



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**Civil Appeal 136 of 2005**

**SOKORO PLYWOOD LTD. .... APPELLANT**

**VERSUS**

**MOSES MBURU MUTUA ..... RESPONDENT**

**RULING**

The applicant, Moses Mburu Mutua, sought for an order that the appellant's appeal be struck out with costs. The application is premised on the grounds that the appellant fully settled the matter, which is the subject of the appeal by paying the total decretal sum on the 14<sup>th</sup> March, 2005. The said settlement meant that the appellant had abandoned the appeal, as the said settlement was made without prejudice and in the letter forwarding the decretal sum, the matter was supposed to be marked as settled.

Counsel for the applicant argued that since the matter in the lower court was settled, there is no case being appealed from and the continuance of this appeal is an abuse of the court process.

This application was opposed by counsel for the appellant who argued that, firstly, the application offends the provisions of **Rule 15(2)** of the **Civil Procedure Rules**.

Secondly, even if the appellant paid the decretal sum, no consent was recorded in court marking the matter as settled. The appellant paid the decretal sum to avoid execution and that was not tantamount to settlement or an abandonment of the appeal. An appeal is a matter of right and a party is at liberty to appeal on principle and since the appeal raises triable issues and directions were given to its hearing, Counsel urged this court to disallow the application.

I have taken into consideration the rival arguments herein. I have also noted that by a letter dated 14<sup>th</sup> March, 2005, the appellant's counsel forwarded the cheque representing the decretal amount and in the said letter they asked the applicants to confirm that the matter has been marked settled.

However, I see no reply on the part of the applicants counsel confirming that the matter was marked settled.

Moreover, no consent was recorded in court to that effect. Since the appellant, as it has been vigorously submitted by its counsel is exercising its inalienable right of appeal for whatever it is worth, I am inclined not to strike the appeal. Suffice it to note that the appellant is supposed to prosecute the appeal within 3 months after the directions have been given as provided under **Order 41 rule 31(1)**.

If the applicant had invoked the above provisions, this appeal could have been dismissed for want of prosecution, for reasons that the appellant has not taken any steps to prosecute the appeal since directions were given on 24<sup>th</sup> March, 2006. However, since this was not the applicant's prayer, I find it inappropriate to strike the appeal. However, I disallow the application with no order as to costs as the appellant has not acted diligently to prosecute the appeal.

It is so ordered.

Ruling read on the 4<sup>th</sup> May, 2007.

**M. KOOME**

**JUDGE**