

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
(MILIMANI LAW COURTS)
CIVIL APPEAL 499 OF 2003

C.K. GITAU

T/A VENUS GENERAL MERCHANTS.....APPELLANT

VERSUS

MICHAEL MWANGI KINYURU.....RESPONDENT

R U L I N G

1. Michael Mwangi Kinyuru, who is the respondent in this appeal, seeks to have the appeal struck out under Section 3 and 3A of the Civil Procedure Act. He contends that the appeal is an abuse of the court process as the appellant C.K. Gitau t/a Venus General Merchants, has never served the respondent with a copy of the memorandum of appeal since the appeal was filed on 7th August, 2003. The appellant maintains that he is being prejudiced by he appeal as there is an order of stay of execution in force in the lower court, based on the pending appeal.
2. The application was served on the appellant but no replying affidavit was filed. Counsel for the appellant indicated to the court on 3rd March, 2009 that he wished to withdraw for lack of instructions. He was given 30 days to do so. However, counsel only filed an application to withdraw three days before the respondent's application came up again for hearing. Counsel for the appellant did not even serve his application to withdraw on the appellant. The court therefore refused any further application for adjournment and proceeded to hear the respondent's application to have the appeal struck out.
3. I have carefully considered this application. The court record is clear that since the memorandum of appeal was filed on 7th August, 2003, the appellant has not taken any active step to have the appeal move forward. On 18th June, 2007, a letter was written to the appellant's counsel requesting him to comply with order XLI Rule 8B(4) (a), (b), (c), (d) and (f) of the Civil Procedure Rules, with regard to filing of the record of appeal, but to date the appellant has not taken any action. No explanation has been given for this failure.
4. In the circumstances, I do concur with the respondent that this appeal is an abuse of the process of the court, as it is only intended to deny the respondent the benefit of the judgment given in his favour by the lower court. I therefore, allow this application and strike out the appeal. I award costs of this application and costs of the appeal to the respondent.

Orders accordingly.

Dated and delivered this 14th day of May, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Advocate for the appellant absent

Kaai for the respondent

Erick – Court clerk