



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MACHAKOS  
Civil Appeal 13 of 2005**

**TIMOTHEY MUSYIMI WAMBUA ..... APPLICANT**

**VERSUS**

**JOSEPH NGOVE .....  
RESPONDENT**

**RULING**

1. By the Application dated 26.11.2007 and premised on Order XLIV Rules 1(1) and 3(2) as well as Order XLI Rules 8A and 9(1) of the Civil Procedure Rules the Appellant, Timothy Musyimi Wambua seeks orders that the orders of *Sitati, J.* made on 27.7.2007 awarding costs of the Appeal to the Appellant herein be reviewed and set aside and the Appeal be marked as withdrawn with no orders as to costs.

2. From the record, what triggered the Application were the following events; on 25.2.2005 the Appeal was filed and on 8.2.2006, a Notice of withdrawal of the same was filed. On the face of the Notice was inserted words that have now become contentious – “**No order as to costs.**” The Deputy Registrar declined to record the notice aforesaid and the matter ended up before *Sitati J.* who heard both advocates appearing on the single issue whether costs, upon withdrawal, were payable to the Respondent. The learned Judge on 27.7.2007 delivered her Ruling on the subject and partly rendered herself thus;

***“The determining factor is service of the memorandum. It is not denied that the Memorandum of Appeal was served upon Ms A.K. Mutua & Company Advocates on behalf of the respondent. If security for costs, had been ordered by the court and not given within the time ordered, the court had the option to dismiss the Appeal. In my view, costs in this matter were payable from the day the respondent was served with the Memorandum of Appeal. Such costs cannot simply be wished away as counsel for the Appellant would want the court to believe.”***

3. In the present Application it is argued that there was an error and/or mistake apparent on the face of the record because the Memorandum of Appeal was never served on the Respondent and consequently the said Respondent was never entitled to costs.

4. The Respondent’s reply is that the Application for review is an afterthought; that indeed the Memorandum of Appeal was served together with an Application for stay of execution pending appeal and that the Application is an abuse of court process and the obvious intention is to deny him his costs.

5. I will ignore the submissions relating to an advocate deponing to contested matters because although I agree that an advocate should not descend to the arena and become one of the combatant, in the present case all issues are on the record and the advocates can properly refer to them as such. The decision of this court in Leilla Osen & another vs Patrick Nyamai H.C.C.A NO. 92/2008 and that of Ringera J, in Kisya Investments Ltd & another vs Kenya Finance Corporation Ltd & others H.C.C.C NO. 3504/1993 are therefore clearly distinguishable.

6. In any event, it is clear that what I am supposed to address is whether there was or there was no error on the record regarding the issue of service of the Memorandum of Appeal upon the Respondent.

7. As I understand it before an appeal can be heard there are certain procedural steps to be taken. They are;

i. the filing of a Memorandum of Appeal signed in the same manner as a pleading – Order XLI Rule 1 of the Civil Procedure Rules .

ii. particulars of the appeal shall be entered in the register of appeals – order XLI Rule 8(1).

iii. the appeal is placed before a judge for admission or rejection under section 79 B of the Civil Procedure Act.

iv. if the judge admits the appeal then ***“the register shall notify the Appellant who shall serve the Memorandum of Appeal on every respondent”*** - Order XLI Rule 8A.

v. not less than 21 days after service of the memorandum of appeal, the registrar shall list the appeal for giving of directions by a judge in Chambers - Order XLI Rule B (1).

vi. thereafter the appeal is set down for hearing once the judge is satisfied that all the documents listed in Order XLI Rule 8 B (4) have been served on either party; processes regarding security for costs etc have been given; and service of notice of the day for hearing of the appeal has been served on the Respondent in the manner set out by Order XLI Rule 10A (11).

8. In the instant case the Respondent has exhibited a Memorandum of Appeal (annexture JN2) and a stamp bearing his advocate’s name and the words ***“recieved”*** (sic) and the date ***“2.3.05”*** and the argument made is that service was effected on that day. Whatever importance the Respondent attaches to that document it cannot be said that service was effected because as I have shown above, no proper service of a memorandum of appeal can be made before admission of an appeal for hearing. I maintain the holding in Muli Mutiso vs Mbithi Ndolo & another , HCC.A 120/2003 (Mks) that:

***“without admission of an appeal and service thereon there is yet no role for the Respondent save perhaps in an interlocutory application say for stay of execution pending appeal. Costs in such a case would be limited to those interlocutory matters and not the Appeal per se. If a Respondent enters the Appeal, fixes it for mention for an unclear purpose and then the Memorandum of Appeal is withdrawn, he cannot claim costs. I say so because as yet he has no role to play in it. The matter is for the judge and the Appellant who can take action on it without the Respondent.”***

9. I should extrapolate by stating further that rejection of an appeal under section 79 B of the Civil Procedure Act is a crucial step because once there is rejection, there is nothing more to be done and the Respondent may not even be aware of the existence of the Appeal. Any Respondent who gets wind of it and purports to enter the fray cannot claim any costs in the end because he would have had no lawful role in the appeal.

10. Similarly therefore in the instant case, I have seen the record and there is no sign at all that the Appeal was placed before any judge for admission or rejection under section 79 B of the Act. When therefore the Appeal was withdrawn, no party save the Appellant was lawfully supposed to be in the picture and whether or not the Respondent obtained a copy of the Memorandum of Appeal was irrelevant. Until proper service was made on him, he could not enter the fray and upon withdrawal claim costs. The Notice of withdrawal was properly worded and to hold otherwise would have been a mistake and/or error in view of the record as it stands.

11. That being the case, the Applicant is properly within the purview of Order XLIV (1) of the Civil Procedure Rules and I am entitled to review the orders issued on 27.7.2007, set them aside and finally

order that the Appeal herein be marked as withdrawn with no orders as to costs.

12. Each party will also bear the costs of the present Application.

13. Orders accordingly.

Dated and delivered at **Machakos** this **27<sup>th</sup>** day of **May 2009**.

**Isaac Lenaola**

**Judge**

In the presence of: Mr Kimeu h/b for Mrs Nzei for Applicant

No appearance for Respondent

**Isaac Lenaola**

**Judge**