



REPUBLIC OF KENYA

High Court at Embu

Civil Appeal 115 of 2010

RACHAEL KOROS.....APPELLANT/APPLICANT

VERSUS

JUDY NYAWIRA RUIRE (*Suing as the Legal Representative of the estate of*

NDEMI MUGANE)..... DEFENDANT

(Being an Appeal from the Judgment of E.M. NYAGA Principal Magistrate Kerugoya

in CMCC 88of 2011 on 218th December 2009)

RULING

This is the Notice of Motion dated 6th February 2013 and brought under Section 1B and 3A of the Civil Procedure Act, Order 51 Rule 1 of the Civil Procedure Rules for the striking out of the appeal as being an abuse of the due process.

The Respondent/Applicant cites 4 grounds to support her application.

1. *The appeal herein was solely calculated to frustrate the recovery of the decretal sum.*
2. *The appellant has lost interest in prosecuting the appeal since the recovery of the decretal sum.*
3. *The appellant has not taken any steps to prepare, prosecute the appeal for the last 27 months.*
4. *It is an abuse of the court process for a party to file an appeal merely to forestall recovery of a lawful money decree.*

The application is also supported by the affidavit of Mr. Peterson Kinyua Kiama the Respondent's advocate. In it he has expounded on the grounds. Of great importance are paragraph 4 – 6 of the affidavit where he states

4. *That the respondent was granted a stay of execution on condition that the decretal sum is deposited in court within 30 days.*

5. *That the respondent did not comply with the condition for stay of execution where upon he proceeded with execution and recovered the decretal sum on the 8/4/2011.*

6. *That since the payment of the decretal sum on the 8/4/2011, the respondent has not take any steps to prosecute this appeal.*

This application was served on the appellant/respondent's counsel but there has been no response to the said application. The application is therefore not opposed. Since the recovery of the decretal sum on

8/4/2011 after the appellant/respondent failed to comply with condition of the stay of execution, it is clear that the appellant/respondent has lost interest in the appeal.

The appellant/respondent has failed to comply with Order 42 Rule 11 of the Civil Procedure Rules for directions on admission or otherwise yet the appeal was filed on 8/1/2010. This is a period of over 3 years.

I find the application to have merit and I strike out the appeal with costs. The respondent/applicant also gets the costs of the application.

DELIVERED, SIGNED AND DATED AT EMBU THIS 3RD OF MAY 2013.

**H.I. ONG'UDI
JUDGE**

In the presence of:-

N/A for or by parties

Njue CC