



**REPUBLIC OF KENYA**

**High Court at Kakamega**

**Civil Appeal 51 of 2009**

***(An Application for lifting of the orders of Stay of Execution)***

**JOHN MUKEYA KITIABI T/A NYUKI AUCTIONEERS.....APPELLANT/RESPONDENT**

**VERSUS**

**JOHNSTONE BARASA MAKOKHA .....1<sup>ST</sup> RESPONDENT/APPLICANT**

**DINAH MAKOKHA ..... 2<sup>ND</sup> RESPONDENT/APPLICANT**

**RULING**

The application by way of Notice of Motion dated 4.10.12 seeks orders that the court be pleased to lift the orders of stay of execution issued herein on 11.6.12. It further seeks orders that the monies deposited in court by the respondent be released to the applicants.

The application is supported by the affidavit of the 1<sup>st</sup> applicant, JOHNSTONE BARASA MAKOKHA sworn on 4/10/12.

The gist of the said affidavit is that the application dated 29.5.12 wherein the respondent sought orders for the enlargement of time within which he was to deposit half of the decretal sum was allowed on condition that the respondent was to file and serve his record of appeal within 30 days. That three months had lapsed by the time this application was filed and the respondent had not yet filed and served the said record of appeal. The applicant accuses the respondent of failure in the past to obey the court's orders issued herein.

The respondent, JOHN MUKEYA KITIABI T/A NYUKI AUCTIONEERS opposed the application as per the replying affidavit sworn on 29.10.2012 by the counsel holding brief, CHARLES MATETE. According to the said advocate, he applied for the typed proceedings on 19.6.12 but the file had gone for typing and efforts to trace the same were not immediately successful as the officer who had been allocated the file for typing had proceeded on leave. It is further averred that the delay was not caused by the respondent or his counsel. It is stated that the respondent has not met the conditions set down by the court and will be praying for an extension of time within which to file and serve the record of appeal. That if the orders sought are allowed, the appeal would be rendered nugatory.

Mr. Momanyi advocate appeared for the applicants while the firm of Anziya advocate appeared for the respondent.

The respondent has not denied having failed to comply with the court's orders. The respondent attributes the delay in the failing to be supplied with the typed proceedings in good time.

The plaintiff's annexures ("CM 1a & 1b") show that the payment for the typed proceedings was made on 19.6.12. Although this was just one week after the court's orders that the record of appeal be filed and served within 30 days, the record shows that the Memorandum of appeal was filed on 8.6.2009. There is no explanation why it took the appellant about three years in total before applying for the typed proceedings and why he had to wait to be compelled to do so by way of a court order, yet he is the one who filed the appeal. The record also shows that the respondent has not been keen in complying with the court's orders dated 24.3.11 for the payment of half the decretal sum.

The orders dated 24.3.11 are as follows:-

***“Let the stay of Execution as prayed in the Application dated 8.2.2011 be granted on condition that the Applicant pays half the decretal sum before hearing inter-partes on 16.6.2011.”***

Taking into account the said orders and having considered the application herein and the reply to the same, this court's view is that the interests of justice would best be served by striking a balance between the parties herein on a 50-50 basis and make the following orders:-

- (a) The money deposited in court to be released to the applicants.
- (b) The applicants at liberty to execute for the balance of the decretal sum still outstanding within seven days of date hereof.
- (c) Costs to the applicant.

***Delivered, dated and signed at Kakamega this 18<sup>th</sup> day of December, 2012***

**B. THURANIRA JADEN**

**JUDGE**