

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

Civil Appeal 5 of 2001

DUNCAN KINYANJUI APPLICANT

VERSUS

PENINA MUCHENE RESPONDENT

RULING

The Applicant Penina Muchene in this Notice of Motion dated 21st March 2002 is praying for orders that the appeal herein be struck out for want of prosecution, alternatively directions be given as to the hearing of the appeal.

From what has been brought to my attention during the hearing of the notice of Motion, I find nothing which warrants the granting of the alternative prayer as directions as to the hearing of an appeal cannot be properly given where the filing of the appeal is not yet complete and the appeal admitted to hearing.

I find that this is an appeal filed by Duncan Kinyanjui on 9th May 2001 and after he obtained a stay of execution of the maintenance order which the Applicant had obtained against him, the Respondent in this notice of Motion and the Appellant in the appeal, Duncan Kinyanjui sat back and did nothing to move the appeal forward. Up to now he has not even obtained and filed copy of the proceedings and the orders appealed from.

Before me in this Notice of Motion, the Respondent raises points of technicalities which cannot stand his main contention being that he is waiting for the Registrar of this court to summons him and the Applicant for directions as to the hearing of the appeal. As I have already stated, no directions as to the hearing can properly be taken before the filing of the appeal is complete and the appeal admitted to hearing. The Respondent/Appellant having filed a naked Memorandum of Appeal and thereafter having moved no step further in the appeal, he is not entitled to sit back and claim that it is the Registrar of this court to blame allegedly the Registrar having failed to set down the appeal for directions. To my mind, that stand by the Respondent in the light of his inaction in the appeal is a vindication of what the Applicant is saying that the Respondent filed this appeal, not to prosecute it, but to maintain a stay of execution of the order for maintenance made against him and being the subject matter of this appeal.

That being the position, I would have no sympathy with the appeal and therefore do hereby strike out the said appeal and order costs as prayed in the Notice of Motion dated 21st March 2001.

Dated this 16th day of May 2002.

J.M. KHAMONI

JUDGE