



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU**

Misc Civil Suit 276 of 2004

AMIT R. GADHIA PLAINTIFF/RESPONDENT

VERSUS

CUM PAUL MUTIVA 1ST DEFENDANTS/APPLICANTS

ELIZABETH MUTIVA 2ND DEFENDANTS/APPLICANTS

RULING

The applicant vide a notice of motion dated 7th August 2007, made under Order XVI Rule 5 (d) of the Civil Procedure Rules seeks the basic order that the respondent's suit be dismissed for want of prosecution and that the costs of the application and the entire suit be borne by the respondents.

The grounds for the application are as follows:-

- (i) It is more than 2 years since the respondent filed the Notice of Appeal.**
- (ii) The plaintiff (respondent) has failed to prepare the record of appeal or proceed further with the appeal since 22nd July 2005.**
- (iii) The plaintiff is not desirous of prosecuting the appeal.**
- (iv) It is only just and fair that this appeal be dismissed with costs.**

These grounds are opposed by the respondents in the following terms:-

- (i) That the application is fundamentally fatally and incurably defective.**
- (ii) That the orders sought are untenable for want of court's jurisdiction to entertain it.**
- (iii) That, the application has been brought under the wrong provision of the law.**
- (iv) That, the whole application is otherwise an abuse of the process of the court.**

Order XVI Rule 5 (d) grounds that:-

"If, within three months after the adjournment of the suit generally, the plaintiff or the court of its own motion on notice to the parties, does not set down the suit for hearing, the defendant may

either set the suit down for hearing or apply for its dismissal."

The present application pre-supposes that the respondents have filed an appeal which is pending before this court.

A perusal of the court's record shows that this is a matter arising from the taxation of the applicant's Bill of Costs filed on 8th November 2004.

The Bill was taxed on the 8th December 2004 and a decree for the sum of KShs.132,950/50 cts. issued in favour of the applicant on the 1st February 2005.

The applicant that sought to execute the decree against the respondents who filed a notice of motion on 10th February 2005, seeking orders that there be a stay of execution and that the taxation order of the 8th December 2004, be set aside.

The notice of motion was heard and dismissed by the Deputy Registrar on the 5th May 2005.

Undeterred by the dismissal of their application, the respondents filed a chamber summons on the 8th June 2005, seeking extension of the time within which objection of the decision of the taxing officer made ex-parte on 8th December 2004 may be raised.

The application was heard and dismissed by Justice Warsame on the 15th July 2005.

The respondents were aggrieved and dissatisfied with the ruling of the learned judge. They filed a notice of appeal dated 22nd July 2005.

The appeal if filed does not lie to this court but the Kenya Court of Appeal. However, on the same 22nd July 2005, the respondents filed in this court a notice of motion for orders that there be a stay of execution pending the hearing and determination of the appeal in the Court of Appeal at Kisumu.

It is the said application that has yet to be prosecuted by the respondents.

It is therefore not difficult to decipher that the applicant's present application is aimed at the said respondents application dated 22nd July 2005.

The present application is thus a misconception in so far as it relates to an appeal.

There is no appeal pending prosecution in this court. The correct forum for the application should be the Court of Appeal. This Court has no jurisdiction to deal with it even though it would have the jurisdiction to deal with the respondent's application dated 22nd July 2005.

If anything, the applicant should apply for the dismissal of the said application for want of prosecution.

Otherwise, the present application is dismissed with costs.

Dated and Delivered on this 25th day of September, 2008.

J. R. KARANJA

JUDGE

J.R.K./mo