



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 208 of 2003

JOHN RIMUI NJAU.....PLAINTIFF

VERSUS

SAMUEL NJAU WAINAINA.....DEFENDANT

RULING

On the 3<sup>rd</sup> of October, 2005 this court allowed the plaintiff's application for summary judgment against the defendant. At page 8 of its ruling, this court held that;

***“The defence and counterclaim filed by the defendant is hereby struck out. Judgment is entered for the plaintiff against the defendant as prayed in the plaint. The defendant is hereby ordered to vacate the suit land within sixty (60) days of being served with the decree of this court, in default thereof, the plaintiff shall be at liberty to evict the defendant from the suit land. The plaintiff shall have the costs of this application and the costs of the suit.”***

The decree of this court was extracted by the plaintiff on the 18<sup>th</sup> of October, 2005. It was served upon the defendant by the plaintiff. When the plaintiff's current advocate made an application to be allowed to come on record on behalf of the defendant, the defendant swore an affidavit in support of the application on the 16<sup>th</sup> of December 2005 confirming that he was aware of the judgment that had been entered against him by this court. The defendant purported to have filed a notice of appeal indicating his intention to appeal against the ruling of this court delivered on the 3<sup>rd</sup> of October, 2005. I state that the defendant purported to file the notice of appeal because the said notice of appeal was filed on the 15<sup>th</sup> of September, 2006 nearly one year after this court made its ruling in favour of the plaintiff.

The defendant has now made an application under **Order XLI rule 4 of the Civil Procedure Rules** seeking to be granted an order staying execution of the order of this court pending the hearing and determination of the appeal to be filed before the Court of Appeal. The defendant did not indicate to the court that he has made any effort to regularize his purported appeal to the Court of Appeal. The defendant confirmed to this court that, so far, he has made no application to be granted leave by the Court of Appeal to appeal against the said order of this court.

**Order XLI rule 4(4) of the Civil Procedure Rules** provides that;

***“For the purposes of this rule 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.”***

**Rule 74 of the Court of Appeal Rules** provides that;

***“(1) Any person who desires to appeal to the court shall give notice in writing which shall be lodged in duplicate with the Registrar of the superior court.***

***(2) Every such notice shall, subject to rule 82 and 84, be so lodged within 14 days of the date of the decision against which it is desired to appeal.”***

It is therefore clear from the a foregoing, that the notice of appeal which the defendant has purported to annex to his application for stay of execution is no notice of appeal as envisaged by **Rule 74** of the **Court of Appeal Rules** because the same was filed outside the fourteen day period allowed by the rules. What the defendant was therefore required to do was to make an application before the Court of appeal under **Rule 4** of the **Court of Appeal Rules** for extension of time to file appeal out of time. The application for stay of execution therefore is incompetent because there is no pending appeal before the Court of Appeal. If the defendant had made an application for extension of time before the Court of Appeal before he made the application for stay of execution pending the hearing of the said application for extension of time to be granted leave to appeal out of time, may be this court would have exercised its discretion in favour of the defendant and heard the application for the defendant to be granted stay of execution pending the hearing of the said application.

There being no appeal pending before the Court of Appeal, this court cannot be asked to grant stay of execution pending the hearing of a non-existent appeal. The application dated the 15<sup>th</sup> of September, 2006 by the defendant cannot therefore be allowed. It is hereby dismissed with costs to the plaintiff.

**DATED at NAKURU this 17<sup>th</sup> day of November, 2006**

**L. KIMARU**

**JUDGE.**