



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CIVIL CASE 84 OF 1994**

**PAUL K. BULLUT .....1<sup>ST</sup> PLAINTIFF**

**ISAIAH K. MUTAI.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**CHEMWOLO TOROITICH.....DEFENDANT**

**RULING**

The Defendant presented to court a Notice of Motion application dated 14<sup>th</sup> December 2006 under the provisions of Order XLI rule 4 of the Civil Procedure Rules. The Defendant seeks an order that pending the hearing and determination of the intended appeal there be a stay of execution. It is founded on the grounds that the Defendant has filed a Notice of Appeal against the ruling of this court delivered on 24<sup>th</sup> November 2006; that there is imminent danger of execution facing the Defendant; that the applicant is ready and willing to abide by any terms imposed as conditions of stay. The Plaintiffs on being served filed grounds of opposition. They contend that the application is without merit as there can be no stay against an order of dismissal of an application. That execution has already been levied and there is nothing to be stayed. That there is no appeal contemplated against the decree and hence the application is without merit. The applicant was not offering any security yet the decree also ordered the payment of *mesne* profits.

I have considered the application and the respective submissions of counsel. I have also looked at the ruling dated 24<sup>th</sup> November 2006 by Justice Gacheche. The Defendant had made an application for stay of application pending hearing and determination of his intended appeal from an order refusing to set aside an *ex parte* judgment. I must state that counsel for the Defendant has not been clear in his prayers. When seeking a stay of execution it has to be specified that it is stay pending and determination of an appeal from the order or decree of so and so and the date given. It does not assist the court by simply asking for a stay pending hearing and determination of an intended appeal. Be it as it may the application was dismissed by Justice Gacheche on 24<sup>th</sup> November 2006 and on 28<sup>th</sup> November 2006 the Defendant lodged a Notice of Appeal. There is no indication from the court record that the Defendant obtained leave of court to appeal. Counsel for the Plaintiff has submitted that the Notice of Appeal is incompetent because no leave was obtained. Counsel cited the provisions of Order XLII of the Civil Procedure Rules and submitted that an appeal does not lie as of right from orders made in exercise of powers under Order XLI rule 4. I agree with counsel for the Plaintiff. No leave as of right is provided for orders made under Order XLI rule 4. Given that there is no competent Notice of Appeal does the jurisdiction to grant a stay arise?

Order XLI rule 4(4) provides that “for the purpose 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.” As a general rule of law there is no automatic right to appeal. A right of appeal is a creation of statute. To recognize the Notice of Appeal as though valid is to ignore the substantive provisions of Order XLII. It is the duty of his court to give effect to all laws notwithstanding the consequences because it is presumed that the consequences are intended by law. When a document is filed when there is no right to file such a document, then it has no right to be in the court file. It is doubtful whether this court has jurisdiction to strike out the Notice of Appeal. Lack of jurisdiction may not however hamper this court in the exercise of its discretion to consider whether a stay of execution should be granted. I take the view that given that the Notice of Appeal is incompetent there is no basis for seeking a stay.

Even if I was wrong in this finding I would still not allow the application because the order sought to be appealed against is not capable of execution. An order of dismissal, as we say cannot be executed. Counsel for the Defendant has not been clear on how best he should assist his client. Counsel supplied to the court the ruling in Civil Application No. NAI 120 of 2007. From the ruling it is apparent that the Defendant filed an appeal being Civil appeal No. 72 of 2007. The Plaintiffs applied to strike it out but their application was dismissed in that ruling. My understanding is that counsel was trying to use the ruling to persuade the court that the appeal is pending. Such a course was clearly a departure from the grounds in support of the application. The application was based on the fact that a Notice of Appeal had been lodged against the ruling of Justice Gacheche dated 24<sup>th</sup> November 2006. For these reasons I find that the application lacks merit and is hereby dismissed with costs.

Dated AND signed at Nairobi on this 21<sup>st</sup> day OF AUGUST 2012.

**M. K. Ibrahim**  
**Judge**

DATED AND Delivered at Eldoret on this 19<sup>th</sup> day of SEPTEMBER 2012.

**F. AZANGALALA**  
**Judge**

In the presence of :Mr. Magare holding brief for Limo for the applicant and Mr. Mokuu for the respondent.