



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL APPEAL NO. 195 OF 2005**

**GATEWAY INSURANCE CO. LTD.....APPELLANT/RESPONDENT**

**VERSUS**

**SIMON W. GAKURU.....RESPONDENT/APPLICANT**

**RULING**

On 14th May 2007, the respondent, Simon Gakuru, filed the chamber summons dated 9/5/2007 praying that this appeal be dismissed for want of prosecution.

The application was brought under Order XL1 Rule 31(1) of the repealed Civil Procedure Rules and is premised on the grounds that one and a half years since the appeal was filed, no step has been taken to prosecute it and that the none prosecution of the appeal is highly prejudicial to the respondent. The summons is supported by the affidavit of the respondent's advocate, Mr. Robert Mungai Mbugua, in which while reiterating the grounds therein, he has deposed that the appellant has been indolent in prosecuting the appeal.

In reply, the appellant, through its advocate belatedly swore an affidavit dated 12/4/2013 and deposed that from the time the appeal was filed, they (the appellant's advocates) have written numerous letters to the Deputy Registrar of this court requesting for typed copies of proceedings and judgment; that it is only on 31st May, 2011 when the Deputy Registrar informed them that the proceedings were ready for collection; that when they went to collect the proceedings, they found that the proceedings were in respect of the proceedings in the High Court and not the proceedings in the lower court. The deponent has also averred that the appeal has never been set down for hearing due to unavailability and/or lack of copies of typed proceedings which she blames on the court.

Contending that dismissal of the appeal would occasion the appellant substantial loss, she has deposed that any actions and proceedings taken in this matter shall be a nullity.

On 12th February, 2014, parties with the concurrence of the court, agreed to have the application disposed of by way of written submissions.

In the submissions filed on behalf of the Respondent, it is submitted that the appellant is careless, indolent and disinterested in the appeal; that instead of addressing the issue of typed proceedings with the lower court, it addressed it to the Deputy Registrar who rightly issued it with the High Court proceedings in respect thereof; and that even after obtaining the wrong proceedings, the appellant did not write to the lower court to supply it with the proceedings; and that instead of so doing, it has threatened not to prepare the record of appeal unless the court supplies it with typed proceedings which it has not sought.

Pointing out that there was inordinate delay in filing a reply to this application and contending that the

delay is a demonstration of the appellant's lack of seriousness to procure the proceedings, it is submitted that it was the appellant's responsibility to ensure that the appeal was prosecuted without delay; and that the delay herein is inordinate and inexcusable. Further that no logical reason has been given for the delay.

In support of the argument advanced in his submissions, the respondent has referred to **Safina Limited v. Jamnadas (k) Ltd (2006) eKLR** where Mary Kasango quoted with approval the holding in **Mukisa Biscuit CO. V. West End Distributors (1969) E.A. 696** thus:-

**“...it is the duty of the plaintiff to bring his suit to early trial, and he cannot absolve himself of his primary duty by saying that the defendant consented to the position.”** The respondent has also relied on the decision in **Dickson Miriti Kamande v. Commercial Bank Ltd** where Isaac Lenaola J., observed:-

**“...For purposes of this application he did nothing between 7/5/2003 and the date this application was filed 7/2/2005, a period of 1 1/2 years. There is no evidence that the court file was unavailable has been given. The delay cannot be excused and an indolent party must reckon with the consequences of inaction.”**

On its part, the appellant has submitted that it failed to fix the appeal for hearing and/or prosecute it because of reasons beyond its control; that under Order 42 Rule 13(4), Criminal Procedure Code 2010, the typed proceedings and/or the judgment, or order appealed has to form part of the record before the appellate court before the appeal can be set down for hearing, a condition owing to lack or unavailability of the typed proceedings in the lower court, the appellant is unable to comply with; and that in any event the respondent under Order 42 rule 35 had an opportunity of fixing the appeal for hearing which opportunity he never took.

Referring to **Kirinyaga General Machinery v. Hezekiel Mureithi Ileri HCC No.98 of 2008** where while interpreting Order XLI 31 (now Order 42 rule 35), Mary Kasango J., stated-

**“It is clearly seen from that rule that before the respondent can move the court either to set the appeal down for hearing or to apply for dismissal for want of prosecution, directions ought to have been given as provided under rule 8B. Directions have never been given in this matter. The directions having not being given the orders sought by the respondent cannot be entertained;”**

It is also submitted that the respondent has not demonstrated any prejudice that he has suffered; and that if he has suffered any prejudice, the same can be rectified by the court which occasioned the delay.

The appellant therefore submitted that the orders sought cannot issue.

The issues for determination are:-

1. Whether the appellant has been diligent in prosecuting the appeal; if not;
2. Whether the appeal should be dismissed for want of prosecution; and if not;
3. What orders should the court make?

