



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, MAKHANDIA & GATEMBU, J.J.A)

KISUMU CIVIL APPLICATION NO. 158 OF 2019

BETWEEN

MOSES ADERO OTIENO.....APPLICANT

AND

CHINA JIANGXI INTERNATIONAL (K) LTD.....RESPONDENT

(An application for stay of execution pending the hearing and determination

of the appeal from the judgment of the High Court of Kenya at Homa-Bay

(J. R. Karanjah) delivered on 9th April, 2019 in HCCA No. 14 of 2018)

RULING OF THE COURT

Moses Adero Otieno, (the applicant) has moved this Court by way of Notice of Motion dated 13th November, 2019 pronounced to be brought under **Rule 5(2)b** of the Rules of this Court (the rules) for orders, *inter alia*, that

“Pending the hearing and determination of the appeal from the judgment of the High Court (Justice J. R. Karanjah) sitting in Homa-Bay delivered on 9th April, 2019 this Honourable Court be pleased to issue an order of stay of execution in Homa-Bay Court Civil Appeal No. 14 of 2018 China Jiangxi International (K) Ltd vs. Moses Adero Otieno an order of injunction restraining the respondent and its employees, agents, servants or hirelings from executing the judgment and orders in the said HCCA No. 14 of 2018.”

Although one of the grounds on the face of the application refers to a memorandum of appeal, there is no memorandum of appeal annexed to the application. More importantly, there is no Notice of Appeal annexed to the supporting affidavit to demonstrate that the applicant has filed an appeal before this Court. Even the index makes no reference to any Notice of Appeal. This Court derives its jurisdiction to entertain applications under **Rule 5(2) b** of its Rules from the Notice of Appeal filed pursuant to **Rule 75** of the said Rules. Rule 5(2) b provides as here under:-

“5(2) subject to sub-rule (1) the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may –

(b) In any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the court may think just.”

On the other hand, Rule 75 provides as follows:-

(1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.

(2) Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.

Inevitably therefore, in absence of a Notice of Appeal filed pursuant to the above Rule, this Court is devoid of jurisdiction to entertain this application and determine it on its merits. Accordingly, the application is hereby struck out with costs to the respondent.

Dated and delivered at Nairobi this 23rd day of October, 2020.

W. KARANJA

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JUDGE OF APPEAL

ASIKE – MAKHANDIA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR