



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

**Civil Case 1654 of 1994**

**MUCHUNU MUMBURA.....PLAINTIFF**

**VERSUS**

**PETER KAMAU CHEGE.....DEFENDANT**

**RULING**

The plaintiff brought this claim by way of an Originating Summons seeking orders of declaration that he is entitled to be registered as the proprietor of the suit land being LR NO. KIAMBAA/KIHARA/1023 by adverse possession having been in occupation for more than 12 years. Hayanga J in his judgment having found that the plaintiff had been in possession, continuous without secrecy or force and with the knowledge of the defendant of the occupation and uninterrupted for more than 12 years declared that he had become entitled to ownership of the suit land and ordered that he be registered as the proprietor of the suit land. After the judgment was delivered the defendant applied orally for stay pending a formal application for stay which he did and on 5<sup>th</sup> July 2005 on condition that the plaintiff deposits Shs.5,000/= into court as security for performance.

On 19<sup>th</sup> May 2005 the defendant filed Notice of Appeal but no Memorandum of Appeal has been filed to date. On 25<sup>th</sup> October 2004 the plaintiff caused the suit land to be transferred to his name while the order of stay was still in force.

On 12<sup>th</sup> January 2005 the defendant brought this application by way of Notice of Motion seeking orders that the registration of the suit land in the name of the plaintiff be cancelled and the suit land revert back to the defendant on the ground that the registration was done when the order for stay of execution was still in force.

Mr. Kinuthia for the defendant in his submissions urged the court to cancel the registration of the suit premises in the name of the plaintiff and restore the name of the defendant as the registered proprietor of the suit land.

Mr. Githuka counsel for the plaintiff opposed the application and submitted that although the defendant was granted stay pending appeal, he only filed a Notice of Appeal on 27<sup>th</sup> May 2005 and went to sleep. The stay order relies upon was never extracted nor was it served. Secondly the stay was conditional on payment of Shs.5000/= as deposit for costs which was never done. The stay was granted on condition that action could be taken within a reasonable time and could not have been meant to be an end in itself. Inordinate delay could amount to an abuse of the court process as the plaintiff had already obtained a judgment.

In this case judgment was delivered on 17<sup>th</sup> May 1995. The defendant was dissatisfied with the same and intended to appeal against that decision. He filed Notice of Appeal on 19<sup>th</sup> May 2005 just 2 days after the judgment was delivered. Since filing of the Notice of Appeal he has not instituted the appeal which is now about 12 years and he has not done so even now. Mr. Githuka for the respondent submits that this is inordinate delay. Rule 82 of the Court of Appeal Rules provides that if a party who lodged a Notice of Appeal fails to institute an appeal within the appointed time:

(a) he shall be deemed to have withdrawn his Notice of Appeal, and shall, unless the court otherwise orders, be liable to pay the costs arising therefrom of any person on whom the Notice of Appeal was served.

The delay in instituting the appeal after the Notice was filed which is prolonged to over 12 years is inexcusable and falls within the provisions of Rule 82 (a) of the Court of Appeal Rules and the Notice of Appeal is deemed to have been withdrawn.

For the above reason the applicant's Notice of Motion dated 12<sup>th</sup> January 2005 is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 26<sup>th</sup> day of November 2006.

**J.L.A. OSIEMO**

**JUDGE**