



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT ELDORET**  
**CIVIL SUIT 115 OF 1999**

**THOMAS OWEN ONDIEK .....PLAINTIFF**

**VERSUS**

**NATIONAL BANK OF KENYA LTD.....DEFENDANT**

**RULING:**

The application is brought Under Section 1A, IB, 3, 3A and Section 63(e) of the Civil Procedure Act and all other enabling provisions of the law.

The Applicant is seeking to strike out the Notice of Appeal to the Court of Appeal dated the 4<sup>th</sup> June, 2004.

The Applicant relies on the grounds set out in the body of the application and on the affidavit in support dated the 8<sup>th</sup> March, 2012.

The appeal arose from the judgment of Nambuye J as she then was, and that the Respondent after filing the Notice of Appeal has taken no steps, eight years down the line, to file the appeal.

The Applicant urged the court to exercise its discretion and to strike out the Notice of Appeal and award costs of the application.

The application was opposed by Counsel for the Respondents who relied on the filed Grounds of Opposition.

Counsel argued that this Honourable court has no jurisdiction to entertain the application as this court was “functious officio”.

That the Civil Procedure Act had no provisions for Notice of Appeal and that the guiding rules for the Court of Appeal are contained in the Court of Appeal Rules.

That it was only the Court of Appeal that had powers to strike out the Notice of Appeal. Counsel made reference to Rule 84 of the Court of Appeal rules which reads as follows:

**“ ..... either before or after institution of appeal to strike out Notice of Appeal if essential steps are not taken.....”**

Counsel also referred to Rule 2 of the said rules which defines the court to be “ the Court of Appeal”

Counsel submitted that the process of appeal commences with the filing of the Notice of Appeal which has the effect of removing the proceedings from the High Court to the Court of Appeal and referred to the authority **MKABARA –VS- FRISCH**

In conclusion submitted that the Record of Appeal had been prepared and filed and served upon the Applicant.

Counsel urged the court to dismiss the application with costs.

Upon hearing the arguments of both Counsels for the Applicant and the Respondent the court finds that there has been an inordinate delay on the part of the Respondent in filing the Record of Appeal.

The court concurs with the submissions of the Counsel for the Applicant that this court is still seized of jurisdiction. Counsel for the Applicant ought to have requested the court to vary or discharge the existing stay Orders granted to the Respondent.

Unfortunately, the Respondent had already filed the Record of Appeal by the time this application came up for hearing.

The Applicant in bringing the application compelled the Respondent to move and prepare and file the Record of Appeal.

As a consequence of this development the application has been overtaken by events.

The application is hereby dismissed and the Respondents are condemned to pay the costs of the application to the Applicant.

**Dated and delivered at Eldoret this 27<sup>th</sup> day of June 2012.**

**A.MSHILA**

**JUDGE**

Coram: Before Hon. A Mshila J

CC: Andrew

Counsel for the Applicant: Miyenda – for Applicant.

Counsel for the Respondent: Anditi for Respondent

**A.MSHILA**

**JUDGE**