REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 790 OF 2006

MINI BAKERIES (NAIROBI) LTD. .....……..APPELLANT

VERSUS

FINAS LUNGAHI INGANI …….....RESPONDENT

RULING

1. This is a Ruling on the Respondent's application dated 5th January, 2011. The application is brought under the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act and Order 42 Rule 35(2) of the Civil Procedure Rules. It seeks the dismissal of this Appeal for want of prosecution.
2. The grounds for the application as appears from the body of the Motion and the Supporting Affidavit of ENONDA A.M. Dickson sworn on 5th January, 2011 are that ever since the Memorandum of Appeal and Record of Appeal were filed on 16th November, 2006 and 12th August, 2009, respectively, no action has been taken to prosecute the Appeal. That the delay in prosecuting the Appeal is inordinate and is prejudicial to the Respondent who has a judgment in his favour.
3. The Application is opposed through an Affidavit in Reply sworn by Patricia Khisa on 15th March, 2012. The Appellant contended that following the filing of the Record of Appeal, the Appellant wrote to the Deputy Registrar on 12th January, 2009 requesting that the Appeal be listed for directions. That attempts to locate the court file in December, 2010 and January, 2011, respectively to list the matter for directions proved futile as the file was said to have been taken for scanning in order to enter the details therein in the Court's electronic system. That the delay in prosecuting the appeal was therefore not deliberate.
4. I have considered the Affidavit on record, the oral submissions presented by the respective counsel together with the authorities relied on. The application is for dismissal of the Appeal for want of prosecution. The applicable law in this area is to be found in **Order 42 Rule 35(1) and (2)** of the Civil Procedure Rules. The Rule provides:-

" 35 (1) Unless within three months after the giving of directions under rule 13 the appeal shall have been set down for hearing by the appellant, the respondent shall be at liberty either to set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.

(2) If, within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal."

5. From the foregoing, it is clear that an appeal can be dismissed for want of prosecution on two instances. Firstly, where there has been failure to list the appeal for hearing three months after directions has been made under Order 42 Rule 13 or, Secondly, if after one year of service of the Memorandum of Appeal the appeal has not been listed for hearing. In these two scenarios, the procedure is different. In the first scenario, the Respondent is given the option to either list the appeal for hearing or to apply for its dismissal. Under that scenario however, the appeal can only be dismissed if it has been admitted and directions have been given. This caveat is for good reason because, the appeal cannot be listed for hearing until the court is satisfied that the record of appeal is in accordance with the trial court record. The law is therefore alive to the fact that the Appellant cannot in the circumstances take any step until directions have been given.

6. On the second scenario, the law is alive to the fact that the Appellant may file an appeal and go to slumber. If for a whole year after service of the Memorandum of Appeal no step is taken to prosecute the Appeal, the Respondent is required to prod the Deputy Registrar to list the appeal for dismissal by a Judge. The requirement in this sub-rule to have the registrar act is to ensure that an appeal is not wrongly dismissed due to inaction on the part of the court e.g. of procuring the original record of the trial court. Obviously, the Deputy Registrar cannot move the court for dismissal of an appeal if the blame lies with him. Of course once the matter comes up for dismissal, it is expected that the Appellant will show the Court the effort he has made to prosecute the Appeal.
7. In the present case, I have noted that although the Record of Appeal was filed way back in 2009, and the Appellant applied for the matter to be listed for directions, the Deputy Registrar has never listed the appeal for directions. This may be as result of the original record of the trial court not having been procured by the Court. It is obvious that directions cannot be given in the circumstances. Can the Appellant be blamed for that? I do not think so. To my mind, what the Respondent should have done, as per sub rule (2) of Rule 35 under which the application was made, was to request the Deputy Registrar to list the appeal for dismissal and not for him to make the substantive application he made.
8. In the circumstances, I am satisfied that the application is without merit and the same is hereby dismissed without any order as to costs.
9. In order to save judicial time, I direct the Deputy Registrar of this court to call for the record of the trial court and list this matter for directions within 90 days of the date of this ruling.

DATED, SIGNED and **Delivered** at Nairobi, this 13th day of March, 2015.

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A. **MABEYA**

JUDGE