

REPUBLIC OF KENYA

IN THE HIGH COURT

AT BUNGOMA

Civil Appeal 100 of 2010

JOASH WAFULA.....APPELLANT

~VRS~

EDWARD SIMIYU LUSANYA.....RESPONDENT

(Appeal arising from Senior Resident Magistrate R. O. Oigara in Sirisia court in civil case no.60 of 2009)

RULING

This appeal was filed on 27/9/2010 by the Applicant against whom the Respondent successfully sued for the payment of dowry under Luhya customary law. He had been sued for marrying the Respondent's daughter and failing to pay dowry. He had been sued jointly with his father Robert Simiyu Mukhwana. They had denied the fact of marriage and liability to pay dowry. The value of dowry plus costs and interest was Ksh.158,895/=. The Respondent was executing when the Applicant filed the appeal and along with it an application for stay of execution pending the hearing and determination of the appeal. On 22/11/2010 the parties appeared before Justice Onyancha who ordered stay for six months. He admitted the appeal and asked that the Appellant files the Record of Appeal within 60 days.

On 8/7/2011 the Respondent filed the present motion seeking to have the appeal dismissed for want of prosecution. His grounds were that the Appellant had not filed a Record of Appeal within 60 days as had been directed; that the appeal had no chance of success; and that the failure to abide by the court order was intended to delay the course of justice. The Applicant filed a replying affidavit to say that he had not complied because he had been attacked by thugs following which he had been unwell and unable to raise money to instruct his advocates to file the Record of Appeal. He swore that he was now ready and willing to file the Record.

The record shows that when the application was filed it was served on 7/9/2011. The Applicant may have been attacked by thieves and consequently been unable to finance the filing of the Record of appeal, but it is clear that since the application was filed no action has been taken to file the Record. The present application was heard about six months after it was served. That is not the conduct of a diligent appellant.

It is notable that the order to file the Record within 60 months was a condition of stay. It was not honoured and there is no request to extend time. The order of stay shall be discharged but the request to dismiss the appeal for want of prosecution is declined. I have made the orders because it was not deponed in the affidavit to support the application for stay that the Respondent was wanting in means or was incapable of paying the decretal sum if the appeal ultimately succeeds. I ask that costs do abide the appeal.

Dated, signed and delivered at Bungoma this 11th day of July 2012.

A. O. MUCHELULE
JUDGE