



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

CIVIL APPEAL CASE NO. 60 OF 2010.

ISAAC WAFULA.....APPELLANT/APPLICANT

VERSUS.

JOHN SIMIYU.....1ST RESPONDENT

JAMES MAKOKHA.....2ND RESPONDENT

ISAAC WAMACHARI KASISI.....3RD RESPONDENT

RULING.

[1]. This Notice of Motion is filed under Sec. 1A, 1B, Section 3 3A Civil Procedure Act 2010 and Order 50 Rule 20 and 51 Rule 15 of the Civil Procedure Rules 2010 . The motion prays that there be a stay of execution of the costs decreed/order issued on 3rd October 2017. Pending the hearing of this application inter partes and that there be a stay of execution pending the hearing and determination of an intended appeal.

[2]. The application is grounded on the fact that the applicant has already lodged a Notice of Appeal with a view to appeal against the dismissal of the appeal and that the Appeal has high chances of success and that the appeal will be rendered nugatory.

[3]. The respondent filed a replying Affidavit and opposed the Notice of Motion. He argued that the application lacks merit and should be dismissed with costs. He argued that there is nothing to stay as the ruling of 3rd October, 2017 declined to reinstate the Appeal which was dismissed on the 11th of October, 2016. He further stated that there is no decree that can arise from the said Ruling that is capable of being stayed.

[4]. Having listened to the parties. It is quite clear that the order the applicant wants stayed is the order of 3/10/2017 that refused to reinstate an appeal. This is a negative order.

The Court of Appeal in *Co-operative Bank of Kenya Vs. Banking Insurance Finance (Kenya) in Civil Application No. 133 of 2015 (UR 107/2013)*. Discussed the issue of stay of execution pending an appeal, and what orders can be stayed and those that cannot be stayed.

In Mugenyi & Co. Advocates Vs. National Assurance Co-operation Civil Appeal No. 13 of 1994 it was held that:-

An order of stay of execution must serve a certain purpose.

In Gichina Mwangi Vs. Henry Mukora Mwangi [2000] eKLR the court held that:

In the circumstances there is nothing to stay, that being the position the application for stay must be and is hereby is, dismissed with costs.

In Executive Estates Limited Vs. Kenya Posts and Another [2005] IEA 53 the court held that the order which dismissed the suit was a negative order which is not capable of execution”

In William Lerukan Konchella and Another Vs. Julius Tabarai Ole Maito Tampushi [2014] eKLR, the court held that

“Courts do not act in vain and therefore cannot grant an event that has already taken place”.

[5]. It is clearly obvious that the order refusing to reinstate an appeal that had previously been dismissed by the court, is a negative order.

The Appeal remains dismissed. That is not an order that is capable of execution. No stay can therefore be granted against the same. This is the only order the court made in this instance. The application for stay of execution is clearly misconceived. The said application is dismissed with costs.

Ruling read before the Parties In open Court.

Dated at Bungoma this 21st day of February, 2018.

S. MUKUNYA

JUDGE

In the presence of:

Joy: Court Assistant

Amani for the defendant/respondent

Rano for Mr. Kituyi for the applicant