



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: MUSINGA, GATEMBU & MURGOR, JJA.)**

**CIVIL APPEAL NO. 48 OF 2014**

**BETWEEN**

**ROSE LWAKOSA.....APPELLANT**

**AND**

**KEITH GOGO ASAVA.....RESPONDENT**

*(Appeal from the Ruling/Order of the High Court of Kenya at Kakamega (Chitembwe, J.)*

*dated 19<sup>th</sup> May, 2014*

**in**

**HCCC NO. 55 OF 2004)**

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**JUDGMENT OF THE COURT**

1. On 2<sup>nd</sup> May, 2013 the High Court at Kakamega (**Chitembwe, J.**) delivered a judgment in which the appellant's suit, **HCCC NO. 55 of 2004** was dismissed with costs to the respondent. The appellant was dissatisfied with that decision and on 13<sup>th</sup> May, 2013 lodged a notice of appeal.
2. On 17<sup>th</sup> May, 2013 the appellant filed an application seeking stay of prosecution of the aforesaid judgment as well as a review of the said ruling. The appellant contended that there was an error apparent on the face of the record.
3. In a ruling delivered on 19<sup>th</sup> May, 2014, **Chitembwe, J.** dismissed the aforesaid application in its entirety. The appellant was again dissatisfied with that decision and preferred an appeal to this Court.
4. In her memorandum of appeal, the appellant stated, *inter alia*, that the learned judge erred in law in refusing to review his judgment and in failing to take into account her submissions.
5. When this appeal came up for hearing, both **Mr. Situma** and **Mr. Athung'a**, learned counsel for the appellant and respondent respectively, told the Court that they were entirely relying on their respective written submissions that are on record.

6. One of the issues raised by the respondent's counsel is that the application for review was incompetent and did not lie, in view of the fact that the appellant had already filed a notice of appeal dated 13<sup>th</sup> May, 2013 against the judgment delivered on 2<sup>nd</sup> May, 2013. Under **rule 75** of the **Court of Appeal Rules**, an appeal is deemed to have been filed in this Court once a notice of appeal has been launched, counsel submitted.

7. We agree with Mr. Athung'a's submission in that respect. **Order 45 rule 1** of the **Civil Procedure Rules** states as follows:

**“1. (1) Any person considering himself aggrieved-**

**(a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**

**(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”**

8. This Court has reaffirmed the provisions of **Order 45 rule 1** in a number of its decisions. In **KISYA INVESTMENTS LIMITED VS ATTORNEY GENERAL & ANOTHER [1995] eKLR** the Court held that a party who has filed a notice of appeal cannot apply for review but if the application for review is filed first, the party is not prevented from filing an appeal subsequently even if a review is pending. It is trite law that an appeal is deemed to have been filed in this Court once a notice of appeal has been lodged.

9. That being the clear position in law, the appellant's prayer in her application before the High Court that Sought a review of the judgment was misconceived and bad in law.

10. As regards the appellant's prayer for stay of execution, in exercising his discretion, the learned judge held as hereunder:

**“On the issue of stay of execution it is clear that the defendant is the one who has been in possession since 1976. He has developed the property. The plaintiff can pursue her appeal and should she succeed then the defendant will be evicted from the suit land.”**

11. The appellant did not demonstrate to us that in arriving at the above quoted conclusion the learned judge exercised his discretion injudiciously.

12. For these reason, we find this appeal lacking in merit and dismiss it with costs to the respondent.

**DATED and delivered at Kisumu this 4<sup>th</sup> day of March, 2016.**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**