



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MACHAKOS

Civil Appeal 120 of 2003

MULI MUTISO APPELLANT

VERSUS

MBITHI NDOLO 1ST RESPONDENT

BENARD MUTISYA 2ND RESPONDENT

RULING

1. The issue here is whether the Respondent is entitled to costs. The argument by Mrs Nzei for the Appellant is that when the Appellant withdrew the Appeal on 11/6/2006, there would be no basis for this court to order him to pay costs because the Appeal had not been admitted and ipso facto there was no matter to be responded to.

2. Mr Musyoka for the Respondent takes the view that when the Memorandum of Appeal was served, the Respondent instructed counsel who appeared on a mention date. On that date the Appeal was withdrawn.

3. On my part, I note that on an unclear date, the Appeal was placed before Wendoh J. who neither rejected nor admitted the Appeal but ordered as follows:-

“Original record to be forwarded to ct (read court) from the Tribunal.”

4. I can only surmise that the order was made to enable the judge decide whether to admit or reject the Appeal. That being the position, Mrs Nzei is right. The Memorandum of Appeal was filed on 3/12/2003 by the Appellant in person. On 29/3/2005, M/S Nzei & Co. Advocates filed their notice of appointment and on 9/1/2008, M/S Musyoka Kimeu & Co. Advocates filed their Notice of Appointment and on 26/3/2008, fixed the Appeal for mention on 24/4/2008 and thereafter on 11/6/2008 when it was withdrawn. It is unclear how the said advocates came to know of the matter, some five (5) years after filing because there is no evidence of service of the Memorandum of Appeal.

5. Order XLI Rule 8A of the Civil Procedure Rules provides as follows:-

“8A. After the refusal of a judge to reject the appeal under section 79B of the Act, the registrar shall notify the appellant who shall serve the memorandum of appeal on every respondent.”

6. Without admission of an appeal and service thereon there is yet no role for the Respondent save perhaps in an interlocutory application say for stay of execution pending appeal. Costs in such a case would be limited to those interlocutory matters and not the Appeal per se. If a Respondent enters the

Appeal, fixes it for mention for an unclear purpose and then the Memorandum of Appeal is withdrawn, he cannot claim costs. I say so because as yet he has no role to play in it. The matter is for the judge and the Appellant who can take action on it without the Respondent.

7. In the end, I see no reason to award costs to the Respondent in this matter and the Appeal is marked as withdrawn with no order as to costs.

8. Orders accordingly.

Dated and delivered at Machakos this **15th** day of **October** 2008.

ISAAC LENAOLA

JUDGE

In presence of: **Mrs Nzei for Applicant**

Mr Musyoka for Respondent

ISAAC LENAOLA

JUDGE