



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU
CIVIL APPEAL 5 OF 2012

CHARLES MUNDIA1ST APPELLANT

JAMES WAIREGI MWANGI.....2ND APPELLANT

VERSUS

ANDREW MAINA GITHINJI.....RESPONDENT

(Being an appeal from Judgment and Decree of M. WACHIRA Chief Magistrate in PMCC No. 144 of 2007 at Embu on 5th July, 2011)

R U L I N G

The Respondent/Applicant has filed his Notice of Motion dated 12/4/2012 under Order 42 Rule 13 of the Civil Procedure Rules seeking the following orders:-

1. Appeal to be struck out with costs.
2. In the alternative and without prejudice in the Court do orders the appellant to file a record of appeal and fix the Appeal for hearing within 30 days.

The application is supported by the affidavit of the Respondent's Counsel Mr. Kiama. The major complaint is that the Appellants have not taken any steps to prosecute the appeal since its filing on 23/1/2012. And that the Appellants were enjoying a stay of execution.

The Counsel for the Appellants/Respondents was served with this Notice of Motion and the hearing notice. He did not file a replying affidavit nor attend the court on 16/6/2012 when the matter was for hearing.

The record shows that though the Respondent/Applicant may have been served with the memorandum of appeal, Order 42 Rule 11 of the Civil Procedure Rules has not been complied with. The Appeal has not been admitted as required under Section 79B of the Civil Procedure Act. It is the duty of an Appellant to cause the appeal to be placed before the Judge for admission. The Memorandum of Appeal is served after the admission of the appeal and thereafter other processes follow.

I understand the Respondent/Applicant's anxiety but I find the application to be premature. I hereby direct the Appellants to move the Court for directions under Order 42 Rule 11 of the Civil Procedure Rules and Section 79B of the Civil Procedure Act. This should be done within 30 days. The Deputy Registrar to notify the Appellants Counsel.

Costs in cause.

DELIVERED, SIGNED AND DATED AT EMBU THIS 18TH DAY OF JULY 2012.

**H.I. ONG'UDI
JUDGE**

In the presence of:-

Mr. Mungai for Kiama for Respondent

Njue CC