

REPUBLIC OF KENYA

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

Civil Case 1846 of 2001

AGANO ONGUTOPLAINTIFF

V E R S U S

CENTRAL ORGANISATION OF TRADE UNIONSDEFENDANT

R U L I N G

On 4th January, 2001, interlocutory judgment was entered against the Defendant herein in default of defence. When an application to set the same aside came up for hearing on 21st June, 2004, objection was taken to granting the Defendant audience upon the ground that it had disobeyed an interlocutory injunction that had restrained it from evicting the Plaintiff from the suit premises. In a considered ruling delivered on 24th September, 2004 the court (Mugo, J) upheld the objection. The Defendant then filed notice of appeal against that order on 29th September, 2004.

On 16th June, 2005 the court (Ransley, J) ordered stay of further proceedings pending disposal of the intended appeal. The Plaintiff has now come to court by notice of motion dated 3rd July, 2008 seeking an order to set aside the said stay order upon the grounds that the Defendant has made no attempt to file the intended appeal since June, 2005; that the Plaintiff has been denied the fruits of her interlocutory judgment and has thus been prejudiced; and that it is in the interests of justice that the Plaintiff be allowed to pursue her claim to its logical conclusion. The supporting affidavit is sworn by the Plaintiff's learned counsel. He depones that no notice of appeal has ever been served upon them, and further, that the Defendant has not taken any step to lodge the intended appeal for nearly three years.

The Defendant has opposed the application as set out in replying affidavit filed on 23rd September, 2008. It was sworn by its National Secretary-General. He depones that indeed notice of appeal was served. A copy of an affidavit of service is annexed; it says that the Plaintiff's advocates were served with a copy of the notice of appeal on 4th October, 2004. The National Secretary-General also depones that that he is aware that court proceedings were applied for to enable record of appeal to be filed.

I have considered the submissions of the learned counsels appearing. No authorities were cited. For purposes of **Order 41, rule 4** of the **Civil Procedure Rules** (the Rules), which provides for stay of execution or proceedings pending appeal, an appeal to the Court of Appeal shall be deemed to have been filed when, under the rules of that court, notice of appeal has been given. See sub-rule (4) of that rule. But it could not have been intended that proceedings should be indefinitely stayed upon the strength of a notice of appeal. It must be remembered that, ultimately, the party intending to appeal must lodge the requisite record of appeal with the Court of Appeal under the rules of that court in order to institute the appeal. In the present case, the Defendant has not have offered any shred of evidence of its efforts towards that end. There is no evidence of any request for copies of proceedings, or any follow-up action taken towards obtaining them. It appears that the Defendant has just sat pretty watching the years pass.

It cannot be just that the mere fact that the Defendant lodged a notice of appeal against an interlocutory order should be permitted to stay the Plaintiff's suit indefinitely, especially where it has not been demonstrated that the Defendant has done, or is doing, anything tangible towards lodging the intended appeal.

For the above reasons, I will allow the application by notice of motion dated 3rd July, 2008. The stay of proceedings granted on 6th June, 2005 is hereby set aside. The Plaintiff shall have the costs of this application. Orders accordingly.

DATED AT NAIROBI THIS 9TH DAY OF OCTOBER, 2008

H. P. G. WAWERU

J U D G E

DELIVERED THIS 17TH DAY OF OCTOBER, 2008