



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**CIVIL APPEAL NO. 57 OF 2001**

**FRANCIS NDAMBIRI NJAGI .....APPELLANT**

**VERSUS**

**SOPHIA WAMBETI NJAGI.....RESPONDENT**

**RULING**

Before me is the Appellant's Notice of Motion dated 4th December 2003 praying for orders:

1. THAT the orders of this Court dated on 1st December 2003 be vacated and/or set aside,
2. THAT the Appeal to be reinstated and restored to hearing on its merits.
3. THAT there be a stay of execution pending the hearing and final determination of the appeal'

Lack of time does not allow me to say as much as what I would have liked to say in this ruling. Briefly therefore this under is what I am able to say:

Beginning with prayer 3 above, I have difficulties in knowing the execution which the Appellant/Applicant wants me to stay. There are the orders appealed against from the Magistrate's Court. Then there are this court's orders dated 1st December, 2003 which the Applicant wants vacated or set aside. Which ones of the two does the Appellant/Applicant want me to stay under prayer 3 in the Notice of Motion before me today?

In so far as the Applicant did not make that clear, prayer 3 is vague and should not therefore be granted.

Secondly, before me on 1st December 2003 for hearing was a Notice of Motion dated 10th July 2003 praying for orders.

1. "That the appeal be dismissed with cost for want of Prosecution"

The ground for the Respondent seeking those orders was that The Appellant had failed to take steps to set the appeal down for hearing.

That Notice of Motion is the application I heard and granted on 1st December 2003. It means that the Notice of Motion having been granted or allowed, the appeal herein which had been filed by the

Appellant was dismissed for failure to prosecute, not on 1st December 2003, but from the time the appeal had been admitted, served and directions if any taken as to the hearing of that appeal. In which case that appeal could still have been dismissed even if Mr. Gacheche Wa Miano, Counsel for the Appellant/Applicant, were in attendance before me on 1st December 2003 and it was not therefore his absence on that day that caused the dismissal of that appeal.

It follows that if the orders I made on 1st December 2003 are vacated or set aside the appeal will be restored but the Notice of Motion dated 10th July 2003 will have to be heard a fresh and the Applicant's appeal will still face the danger of being dismissed as the reasons which led to its dismissal will still be there and the question of having that appeal heard on merits will not arise before effecting a dismissal of the Notice of Motion dated 10th July 2003, a dismissal which the Appellant may not come by, because if ground (a) in the Appellant's Notice of motion dated 4th December 2003 is truth that the Appellant's counsel had all along been told by the Court's Registry staff that the lower court's file had never been dispatched to this court, then I do not see how the Appeal was admitted to hearing on 5th February, 2002. Further I do not see why Mr. Gacheche Wamiano could have filed chamber summons dated 17th November 2003 asking for directions that the appeal be set down for hearing on the ground that the "Record of Appeal is in order and the Appeal May be admitted to hearing"

That chamber summons was filed on 24th November 2003 apparently with the Record of Appeal. Otherwise the appeal must have been ready for hearing whether or not lower court file was there.

Concerning the hearing of the Notice of Motion dated 10th July 2003, it was not granted because of non attendance by the Advocate for the Appellant. In fact Mr. Gacheche Wa Miano was present through another advocate Mr. Githinji who told the court that Mr. Gacheche Wamiano had gone to the High Court at Nyeri in H.C. Criminal Appeal No.142 of 2003 and applied for adjournment. That application for adjournment was dismissed and thereafter hearing of the Notice of Motion proceeded and the Notice of motion was decided on merits. Mr. Githinji was present ready to argue the case for the Appellant only that if it is true that the Appellant's Advocate had prepared grounds of opposition to the Application dated 10th July 2003 but his clerk had by mistake failed to file them, Mr. Githinji should have been asked to inform the court and in fact that could have formed a ground for seeking adjournment, but he was never given that information and he never therefore used it as a ground for adjournment. That ground is therefore an after thought and that is why Mr. Maina, counsel for the Respondent has been able to disprove that ground, and goes on to point out that provisions of the law under which the Notice of Motion dated 4th December 2003 is brought are not the correct provisions and that the affidavit is inadmissible as it offends the rule relating to jurants to the effect that a jurant must not be on a separate page from the rest of the affidavit.

If that affidavit is inadmissible then the Notice of Motion dated 4th December 2003 remains without an affidavit supporting it as the one deponed by Francis Ndambiri cannot stand, it being dependant upon the defective affidavit sworn by Mr. Gacheche Wa Miano.

On the whole therefore, this Notice of Motion dated 4th December 2003 be and is hereby dismissed with costs to the Respondent.

**Dated this 3rd day of March 2004.**

**J.M. KHAMONI**

**JUDGE**