

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI**

Civil Case 76 of 1990

STEVENSON MURIMI NGUCHU PLAINTIFF

VERSUS

CITY FINANCE LTD. DEFENDANT

R U L I N G

Under Order XLIV rule 1 of the Civil Procedure Rules a party may apply for review of a judgment or order where new and important matter or evidence which was not within the knowledge of the applicant, or on account of some error or, mistake apparent on the face of the record or for any other sufficient reason.

Order XLIV rule 4 merely provides for such an application to be made before the Judge who passed the decree or order or where the judge is precluded by absence of any other cause such an application may be heard by any other judge.

In this case, the applicant seeks to have the order made by Osiemo J on 24th April 1997 staying execution of the decree, reviewed, and applicant allowed to proceed with execution. The main reason relied upon by the applicant is that the Respondent has taken no action to file or prosecute his intended appeal and is therefore simply using the court process to prevent the applicant from enjoying the benefits of his judgment.

Mr. Mahan who appeared for the Respondent has urged the court to dismiss the application as the grounds upon which it is brought do not bring it under Order XLIV of the Civil Procedure Rules but that a notice of appeal having been filed by the Respondent in the court of appeal the matter can only be dealt with under rule 80 of the court of appeal rules.

It is clear that the order for stay of execution was granted on 24th April 1997. It is not denied that over 8 years later the Respondent has not made much progress in pursuing his appeal. The explanation given as per the replying affidavit which was sworn by the Respondent on 12th September 2003 is that as at that date, no proceedings had been availed to the Respondent's advocate despite a request for proceedings having been made on 30th September 1992.

I agree with Mr. Mahan that order XLIV of the Civil Procedure Rules is not applicable herein as none of the pre-requisites for the operation of the rule has arisen, there is no discovery of new matters or evidence nor is there any error apparent on the face of the record. Indeed what is relied upon by the applicant are matters subsequent to the issuance of the Order i.e. the indolence of the Respondent in pursuing his appeal. It is evident that the Respondent has not been vigilant in pursuing the proceedings or taking any other action to facilitate the speedy disposal of the appeal.

It is true that a notice of appeal was filed sometime in 1992. This does not however take away the power of this court under section 3A to make orders that may be necessary to meet the ends of justice or to prevent the abuse of the court process.

It is evident that the Respondent is abusing the court process by his inactivity in this matter as it means that the applicant cannot be able to reap the fruits of its judgment. In any case the setting aside of the order for stay of execution will not in any way affect the powers of the court of appeal to deal with the appeal notice of which has already been lodged before it. The Respondent has abused the process of the court by failing to diligently pursue his intended appeal knowing full well that there is an order for stay of

execution pending appeal in existence. In the circumstances I do exercise this court's inherent jurisdiction under section 3A of the Civil Procedure Act and lift the order of stay of execution pending appeal issued on 24th April 1997. The applicant shall be at liberty to execute the decree dated 25th October 1993.

The Respondent shall further pay costs of this application.

Dated this 25th day of July 2005.

H. M. OKWENGU

JUDGE