



MARK KHAN TRANSPORTERS
LTD.....APPELLANT

-VERSUS

GLADYS KANGU WETOYI *Suing as the legal representative of the Estate of*

JOSEPH TENDE

WATANI.....RESPONDENT

(Being an appeal from the decision, judgment and or decree of the Hon. Mr.C M Mbogo Chief Magistrate given on

26th November 2009 delivered by Gicheru M N Chief Magistrate, Kisii in Kisii CMcc 141 of 2005)

RULING

The application before me is a notice of motion dated 2nd June 2010 brought pursuant to section 1A, B and 79G of the **Civil Procedure Act** and Order XLI and I of the **Civil Procedure Rules** (now repealed). The applicant seeks an order for the dismissal of the appellant's appeal for being an abuse for want of prosecution. The application is premised on the following grounds inter alia that the appellant had not taken any serious steps to prosecute the appeal after he filed the memorandum of appeal on 23rd December 2009 and that the appellant was enjoying a stay granted on 9th March 2010 whose conditions he had not fulfilled.

The application is supported by the affidavit of **Mr. Don Z. Ogweno** advocate for the respondent. The supporting affidavit has elaborated the grounds listed hereinabove. On the main the applicant avers that since the judgment was delivered on 26th November 2009, as at 29th April 2010, the appellant had not extracted a decree or requested the court for typed proceedings for purposes of filing a record of appeal. Further the appellant had not by 2nd June 2012 met the conditions for stay imposed by the court namely to pay the plaintiff costs amounting to Kshs.58,000/= and further court fees amounting to Kshs.23,781/= and file an undertaking by Kenindia Insurance Company Ltd to pay the decretal sum upon finalisation of the appeal. The said conditions were to be met on or by 30th March 2010.

The application is opposed by the respondent/appellant. In the replying affidavit of **Kennedy Okongo Advocate** dated 27th September 2010, the respondent has averred that the application to have the appeal struck out is premature as it was made barely three weeks after the decree and certificate was drawn by the Registrar and that the subordinate court had not availed its record for purposes of preparing a record of appeal. He has averred that the conditions for stay of execution pending appeal had been met through payment of costs at Kshs.55,000/= and further court fees of Kshs.23,871. The letter forwarding the cheques is dated 21st April 2012. His averment is however silent on the issue of undertaking by the insurer to pay the decretal sum, and interest thereon upon determination of the appeal.

Parties consented to canvass the application by way of written submissions which they duly filed and exchanged. The main submission by the applicant is that the respondent has failed to comply with the order of **Hon. Gicheru** dated 9th March 2010 staying execution of the decree of lower court which stay

was conditional on the appellant paying costs and court fees and on filing an undertaking on the decretal amount. The appellant paid both the costs and the court fees outside the 21 days timeframe given by the court and has to date not provided an undertaking by Kenindia Insurance Company to pay the decretal amount and interest upon determination of the appeal. The applicant has further submitted that the appellant has not demonstrated any steps it has taken to prosecute the appeal. On the other hand, the appellant has submitted that he wrote to the Executive Officer of the Court to supply certified copies of the proceedings and judgment on 9th December 2009 and 13th April 2011 and further that the onus was on the Deputy Registrar to write to the appellant informing him whether or not the appeal had been admitted as per **Order 42 Rule 2** read with **Section 79B** of the CPA.

I have considered the rival submissions and authorities filed by the parties. I have also perused the court record. Two issues stand out for my determination namely whether or not the appellant has failed to take active steps to prosecute the appeal so as to warrant its dismissal and, whether the appellant has met the terms of the stay granted by the court so as to continue enjoying the stay until such time as the appeal is heard and determined.

Order XLI provides steps that must be taken before an appeal is heard. Upon filing a memorandum of appeal, the appellant must cause the matter to be listed before a judge for directions under section 79G of the **Act**.

The applicant contends that the appellant has not taken acting steps towards the prosecution of the appeal while the respondent has strenuously defended himself stating that the onus was on the Registrar to inform him whether or not his appeal had been admitted or rejected. He has also cited the delay in availing the lower court record.

It is also not clear from the record whether a decree was extracted and filed by the appellant. Be that as it may however, such omission or failure on the part of the appellant does not entitle the respondent to make an application for dismissal of the appeal for want of prosecution. Under **Order XLI**, the right is reserved to the Registrar who can place the file before a judge for dismissal if after admission of an appeal no steps are taken by the appellant to prosecute it within one year.

On the issue of stay of execution, the record clearly shows that the stay was conditional on the appellant meeting three conditions namely, payment of court fees and costs to the respondent and providing an undertaking from the insurer on the payment of the decretal amount within 21 days of the order of 9th March 2010. There is evidence on record that the appellant paid both the costs and the court fees (albeit out of time) but has to date not provided the undertaking.

To my mind, failure to meet all three conditions automatically rendered the stay inoperative.

In sum therefore, I find that whereas the appellant has the right to appeal which cannot be taken away, I find that his conduct in purporting to selectively meet the conditions of the court order granting stay and to continue enjoying the benefits of the stay while shunning responsibility for moving the appeal forward amounts to an abuse of the process of court.

Consequently, I allow the application as prayed and hereby dismiss the appeal with costs.

Ruling dated, signed and delivered at Kisii this 23rd day of August, 2012.

R. LAGAT-KORIR

JUDGE

In the presence of :

Edwin Mongare Court clerk

.....Counsel for the plaintiffs/Applicants

.....Counsel for the defendants/respondents

R. LAGAT-KORIR

JUDGE