



ELDORET EXPRESS.....APPELLANT

VERSUS

JACKSON KURIA GITAHI.....RESPONDENT

R U L I N G

1. On the 11th June, 2008 this Court issued an order for stay of execution pending the determination of the appeal filed herein by Eldoret Express (hereinafter referred to as the appellant), on the following conditions:

- (i) The sum of Kshs.170,000/= deposited in Court shall remain in Court until further orders.
- (ii) The appellant shall file a record of appeal within 90 days from the date hereof.
- (iii) The order for stay of execution shall remain in force for a period of 12 months within which period the appeal must be disposed of.

2. Jackson Kuria Gitahi who is the respondent to the appeal, has now moved the Court under section 3A of the Civil Procedure Act, and order 50 Rule 1 of the Civil Procedure Rules, to have the appeal filed herein dismissed for non compliance of the orders issued on the 11th June, 2008. The respondent further seeks an order for the Court to release to him, the decretal sum which was deposited in Court.

3. The respondent maintains that the appellant's failure to comply with the Court order of 11th June, 2008 is aimed at frustrating the respondent, and denying the respondent the fruits of his judgment.

4. In response to the application, two affidavits have been sworn by S.K. Amani who is the respondent's advocate. She explains that the delay was due to the difficulty in obtaining certified copies of the proceedings and judgment, and the certificate of delay.

5. Having considered the application, it is apparent to me that the appellant has not been diligent in pursuing the speedy disposal of the appeal. Although the judgment of the lower Court was delivered on 16th April, 2008, and a memorandum of appeal filed on 6th May, 2008, the appellant did not apply for proceedings until 4th June, 2008.

6. Further the appellant does not appear to have followed up the typing of proceedings to ensure compliance with this Court's order of 11th June, 2008. Although the appellant was granted an extension of 90 days with effect from 9th September, 2008, within which to file the record of appeal, none has been filed to-date nor has the appellant make any attempt to apply to the Court for further extension.

7. I have considered the explanation by the appellant's counsel that the delay was caused by the difficulty in obtaining Court proceedings. I am not however satisfied that the appellant has exercised due diligence in pursuing these proceedings. Indeed, if the lower Court was unable to have the proceedings typed due to pressure of work, the appellant was at liberty due to the urgency of the matter, to apply for handwritten copies of the proceedings and judgment and have the same typed in their advocate's office.

8. I find that the failure by the appellant to comply with the order of 11th June, 2008 is prejudicial to the respondent, as the respondent is being denied the benefit of the judgment given in his favour by the lower Court. The respondent has urged the Court to dismiss the appeal for non compliance with the order of 11th June, 2008. Nevertheless, that would be a very draconian measure. Moreover, it would be premature at this stage to dismiss the appeal before admission of appeal under section 79B of Civil Procedure Act or compliance with order XLI Rule 8B of the Civil Procedure Rules.

9. I decline to grant the order for dismissal of the appeal but grant an order lifting the order for stay of execution pending appeal. Consequently, I order that the decretal sum deposited in Court may be released to the respondent. Costs to be in the appeal.

Orders accordingly.

Dated and delivered this 23rd day of October, 2009.

H. M. OKWENGU

JUDGE

In the presence of: -

Ombae for the respondent/applicant

Kuyo for the respondent/appellant

Eric, court clerk