



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL DIVISION
HIGH COURT CIVIL APPEAL NO. 311 OF 2013

TECHNO TRADE PAVILION LIMITED.....APPELLANT/RESPONDENT

VERSUS

KATE AZIZA ONG'AYO T/A

NJIRAMU'S SMALL EATING HOUSERESPONDENT/APPLICANT

RULING

1. The Application dated 18th September, 2015 seeks order that:

- “1. THAT this Honourable Court be pleased to dismiss this appeal for want of prosecution.**
- 2. THAT this Honourable Court be pleased to set aside the stay of execution order issued on 4th March, 2014.**
- 3. THAT the sum of Kenya shillings one Hundred and Fifteen Thousand Five Hundred and thirty (KShs.115,530) deposited in Kenya (sic) by the Appellant/Respondent on 26th March 2012 be released to M/s Ongegu & Associates Advocates for the Respondent/Applicant**
- 4. THAT the cost of this Application and the entire suit be awarded to the Respondent/Applicant.”**

2. It is stated in the affidavit in support that judgment was entered in favour of the Applicant on 7th May, 2013. That the Respondent filed this appeal and also filed an application for stay of execution. The stay of execution application was allowed on condition that the decretal sum was deposited in court. The deposit was made on 26th March, 2013. That thereafter the Respondent has not taken any steps to prosecute the appeal. According to the Applicant the appeal is frivolous, an abuse of the court process and is only meant to deny the Applicant the enjoyment of the fruits of his judgment.

3. The application is opposed. It is stated in the replying affidavit that the appeal has never been fixed for direction and the application is premature. That the appeal file could not be traced in the registry and that indeed the Applicant also had an equal responsibility to fix the appeal for hearing.

4. I have considered the application, the reply to the same and the counsels submissions.

5. A perusal of the file reveals that the lower court record has not been availed to this court. The file has not been placed before a judge for direction under Section 79B Civil Procedure Act. A further perusal of the file does not reflect any efforts made by the Respondent to follow up on his appeal. The Applicant and the Deputy Registrar of this court cannot escape blame either. It seems there has been no follow up on the letter by the Deputy Registrar written on 12th June, 2013 requesting for the lower court record.

6. With the foregoing, the court is willing to give the appeal a chance to be heard on merit. Consequently, the application is dismissed with costs in cause. The appeal to be mentioned before the Deputy Registrar on 21st November, 2016 for the Lower Court file to be availed.

Dated, signed and delivered at Nairobi this 3rd day of Nov., 2016

B.THURANIRA JADEN

JUDGE