REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL APPEAL 75 OF 2007

ATHI RIVER STEEL PLANT LIMITED.....APPELLANT

VERSUS

PETER ODHIAMBO MUKOK.....RESPONDENT

(Being an Appeal from the judgment and decree of V. W. Wandera, P.M. delivered on 05/04/2007

RULING

1. **Athi River Steel Plant Limited** ("Appellant") filed a Memorandum of Appeal herein on **23/04/2007.** The appeal was against the judgment and decree of the Learned **V. W. Wandera** delivered and dated **05/04/2007** which was against the Appellant. The Plaintiff in the lower Court and the Respondent herein is **Peter Odhiambo Mukok** ("Respondent").

2. On **17/08/2007**, the Appellant, through its advocates, **Manthi Masika & Company Advocates**, dispatched a letter to the advocates for the Respondents enclosing the judgment sum and offering to pay the costs upon sight of the decree. Later on, the Appellant's insurer settled costs in the suit.

3. The Appeal, however, was never withdrawn or formally abandoned. It remained dormant until **23/10/2007** when the Respondent took out a Notice of Motion seeking its dismissal for want of prosecution. In a ruling delivered on 2**5/06/2008,** the *Justice Isaac Lenaola* declined the Respondent's invitation to dismiss the appeal for want of prosecution terming it premature. However, *Justice Lenaola* noted that the decretal sum had been paid and directed as follows in the operative portion of his ruling:

If the Appellant has shown no interest and the decretal sum has been paid, I will make the following orders:

Let the Appellant prepare and serve the record of appeal within **45 days** failure to which the Appeal stands dismissed with costs to the Respondent.

4. Apparently, the Respondent's counsel was not present when that ruling was delivered. This was because the ruling had originally been slated for 24/06/2008. The record shows the Appellant's advocate, **Mr. Masika** was present during the reading of the ruling on **25/06/2008**. There was no appearance for the Respondent. His advocate says they did not know of the new date when the ruling would be read. Suffice

it to say that after the ruling was duly delivered the record indicates as follows:

Mention on 23/09/2008. Notice to issue.

5. And so, there was a mention on 23/09/2008. Again, **Mr. Masika** was present for the Appellant. Again, there was no representation from the Respondent. We have now learnt that was because the Respondent did not know of the mention date. In fact, no mention notice issued despite the Court order of 25/06/2008. The Respondent complains that this was the Appellant's lawyer's failure. In fact, the Respondent's attorney puts it more strongly: he says it was the Appellant's advocate's conspiracy not to serve him with a mention notice so that he could appear alone on 23/09/2008.

6. Hence, when **Mr. Masika** appeared before the Court on 23/09/2008 his address to the Court was short:

"The Appeal should be withdrawn as it has been compromised."

7. The Court obliged. It made the order:

"Appeal herein is marked as withdrawn. No order as to costs."

8. The Respondent is quite unhappy with the Court's order that there should be no costs and he wants it set aside. His application is by Notice of Motion dated **11/08/2009** ("Application"). It is expressed to be brought under **section 3A** of the **Civil Procedure Rules.** I assumed the Respondent actually meant **Civil Procedure Act** and that this was a scrivener's error. His complaint is that he is entitled to costs to the withdrawn appeal and that the Appellant misled the Court into issuing an order of "no order as to costs." While he accepts that the Court has discretion to award costs, he says that the Court did not exercise any discretion here. Instead, it was misled by the Appellant when he, falsely from the Respondent's perspective, represented that the appeal had been "compromised."

9. The Respondent argues that the appeal was never "compromised." It was, instead, withdrawn. The Respondent says the Appellant settled the decretal amount and wrote a letter to his advocates "withdrawing" the appeal. The Respondent did not participate in the decision or outcome. As such, the Respondent argues he is entitled to the costs of the appeal since as a general principle costs should follow the event. Here, the Respondent argues, there was no reason to depart from the general principle and, in fact, the Court did not exercise its discretion to so depart. It was simply misled by the Appellant's counsel who, after failing to serve Mention notice, misrepresented to the Court that the appeal had been "compromised."

