



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

**CIVIL DIVISION**

**CIVIL SUIT NO 180 OF 2008**

**JOYCE LIKU JANDA.....PLAINTIFF**

**VERSUS**

**CARE INTERNATIONAL.....DEFENDANT**

**RULING**

1. In the suit herein **interlocutory judgment** was entered against the Defendant on 23<sup>rd</sup> June 2008. An application to set aside that interlocutory judgment was refused by a **ruling dated and delivered on 27<sup>th</sup> July 2009 (Onyancha, J)**. On 10<sup>th</sup> June 2010 Onyancha, J dismissed an application to review and set aside his said order of 27<sup>th</sup> July 2009.
2. Then the Defendant applied for stay of proceedings pending an intended appeal against the aforesaid order of 10<sup>th</sup> June 2010. That application was refused by a **ruling dated 1<sup>st</sup> November 2012 (Odunga, J)**.
3. The Defendant then filed **notice of motion dated 13<sup>th</sup> February 2013** seeking the main order that the court be pleased to review and set aside the aforesaid order of 1<sup>st</sup> November 2012. That application is the subject of this ruling. The application is expressed to be brought under **Order 45, Rules 1 and 2 of the Civil Procedure Rules, 2010 (the Rules)**. **Sections 3A and 80 of the Civil Procedure Act, Cap. 21 (the Act)** are also cited.
4. The grounds for the application appearing on the face thereof include –
  - (i) That the Defendant's notice of appeal dated 21<sup>st</sup> June 2010 and filed on 22<sup>nd</sup> June 2010 was missing from the court file and hence the Court failed to consider it.
  - (ii) That the notice of appeal had been served upon the Plaintiff within the requisite time.

A supporting affidavit sworn by one **Amy Wanjiru Sironka**, an advocate in the firm representing the Defendant, gives a history of the litigation and background to the application.

5. The Plaintiff has opposed the application by replying affidavit filed on 10<sup>th</sup> April 2013 which is sworn by her counsel. The sum effect of the replying affidavit, which is quite argumentative, is that the application is without merit and an abuse of the process of the court.

6. I have considered the submissions of the learned counsels appearing, including the one case cited. I have also read the ruling of Odunga, J dated 1<sup>st</sup> November 2012. I must here state that I heard the application because Odunga, J is no longer in this Division; otherwise the learned Judge would have been best suited to hear this application that seeks to review his own decision.

7. Odunga, J dismissed the application for stay of proceedings pending appeal upon two grounds; one, **want of notice of appeal** and, two, **he was not satisfied that the intended appeal would be rendered nugatory.**

8. In respect to notice of appeal, Odunga, J expressed himself thus, *inter alia* –

**“I have perused the record herein and I have not been able to trace any notice manifesting an intention to appeal to the Court of Appeal. Neither has the Defendant bothered to annex a copy thereof if the same exists...”**

9. It turns out that the Defendant had indeed filed a notice of appeal within time manifesting its intention to challenge the order of 10<sup>th</sup> June 2010 that had dismissed its application for review of the order of 27<sup>th</sup> July 2009. Indeed, during arguments learned counsel for the Plaintiff conceded that he had been served with the notice of appeal.

10. But as already pointed out, Odunga, J dismissed the application for stay of proceedings pending appeal **also** upon the ground that he was not satisfied that the Defendant’s intended appeal would be rendered nugatory if the suit proceeded to formal proof and final judgment. On that point the learned Judge expressed himself –

**“In the present case, if the intended appeal succeeds and the decision dismissing the application for review is allowed with the result that the Defendant is given an opportunity to defend the suit, what would follow is that the proceedings in the formal proof would have been rendered nugatory, and an appropriate order for costs can be made....I am not convinced that the intended appeal would thereby be rendered nugatory....”**

11. That holding of Odunga, J still stands and has not been challenged. In any case it can only be properly challenged before the Court of Appeal.

12. The net result is that even if the point taken by the Defendant on this application for review may have some merit, it is not sufficient, of its own, to entitle the Defendant to a review and setting aside of the entire decision of Odunga, J of 1<sup>st</sup> November 2012.

13. The application is clearly without merit. It is hereby dismissed with costs to the Plaintiff. It is so ordered.

**DATED AND SIGNED AT NAIROBI THIS 25<sup>TH</sup> DAY OF SEPTEMBER 2013**

**H. P. G. WAWERU**

**JUDGE**

**DELIVERED AT NAIROBI THIS 27<sup>TH</sup> DAY OF SEPTEMBER 2013**