### **Whether the appellant has been diligent in prosecuting the appeal?**

The evidence on record shows that the appeal herein was filed on 19th October, 2005. Ever since then, no record of appeal has been prepared. The reason for the appellant's failure to prepare the record of appeal has been blamed on the court's failure to supply the appellant and/or its advocates with typed proceedings and the judgment of the lower court to enable it to prepare the record of appeal.

I have considered the positions taken by both parties. There is no doubt that there has been inordinate delay in prosecution of the instant appeal the same having been filed more than eight (8) years ago.

Under Order XLI Rule 31(1) a respondent had the liberty to either set down the appeal for hearing or to apply by summons for its dismissal, if within three months after giving of directions under rule 8B, the appeal had not been set down for hearing by the appellant.

Rule 8B aforementioned rule provides:-

**“On notice to the parties delivered not less than twenty-one days after the date of service of the Memorandum of appeal the registrar shall list the appeal for giving of directions by a judge in Chambers.”**

The record shows that on 14.5.07 there was some attempt to settle this matter out of court. Apparently, the intended out of court settlement did not materialize. Consequently, the appeal was fixed for giving of directions on 25th April, 2008.

On 17th June, 2008, when the appeal came up for directions, it was observed that the proceedings in the lower court had not been typed and an order was made for the typing of the proceedings. The matter was then stood over generally.

From that date, the appellant wrote several letters to the court requesting for typed proceedings and judgment. Those letters are the ones dated 15/4/2009, 4/5/2010, 26/1/2011, 23/1/2011, 18/4/2011. These letters culminated in the letter from the court dated 13/5/2011 advising the appellant that the proceedings were ready for collection.

The appellant's advocate has averred that upon collecting the proceedings as advised by the court, they found that they were in respect of the proceedings in the High Court as opposed to the proceedings in the lower court.

Whereas the respondent's advocate blames the appellant's for having addressed its letters to the wrong forum, I find that, in the circumstances of this case, the appellant's advocate was justified in addressing his letter to the Deputy Registrar of this court because the order of typing of the proceeding had been made by him, for and on behalf of this court. That being the case, he was the right officer to follow up and ensure that his order was complied with.

Having been served with the wrong record, there is no evidence that they complained to the court about being supplied with the wrong proceedings and/or requested to be supplied with the right proceedings. Once again, the appellant and/or its advocate acted indolently and must take most of the blame because this is their appeal and it is upon it to move with speed to ensure its prosecution. Though the court is partly to blame for the delay, the appellant takes the bulk of the blame.

### **Whether the appeal should be dismissed for want of prosecution?**

Concerning this issue, the appellant submitted that the instant appeal cannot be dismissed for want of prosecution because directions in respect thereof have not been issued. Citing **Kirinyaga General Machinery v. Hezekiel Mureithi Ireri** (*supra*) the appellant's counsel has submitted that until and unless directions are issued an appeal cannot be dismissed for want of prosecution; and that the procedure of dealing with an appeal where directions have not been issued is that contemplated in Order XLI Rule 31(2) and not Order XLI Rule 31(1) (now Order 42 rule 35(2) and Order 42 rule 35(1) respectively).

These provisions of the law provide as follows-

**“Unless within three months after giving of directions under rule 8B 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 (Order XLI Rule 31(1)); and**

**If, within one year after 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 (Order XLI Rule 31(2))”**

Clearly, an application for dismissal of an appeal, brought under Order XLI Rule 31(1) (*supra*) can only be brought where directions have been issued. Where directions have not been issued, like in the instant case, the procedure for dismissing the appeal is that contemplated under Order XLI Rule 31(2). In my view, however, this court can still exercise its discretion, considering the special circumstances of this case and invoke Order XLI Rule 31(2) of the Civil Procedure Rules.

**What orders should the court make?**

This appeal was filed on 8th December, 2005, nearly 10 years ago. To date the proceedings in the lower court have not been typed and supplied to the appellant's advocate for purposes of preparing the record of appeal. I note that the appellant's advocates have severally requested to be supplied with copies of the typed proceedings and judgment to no avail. This is so despite an order having been made, earlier on, that the lower court file be taken for typing of the proceedings. The appellant has not been vigilant in following up of the said proceedings. Consequently, I make the following orders:-

1. that the Deputy Registrar of this court to ensure that the proceedings are typed and availed on priority basis and , in any event, not later than thirty (30) days from the date hereof.
2. that the appellant and/or its advocate to take the initiative to be supplied with copies of the typed proceedings within thirty five (35) days from the date hereof;
3. that the appellant and/or its advocate do prepare the record of appeal and list the appeal for directions within thirty (30) days from the date of obtaining the typed proceedings, failing which the appeal shall stand automatically dismissed.

Due to the lax attitude taken by the appellant in the conduct of the matter, I direct that the appellant pay the costs of this application.

**DATED and DELIVERED this 30th day of May, 2014.**

**RPV WENDOH**

**JUDGE**

**PRESENT:**

N/A for the appellant/respondent

Mr. Mbiyu for the respondent/applicant

Kennedy – Court Assistant