10.For its part, the Appellant insists that the appeal was, indeed, compromised and that the Appellant's advocate did not mislead the Court or withhold any information from it. In the Appellant's advocate's understanding, it is a "compromise" if the payment of the decretal amount plus costs has occurred. In any event, the Appellant relies on *Timothey Musyimi Wambua v Joseph Ngove* (2009) eKLR to make the argument that costs are not awardable upon an appeal that is withdrawn before it has formally been admitted. This was also the holding in *Muli Mutiso v Mbithi Ndolo & Anothe*r (HCC A No. 120 of 2003 (unpublished)). Finally, the Appellant argues that its advocates did not withhold any information from the Court. It is only that, the Appellant argues, the Court moved to award no costs since the appeal was yet to be admitted and therefore there was no role for the Respondent in the appeal.

11.First, I would observe that the Application is really one for review. The Respondent is, without using so many words, urging the Court to review its own decision. It should, therefore, have been brought under **Order 45, Rule 1** of the **Civil Procedure Rules** (which is exactly the same as Order **XLIV, Rule 1** of the (**Old) Civil Procedure Rules.)** I will treat it as an application brought under that section since a party should not invoke the inherent jurisdiction of the Court when the situation they seek to redress has been specifically provided for in the Rules.

12.The relevant rule to apply, therefore, provides as follows:

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.

13.The question for consideration, then, is whether the Respondent has met the threshold for review under our jurisprudence. His argument can only be shoe-horned to the "mistake or error apparent on the face of the record" prong since there is, obviously, no new matter he raises here. Understood this way, the error on the face of the record would be the Appellant's description of the state of affairs as a "compromise" which, the Respondent argues, led the Court to the non-use of its discretion.

14.I am not persuaded that the Court was misled in this matter. I readily accept that the choice of the word "compromise" by the Appellant's advocate was imprecise as it could have given an impression that the parties had negotiated and agreed on a course of action. The technically accurate term would have been "withdraw." However, three things need to be said about this.

15.First, I am not at all persuaded that the Appellant's advocate deployed the word "compromise" with the intention of misleading the Court or in bad faith. It appears from the context that he was using the word in its generic meaning. As I already pointed out, I think this was imprecise. But I have found no tell-tale signs of bad faith. I attribute the non-service of the mention notice not to the intentional failure of the Appellant's advocate but to the incomplete delineation of obligation by the Court. The Court simply ordered "Notice to issue." It was unclear whether such notice was to be issued by the Court itself or the Appellant's advocates. Ordinarily, it is courteous for an advocate who is in Court to serve the other side in such circumstances – but that obligation was not expressly made incumbent upon the Appellant's advocate.

16.Second, I find no evidence at all that the Court was "misled" into issuing the order that it did. On the contrary, the record suggests that the Court applied itself to the submission by the Appellant's counsel and then issued its own order. The fact that the Court used a different word than the one used by the Appellant's advocate indicates that the Court advertently considered the issue and came to its decision. The Appellant's advocate told the Court that the appeal had been "compromised." Yet, the Court, in its order, recorded that the appeal was "withdrawn with no order as to costs." My view is that the Court exercised its discretion in awarding no order as to costs. I find no error or mistake on the face of the record since it is not denied that the Court has such discretion.

17.Third, if ever there was doubt that the Court made the "no order as to costs" order knowingly and after exercise of its due discretion, one need only glean the attitudes of the particular judge who made the order from his previous decisions on similar issues. As the Appellant points out, in a previous case, *Justice Lenaola* ruled that a Respondent is not entitled to costs where the appeal is withdrawn before it has been admitted. His view, explicitly espoused in the **Timothey Musyimi Wambua** and **Muli Mutiso** cases cited above, is that such a Respondent has no role to play before the appeal has been admitted and is therefore undeserving of an order for costs. If one takes this view into account, any doubts as to whether the Learned Judge exercised his discretion or simply fell to the wiles of the Appellant's counsel is put to flight.

18.Consequently, because I find no mistake or error apparent on the face of the record and because I find no attempt or success on the part of the Appellant's counsel to mislead the Court, I would dismiss the Application with costs, and I hereby do so.

DATED at **MACHAKOS** this **13TH** day of **MARCH 2012**.

_____
J.M. NGUGI
JUDGE

DELIVERED at **MACHAKOS** this **19TH** day of **MARCH 2012**

_____
ASIKE–MAKHANDIA
JUDGE