



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CIVIL DIVISION**  
**HIGH COURT CIVIL APPEAL NO. 259 OF 2005**

**PRIME BANK LIMITED.....APPELLANT/RESPONDENT**

**VERSUS**

**JOSEPHAT OGOVA ESIGE .....RESPONDENT/APPLICANT**

**RULING**

1. The Applicant brought an application dated 21<sup>st</sup> July, 2016 where he sought orders to wit:-

- 1. That the Application herein be certified as urgent and be placed before Lady Justice Thuranira for further directions.**
- 2. That the orders made on 13<sup>th</sup> July by Lady Justice Thuranira be reviewed and set aside.**
- 3. That the Appeal herein be struck out for being an abuse of the process of the Court.**
- 4. That the appeal herein in the alternative and without prejudice to prayer 2 be dismissed for want of prosecution and for being a gross violation of the Respondent's Constitutional rights to expeditious Justice.**
- 5. That the costs of this application be provided for.**

2. The Application is premised on the grounds that the Respondent's previous Advocates have declined, refused or neglected to release or handover to the Appellant's present advocates, the advocates file. That an advocate has a lien over his client's file and by declining to release the file the former advocates have asserted their authority to remain in the matter, until lawfully removed from the record. That the appeal herein is in respect of a matter where there is already judgment and consequently the present advocates cannot come on record until there is compliance with Order 9 rule 9 or until the court makes an order thereof. That the effect of the orders made on 13<sup>th</sup> July, 2016 allowing the Respondent's present advocates to obtain copies of the proceedings and exhibits from the court file is intended to defeat the former advocates right of lien and should not be countenanced in the absence of an order under Order 52 rule 4 of the Civil Procedure Rules as read together with the Advocates Act. That the appeal herein has been pending for eleven (11) years and that the court has twice served a notice to dismiss this appeal and the Applicant has equally applied in writing to have the appeal dismissed. According to the Applicant, the appeal has no merits. That the Respondent herein first filed Nbi HCCA 812 of 2004 seeking orders of

stay of the lower court proceedings. That in its ruling the court made far reaching findings that the appeal was not likely to succeed. That the said appeal file has mysteriously disappeared from the registry and the instant appeal was subsequently filed.

3. In response, the Respondent deponed a replying affidavit in opposition to the application. It is stated that the firm of Muchui & Co. Advocates filed a Notice of Change of Advocate by 6<sup>th</sup> January 2016 and took over the conduct of the matter on behalf of the Appellant from the firm of Desai, Sarvia and Pallan Advocates. It is stated that the instant appeal arose from CMCC No.9763 of 2002 and that the firm did not require the leave of the court before filing a notice of change of advocate and as such, they are properly on record. It is averred further that an advocate may have a lien over his client's property towards the recovery of fees but such lien does not extend to suits or other court proceedings. It is argued further that the firms of Desai, Sarvia and Pallan Advocates have not raised any complaints/objections against the present advocates appearing in the appeal and that neither have they raised any query in regard to payment of fees. It is further stated that no proper basis has been laid to justify the review of the orders herein dated 13<sup>th</sup> July, 2016. The Respondent's advocate further claimed that the delay in prosecuting the suit is attributed partially to the Applicant. It is asserted that the irregular release of the decretal sum of Ksh.728,050/= deposited in court to the firm of Nelson Harun & Co. Advocates and the subsequent proceedings to have the same refunded caused further delay in prosecuting the suit.

4. The application was argued by way of written submission. I have considered the said submissions.

5. On 13<sup>th</sup> July, 2016 the court made orders that the Respondent's current Advocate be supplied with a copy of typed proceedings and copies of all the documents in the file for purposes of prosecuting the appeal. The Applicant now wishes to have this order reviewed on the ground that this order defeats the former advocates right of lien over the matter which is contrary to Order 52 rule 4 of the Civil procedure Rules. This provision under sub rule 3 reads that **"If the advocate alleges that he has a claim for costs, the court may make such orders for the taxation and payment or securing the payment thereof and protection of the advocates lien if any, as the court deems fit."** My understanding of Order 52 rule 4 is that the former advocates on record are the ones with the *locus standi* to invoke this provision. In the present case, the Respondent's former Advocates have not lodged any such application with the court. The claim by the Applicant that Order 9 rule 9 has not been complied with is not true. The Respondent's current advocates, Ms. Muchui and Company Advocates filed a Notice of Change of Advocates on 6<sup>th</sup> January 2016. Subsequently they filed the application dated to October, 2016 and sought the leave of the court to come on record in accordance with Order 9 rule 9. The said application was served on the Respondent's former advocates Desai, Sarvia and Pallan Advocates as well as that of the Applicant's advocates. The Respondent's current advocates were given leave by the court to come on the record on 13<sup>th</sup> October, 2016. The Respondent's current Advocates are therefore now properly on record. They regularized their position.

6. On whether to dismiss the appeal for want of prosecution, it is apparent that there was activity from the time the appeal was filed until the year 2012. The matter thereafter remained dormant. The Deputy Registrar issued a dismissal notice in the year 2012 and again in the year 2015. It seems the dismissal notices were not served and the appeal remained pending. In May, 2016 the Respondent's current advocates fixed the appeal for mention on 13<sup>th</sup> July, 2016 and made the application to be supplied with the court proceedings. The application for the dismissal of the appeal has come in rather late in the day when the appeal is already active. I have perused the court file. In my view the delay in the prosecution of this appeal cannot be attributed one side only.

7. On whether the appeal herein is an abuse of the court process, I have perused the ruling in Nbi HCCA 812 of 2004 which is one of the annexures herein. In the said ruling, both the bid to stay the lower court proceedings and also the bid to have that appeal summarily dismissed failed. Nbi HCCA 812/2014 is different from the appeal herein. The appeal herein is in respect of the judgement of the lower court.

8. With the foregoing, I find no merits in the application and the same is dismissed with costs.

Dated, signed and delivered at Nairobi this 26<sup>th</sup> day of Jan.,2017

**B. THURANIRA JADEN**

**JUDGE**