

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 82 OF 2013

RIFT VALLEY RAILWAYS KENYA LIMITED.....APPELLANT

VERSUS

JEREMIAH KYALO MEANTHI.1ST RESPONDENT

ISAIAH O. NYANGWESO.2ND RESPONDENT

CHRISTOPHER MWANDIKI..... 3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

R U L I N G

1. The Appellant has filed the motion dated 23rd September, 2016 seeking orders that the this court be pleased to find and declare that the orders issued by Hon. Justice Onyancha on 13th March, 2013 staying execution of the impugned judgment and decree are still in force.

2. The grounds upon which the motion is premised are that the Respondents have threatened to execute the judgment of Hon. C. Obulutsa delivered on 29th January, 2013 notwithstanding that there are stay orders of 13th March, 2013 in place. That on 15th October, 2015 the court directed the Appellant to fix the appeal herein for hearing within 30 days or the same shall stand dismissed. That on 16th October, 2015 the Appellant invited the Respondents for fixing a date on 12th November, 2015. That on 12th November, 2015, they were informed that the court file was missing at the registry. That the Appellant made several attempts to trace the file and was advised to appear at the registry on 14th January, 2016 for purposes of taking a hearing date. That the file was once again misplaced and several attempts were made to trace the file in vain until 3rd August, 2016 when the Appellant was advised that the Chief Magistrate’s Court file had been returned to the lower court registry. That attempts to move the registrar to proffer clarification on the status of the matter has been in vain.

3. The Respondents filed a replying affidavit on the 18th October, 2016 in which he depones that the Appellant has never taken any steps to file and serve a record of appeal since 2013. He invoked the provisions of Article 50(1) (2), 48 and 159 of the Constitution. He averred that the Appellant waited until he commenced execution and that is when he rushed to court to secure a stay of execution, that the application is an abuse of the court process in that on the 15th October, 2015, the court made an order that unless the appeal was listed for hearing within 30 days from the at of that order, it shall stand dismissed and in line with the order, the appeal stood dismissed by 15th November, 2015 and, therefore, there is no appeal before the court for adjudication.

4. The motion was dispensed with by way of oral submissions in court. Learned counsel for the Applicant Mr. Ombija essentially reiterated the averments in the supporting affidavit. In response thereto, learned counsel for the Respondent Mr. Ondieki submitted that the provisions of the Constitution of Kenya should be complied with. He referred to Article 10 and 159 (2) (d) (e) that emphasizes that justice should not be delayed. That the matter appealed against was finalized in 2012. That the Appellant filed this appeal and subsequently secured stay orders which it has since enjoyed but has never filed the record of appeal. That the wording of the ruling of 15th October, 2015 was clear and was in mandatory terms. That

the Appellant did not take any step to extend the said orders. That the amount awarded continues to attract interest and that the application is an abuse of court process.

5. In response thereto Mr. Ombija submitted that the Appellant has a right to protection by the court.

6. The court has taken the liberty to read the record vis-à-vis the annexures to the affidavit in support of the application, which confirms the averments that the court file had been misplaced during the time within which a date was to be taken as per the court orders given on the 15th October, 2015. However, the court notes that as per its orders of 15th October, 2015, the appeal stood dismissed upon expiry of the 30 days it had given for fixing of the appeal for hearing. As it stands now, there is no appeal on record and any orders that had been issued in the appeal went down with it. It is unfortunate that the Applicant/Appellant has not sought orders to have the appeal reinstated and in prayer 2 of the application, stay is sought pending the hearing and determination of the application herein.

7. In view of the foregoing, the application dated the 23rd September, 2016 is hereby dismissed with costs.

Dated, signed and delivered at Nairobi this 1st day of December, 2016.

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L NJUGUNA

JUDGE