



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

Civil Appeal 41 of 2008

MACHAKOS RANCHING LIMITED..... APPELLANT

VERSUS

JOSEPH WAMBUA..... RESPONDENT

R U L I N G

1. The appeal herein filed on 27th February 2008 is against a money decree of the lower court. Apparently the lower court granted stay of execution pending appeal.
2. On 2nd June 2010 the Respondent applied by **chamber summons dated 19th May 2010** for an order for dismissal of the appeal for want of prosecution. The application was brought under **Order XLI, rule 31** of the then **Civil Procedure Rules** (the **Rules**) which provided -

“**31. (1) Unless within three months after the 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.**

(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.”
3. The application is supported by the affidavit of the Respondent’s advocate. It is deponed that since the filing and service of the memorandum of appeal the Appellant has not taken any step towards hearing of the appeal, despite reminder by the Respondent’s learned counsel that he do so.
4. The Appellant has opposed the application by replying affidavit filed on 3rd November 2010. Sworn by the Appellant’s advocate, it is deponed, *inter alia*, -
 - (i) That by a letter dated 14th May 2008 the Appellant’s counsels applied for copies of proceedings and judgment to enable them to prepare the record of appeal.
 - (ii) That deposit for fees for the proceedings and judgment was paid on 30th July 2008.
 - (iii) That they have visited the registry to check on the proceedings a number of times in vain.
 - (iv) That the lower court record has not been forwarded to the High Court so that the judge may give directions.

5. No directions under Order XLI, rule 8B of the Rules have ever been given. Rule 31(1) is thus not applicable. But rule 31(2) is applicable. The appeal was not fixed for hearing within one year after service of the memorandum of appeal on 27th February 2008. By the time the present application was filed on 2nd June 2010, over two years had passed since the memorandum of appeal was served upon the Respondent.

6. Why has the appeal not been fixed for hearing? It is a combination of factors. One, the appeal has never been admitted. The High Court will not admit it without having before it the lower court record. The Deputy Registrar has asked for the file. There is on the record a letter to that effect dated 28th February 2008. The lower court record has not yet been forwarded to the High Court. It is only after admitting the appeal that the court can impose time-lines within which the Appellant should act towards bringing the appeal to hearing.

7. The Appellant says that its hands are tied because it has not been supplied with copies of the proceedings and judgment despite paying a deposit for them. It may or may not have been diligent enough in trying to get copies of the proceedings and judgment. But I consider that it would be unjust to dismiss its appeal for want of prosecution at this stage when even this court is apparently unable to secure the original record of the lower court.

8. In the circumstances I will refuse the application by chamber summons dated 19th May 2010. It is dismissed with no order as to costs. It is so ordered.

9. The delay in preparation of this ruling is deeply regretted. It was caused by my poor state of health the last few years. But thank God I have now regained my full health.

DATED AT NAIROBI THIS 29TH DAY OF AUGUST 2012

H. P. G. WAWERU
JUDGE

COUNTERSIGNED AND DELIVERED AT MACHAKOS THIS 28TH DAY

OF SEPTEMBER 2012

ASIKE-MAKHANDIA

.....
JUDGE