



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**Civil Appeal 57 of 2008**

**SANDHU CONSTRUCTION LTD :::::::::::::::::::::::::::::::::::APPELLANT**

**VERSUS**

**AKAMBA TIMBER & HARDWARE LTD :::::::::::::::::::::::::::::::::::RESPONDENT**

**RULING**

1. The Application dated 18.6.2008 seeks orders as follows:-

i. ....

ii. That the appellant be granted leave to appeal to the court of Appeal against the decision of the Honourable Justice Lenaola made on 5.6.2008.

iii. That this Honourable Court be pleased to stay execution in this matter pending the hearing and determination of this application inter-partes.

iv. That there be a stay of execution in this matter pending appeal.

v. That the costs of this application be provided for.

2. I have read the Supporting Affidavit sworn on 18.6.2008 by Harder Singh, Managing Director of the Applicant Company and all I should state is that the decision dated 5.6.2008 is to the effect that the Appeal and the Application within it be marked as withdrawn. The prayer for that order was made by one Mr. Kimuli Advocate. It was allowed because one Ngolya, Advocate for the Respondent had no objection. It is not for this court to enter into the other complaints raised in the Supporting Affidavit because they have no bearing on what is before me. However, it is important to note that the complaints are baseless and Mr. Singh, with respect to him, has no idea about what transpired in court on 5.6.2008.

3. Having so said, I note that section 75(1) and section 76(1) of the Civil Procedure Act provides as follows:-

***“s.75(1) An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted-***

- (a) an order superseding an arbitration where the award has not been completed within the period allowed by the court.*
- (b) an order on an award stated in the form of a special case;*
- (c) an order modifying or correcting an award;*
- (d) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;*
- (e) an order filing or refusing to file an award in an arbitration without the intervention of the court;*
- (f) an order under section 64;*
- (g) an order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution or a decree*
- (h) any order made under rules from which an appeal is expressly allowed by rules;*

*s.76 (1) save as otherwise expressly provided, no appeal shall lie from any order made by a court in the exercise of its original or appellate jurisdiction; but, where a decree is appealed from, any error, defect or irregularity in any order affecting the decision of the case may be set forth as a ground of objection in the memorandum of appeal.”*

4. The Applicant has however also invoked Order XLII Rule 1(3) which provides as follows:-

**“Nothing in this order shall apply to any adjudication which, as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit.”**

5. It is not denied that the Applicant is properly before this court but I will dismiss the Application for the following reasons;

6. I maintain that when an advocate properly addressing his mind to his brief decides to withdraw any suit or appeal, he does so conscious of his duty to his client and to the court. He cannot later turn back and raise all manner of complaints against the court as has happened here.

7. The order made by the court was in line with the choice and brief of the Applicant’s advocate and I see nothing to be appealed against. Any appeal would in any event be seen only as an attempt at vexation and frivolity and this court cannot support that venture.

8. I agree with Mr. Ngolya that in fact there being no appeal left on record, all other proceedings are academic and there is also nothing left to stay.

9. The Application dated 18.6.2008 is hereby dismissed. I shall make no order as to costs only if to bring to a close this untidy matter.

10. Orders accordingly.

Dated and delivered at Machakos this 16<sup>th</sup> day October 2008.

**Isaac Lenaola**

**Judge**

In the presence of: Mr. Mutia for Applicant

Mr.Ngolya for Respondent

**Isaac Lenaola**

**Judge**