



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Suit 1222 of 1999

LAZARO KABEBE. PLAINTIFF

VERSUS

NDEGE MAKAU..... 1ST DEFENDANT

ANJELO NJAIBU MUGO. 2ND DEFENDANT

R U L I N G

The application before me is a Notice of Motion dated 28th March 2006 and filed by the Plaintiff through his advocates, M/s S. Ndege & Company. The application seeks mainly, for an order of stay of execution pending appeal, of the decree of court dated 27th February, 2006. It is based on the ground that the applicant/plaintiff had filed an appeal and that if the stay is not granted, the preferred appeal would be rendered nugatory and he will suffer substantial loss. The Plaintiff/Appellant/Applicant also said that he had filed the appeal without unreasonable delay by filing a Notice to the Court of Appeal.

In the statement of the Grounds of Opposition filed by the Respondent/Decree Holder on 3rd May 2007, the latter states that

- a) The application is incompetent and/or fatally defective.
- b) The applicant has not fulfilled the conditions of obtaining a stay as stated under the relevant law.
- c) That the intended appeal is hopeless and has little chances of success.
- d) That a stay order will be prejudicial to the proprietary interests of the decree holder.
- e) That the Notice of Appeal dated 6th march 2006 was filed and served outside the prescribed period of 14 days which makes it incompetent and invalid and is liable to be struck out.
- f) That this application does not comply with order 41 rule 4 of the Civil Procedure Rules.

When the application came up for a hearing on 24th September, 2009, one appellant had not been served and the matter was adjourned with an order of costs and adjournment fees imposed on the Appellant who had failed to do the service. The order has been complied with. Later when service was properly effected, the court gave an order that submissions were to be in writing to be filed before 12th November, 2009.

On 12th November, 2009 the Plaintiff chose not to attend court for mention and had failed to file his written submission in support of this application for stay before the court. Meanwhile the Respondents/Defendants had filed their written submissions. Not to close out the applicant on submissions, the Plaintiff despite being deliberately absent while knowing that his submissions in support of the application for stay was required, was nevertheless allowed even at that late hour, to file his

submissions. However, the court put conditions: - the plaintiff had to file written submissions only if he first paid the earlier ordered court adjournment fees as well as Respondents adjournment costs. The applicant/Plaintiff was to comply within 7 days of the court order.

There is evidence in the file that the Applicant/Appellant filed his written submissions and paid court adjournment and costs of the other party on 19th November, 2009. This ruling will accordingly be based on the written submissions of both parties herein.

I have carefully studied the material in the file from both sides and considered the submissions. A stay of execution pending appeal presupposes proper and valid existence of an appeal either in form of a Notice of Appeal or in the form of a substantive appeal itself. That is why a notice of Appeal properly filed is presumed to be an appeal for purposes of stay.

In this case the Applicant/Appellant has not denied that he filed his Notice of Appeal on 15th March, 2006, a day after 14 days expired. That without doubt and I so hold, makes the Notice of Appeal incompetent or invalid. Even then there is no evidence that the applicant ever filed any substantive appeal which must be filed within 60 days. The Notice of Appeal in question bears court-receiving stamps of 6th March, 2006 and 15th March, 2006. This is explained by the Respondent that on 6th March, 2006 the Notice was rejected by the Registry after being found without signature. It was returned to court for refiling on 15th March, 2006. This explanation makes sense in respect of a paper showing two receiving dates at the Registry. This point required reasonable or logical explanation from the applicant. But no such explanation was forthcoming from him.

The conclusion this court arrives at from the facts above is that there is no valid appeal notice which was filed. There is also no substantive appeal filed within 60 days as required by Rule 81 of the Court of Appeal Rules. In these circumstances, the applicant cannot be heard to say, that the stay sought is to save the appeal from being rendered nugatory. The reality is that there is no substantive appeal pending as it ought. There is therefore no necessity for a stay of execution since Court of Appeal Rules aforementioned, in particular Rule 82, provides to the effect that where a substantive appeal is not filed within 60 days of filing of the Notice of Appeal, the Notice is deemed to have been withdrawn. For the above reasons, this application has no merit. It is hereby dismissed with costs to the 2nd Respondent/Decree-holder. Orders accordingly.

Dated and delivered at Nairobi this 9th day of February, 2010.

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JUDGE