



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CIVIL APPEAL NO. 23 OF 1986**

**NDANGILI MUTHYA :::::::::::::::::::: APPELLANT**

**VERSUS**

**WILLIAM MAKOVO :::::::::::::::::::: RESPONDENT**

**RULING**

On 11.11.1998 the appellant herein was granted orders of stay of execution and taxation pending appeal to Court of Appeal. Since then the applicant has not done anything towards the filing of the appeal and the Respondent/Appellant has therefore moved this court to have the court's order of 11.11.1998 reviewed. The application is brought under Order 44 R 1 Civil Procedure Rules and S. 3A Civil Procedure Act. The applicant in his grounds in support of the application contends that they have never been served with memorandum of appeal and notice of appeal alone is not evidence of an appeal having been filed; that the notice was filed outside the 14 days allowed in which to file the notice; that no security was given by applicant and the stay granted is meant to delay the Respondent from enjoying fruits of his judgement. The application is also supported by an affidavit sworn by the Respondent Nzwili Muithya which I have considered.

The Appellant/Respondent did not file any grounds in opposition of the application nor did they file any affidavit in reply to the application. However counsel for Applicant/Respondent was present and addressed the court on points of law in which he says that the Notice of Appeal was launched within 60 days of the court's ruling, that the appeal is not struck out and the order of the court can not reviewed.

A reading of the ruling dated 11.11.1998 is clear as it was presumed by court that the appeal would be filed expeditiously. Since the said order of stay was given, no record of appeal has been prepared. It is over 4 years since. The applicant/respondent has not filed any papers to explain why the delay in filing the appeal or preparing the record of appeal. It is obvious that it has not been done expeditiously as the judge who gave orders of stay expected. There has been indeed inordinate delay in prosecuting the appeal and setting it down for hearing.

The order sought to be reviewed was made on 6.8.1998. The counsel for Respondent filed Notice of Appeal on 24.8.1998 about 16 days after the days allowed to file a Notice of Appeal. Rule 74 (2) of Appellate Jurisdiction Act provides that Notice of Appeal shall be made within 14 days of the decision against which it is desired to appeal. The Respondent never applied to have time enlarged and I do agree with counsel for applicant that there is no Notice of Appeal filed.

The conduct of appellant speaks for itself. It is apparent the respondent is not interested in proceeding with the appeal having filed, no notice, no application for proceedings and I believe all was to buy time and delay finalization of this mater and denying the applicant enjoyment of his fruits of his judgement dated 27.1.1997. There is good and sufficient reason to review the orders of 11.11.1998 and they are hereby reviewed so that the orders of stay of taxation and execution are vacated. Respondent will bear costs of this application.

Dated, read and delivered at Machakos this ..... day  
of ..... 2004.

**R. V. WENDOH**

**JUDGE**