



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL APPEAL NO. 26 OF 2008

JAMES MIGWI.....1ST APPELLANT/RESPONDENT
JANE WANGECHI.....2ND APPELLANT/RESPONDENT

VERSUS

SUSAN WANJIKU MWANGI..... RESPONDENT/APPLICANT

R U L I N G

This motion was brought under Order 42 rule 35 (2) of the Civil Procedure Rules seeking that the appeal be dismissed for want of prosecution, or that the court lifts the unconditional stay of execution that was ordered by the subordinate court on 20th May 2008. The ground is that since the Memorandum of Appeal was served on the Applicant on 13th March 2008, which is over 39 months ago, the appeal has not yet been set down for hearing and yet the Respondents are enjoying the stay.

The suit in the subordinate court was filed by the Applicant on 10th January 2005 seeking a mandatory injunction to compel the Respondents to deliver to her 112 bags of pishori rice or its market value. It was alleged that the Respondents had on diverse dates between July and October 2003 agreed to supply the rice worth KShs.134,400/= which they had received. The court heard the case and on 15th February 2007 rendered a judgment ordering the Respondents to supply the rice or refund the KShs.134,400/= with interest at court rates from 15th December 2004 until payment in full. Subsequent to that, on 20th May 2008 stay was granted until the appellate court had issued any further orders. It is this order of stay that the Applicant is complaining about. She was represented during this application by Mr. Kiama.

The application was opposed by the Respondents who were represented by Mr. Kariithi. Their contention was that the file from Wanguru court had not been received by this court to enable the appeal to be admitted or rejected. This is the reason why they have not moved to process the appeal for hearing.

I have checked the record and it shows that this court received the file from Wanguru court on 17th December 2008 and that the appeal was admitted to hearing on 22nd of April 2009. The fact that the Respondent are unaware of these crucial developments is clear demonstration that they lack interest in their appeal. In the alternative, they have not shown any diligence in pursuing the appeal. It was not at their instance that directions under Section 79 B of the Civil Procedure Act were given. Over 2 years later no action has been taken to set down the appeal for hearing. My determination is that there has been inordinate and inexcusable delay in the prosecution of this appeal.

The result is that this application succeeds with costs. The appeal filed by the Respondents against the Applicant is dismissed with costs for want of prosecution. For the avoidance of doubt, the stay order granted by the subordinate court on 20th May 2008 is hereby lifted.

DATED, DELIVERED AND SIGNED AT EMBU THIS 28TH DAY OF JUNE, 2011.

A.O. MUCHELULE
JUDGE