



REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 136 OF 2006

HUSSEIN ALI ABDALLA.....APPELLANT/RESPONDENT

-AND-

AHMED ABDALLA S. ABAD.....RESPONDENT/APPLICANT

RULING

The respondent in the appeal case moved this Court by its Chamber Summons dated **10th June, 2010**, brought under Order XLI, rule 31 of the earlier edition of the Civil Procedure Rules.

The respondent/applicant's substantive prayer is that the pending appeal be dismissed for want of prosecution. The grounds for this prayer are (in summary) as follows:

(i) *the appellant's Memorandum of Appeal was filed on **14th September, 2006** and served upon the respondent/applicant on **18th September, 2006**;*

(ii) *the appellant, after filing the appeal, applied for and obtained Orders staying execution of the decree of the Subordinate Court;*

(iii) *since then, the appellant has enjoyed the stay Orders to-date;*

(iv) *since filing the appeal, the respondent has taken no steps to have the appeal set down for hearing.*

The respondent/applicant provides supporting evidence in the form of an affidavit sworn on **22nd June, 2010**. He deposes that the appellant had filed the appeal on **14th September, 2006** and served the same on the applicant's Advocates on **18th September, 2006**. The appellant had then filed a Notice of Motion dated **29th September, 2006** which he set down for *ex parte* disposal; he obtained Orders of stay, which he has enjoyed since then, and he "*does not seem eager to prosecute the appeal or to take necessary steps towards quick disposal of the matter.*" The deponent avers that he "*has suffered and continues to suffer loss and damage as the appellant continues to stay in the premises which have been handed over to [the respondent/applicant] by a competent Court.*"

The appellant, through the firm of *M/s. Okanga & Company, Advocates*, responded by filing their grounds of opposition dated **15th July, 2010**; and the following contentions are made:

(i) the application is premature, and ought to be dismissed;

(ii) the appellant has attempted to have his application of **29th September, 2006** heard *inter partes* – and that it had come up for this purpose on **2nd July, 2008**;

(iii) the appellant “*is not in any way guilty of delays in prosecuting this appeal*”;

(iv) the appellant/respondent “*is ready and willing to have the appeal heard and determined.*”

Learned counsel, **Mr. Kariuki** for the applicant submitted that the applicant had obtained Judgment in the terms of his plaint is SRMCC No.2236 of 2002; and “*the effect of the said Judgment was to declare the house-without-land bought by [the applicant] in a public auction as belonging to the [applicant, the plaintiff in SRMCC 2236/2002]. Theapplicant herein also obtained Orders for eviction.*” The appellant then moved the Court and, in **September, 2006**, “*obtained stay of execution pending the hearing and determination of the appeal herein.*”

Counsel urged that the appellant, though obtaining stay Orders, had not deposited any form of security contrary to the terms of Order XLI of the Civil Procedure Rules. He submitted that the appellant has since **2006**, “*failed to list the matter for directions or prosecute the appeal*”; he urged that “*a period of four years is unreasonable and inordinate delay*”; and that “*a party should not take advantage of a stay Order to defeat and/or frustrate a party who has already obtained Judgment and who should be allowed to enjoy the fruits of his Judgment.*”

Learned counsel urged that the appeal is frivolous and has “*little chances of success*”; and that the appellant has no intention of prosecuting the appeal, and “*the same should be dismissed with costs to theapplicant*”.

M/s. Okanga & Co., Advocates in their submission for the appellant/respondent, signalled as an explanation for the dormant appeal, that “*the appellant’s Memorandum of Appeal dated 1st September, 2006 has not been admitted to pave way for the appellant to proceed further and prepare the other documents relating to the prosecution of the appeal...*” Counsel also suggest that the delay is attributable to their client’s Notice of Motion of **29th September, 2006** (the basis of the stay orders granted *ex parte*) “*still pending before the Honourable Court for determination.*”

Counsel contended that “*the appellant...has not delayed the prosecution of the appeal...and that once the appeal has been admitted, then the appellant shall move expeditiously to have the appeal prosecuted.*”

Counsel asks this Court “*to dismiss the applicant’s Chamber Summons application dated 10th June, 2010 and let the appellant prosecute his appeal which has been occasioned by matters which are beyond his control such as the admission of the appeal.*”

The learned Resident Magistrate, **Ms. R.N. Makungu**, on **18th August, 2006** gave Judgment in Civil Suit No.2236 of 2002, **Ahmed Abdalla S. Abad v. Hussein Ali Abdalla**. The vital part of that Judgment reads as follows:

“The plaintiff was an innocent purchaser for value without notice and had bought the said house in a properly advertised auction. I do not find any fraud or irregularity that was occasioned by the auction sale...

“I find that the plaintiff has proved his case on a balance of probability...

“The defendant is hereby given a 21-day notice period within which to give vacant possession to the plaintiff herein.”

The Judgment-creditor in that case was the applicant herein, and he has since then been anxious to partake of the fruit of his Judgment, by taking possession of the suit property from which the appellant/respondent had been lawfully evicted.

But on **29th September, 2006** the appellant filed an appeal, accompanied by a Notice of Motion application of even date, on the basis of which, *ex parte*, he obtained Orders staying the trial Court's decree, with the consequence that since **2006** the applicant has been kept away from his entitlement under the law.

Not only did the respondent not set down his Notice of Motion for an *inter partes* hearing, he took no step on record to prosecute his appeal which was the *raison d'être* for keeping the applicant away from his Judgment and decree.

Today the applicant brings excuses for not prosecuting his appeal: he has never been unwilling to prosecute the same; the Court machinery itself stands to blame for not formally admitting the appeal; he had always wanted the Notice of Motion application of **29th September, 2006** heard *inter partes*.

It is the contrasting merits of the two positions that must determine the outcome of the Judgment-creditor's application herein. Whereas the applicant's case, as to his entitlements and deserts, speaks for itself, that of the appellant/respondent appears as no more than mere excuses, and a failure of due diligence. There is no reason, in my opinion, for obtaining *ex parte* orders in such clear derogation from the applicant's vested legal rights, and then taking at least four years before setting down the matter for a hearing on the merits; and no valid reason exists for representing that an appeal is pending, when the Court has not been moved to set it in a trajectory of disposal. All such bare impressions have been created, in my opinion, illegitimately, and the loser has been the Judgment-creditor.

I allow the respondent/applicant's application by Chamber Summons, and dismiss the appellant/respondent's appeal, for want of prosecution.

The interim Orders of 2nd October, 2006 are hereby vacated.

The appellant/respondent shall bear the applicant's costs of the application.

SIGNED at NAIROBI

**J.B. OJWANG
JUDGE**

DATED and DELIVERED at MOMBASA this 16th day of February, 2012.

**.....
M.A. ODERO
JUDGE**