision sought to be impugned was made. The question is: *Whether there is a*

competent appeal pending hearing? In the absence of any order of leave given to the Plaintiff to lodge a notice of an appeal out of time, then we have no competent appeal. In essence, the substratum of the Motion does not exist hence the Application cannot stand. In the circumstances I am of the view that the Motion should be struck out without considering the merits of the Application. Consequently, I find the Motion dated 19th December 2013 to be without any foundation in law hence the same is rendered incompetent. The same is hereby ordered struck out with costs to the Defendant.

Dated, signed and delivered in open Court this 26th day of June 2014.

J. K. SERGON

JUDGE

In the presence of:

- Mr. Motanya holding brief for Orina for Plaintiff.
- Mr. Mutai for Defendant.