



REPUBLIC OF KENYA

High Court of Kisii

Civil Appeal 67 of 2006

BROOKE BOND (K) LTD APPELLANT

-VERSUS-

ORPHA KEMUNTO BITANGE RESPONDENT

JUDGMENT

(Being an appeal from the Judgment and Decree of the Chief Magistrate's Court at Kisii, Hon. Ingutya in SRMCC No. 512 of 1997 dated 10th March, 2006)

By Notice of Motion dated 3rd February, 2011, the respondent in this appeal asked this court to dismiss the appeal with costs for being an abuse of the process of court and/or for want of prosecutions. He also sought an order for the release of the decretal sum amounting to kshs. 453,000 and interest thereon to the respondent.

The application is supported by the affidavit of the respondent's counsel who has deposed that the appellant has since the filing of the appeal on 7th April, 2006 failed to file the record and decree to enable parties take directions on the hearing of the appeal.

The appellant has opposed the application. Counsel for the appellant has averred in his replying affidavit that the delay has primarily been caused by failure of the court to avail typed proceedings and decree to facilitate the preparation of the record of appeal.

Parties consented to canvass the application through written submissions. I have considered the submissions along with the authorities cited. I have also carefully perused the record.

The issue for my determination is whether the application is merited. Has there been inordinate delay on the part of the appellant? And if so, is such delay excusable? It is not contested that judgment was rendered by the lower court on 10th March 2006 in Kisii CMCC No. 512 of 1997, the subject of the present appeal. Subsequently, the appellant being dissatisfied with the judgment, filed a memorandum of appeal on 7th April, 2006.

According to the applicant, the appellant vide an application dated 8th April 2006, sought and obtained stay of execution of the judgment and decree. It is stated by the applicant that the decretal sum amounting to kshs. 453,000 and interest thereon was deposited at the Housing Finance Corporation Eldoret Branch.

It appears from the record that between then and the year 2011, no progressive steps were taken to file the record and have directions taken on the appeal. The applicant filed the present application on 8th February 2011. In the replying affidavit, the respondent stated that he had on the 6th April, 2006 written a letter to the Senior Principal Magistrate in the lower court requesting for typed proceedings and judgment. He wrote a follow up letter on 14th November, 2006. The applicant disputes the existence of the 1st letter dated 6th April, 2006 indeed while replying to the letter of 14th November 2006, one **Enock Kinaro**, signing for the Chief Magistrate stated that the letter dated 14th June 2006 was not in the court's file. Be that as it may, the appellant seems to have despaired and made no follow up till the 17th May 2011 when he wrote to the SRM's court asking if the typed proceedings were ready. He also simultaneously planned to move the High Court with an application for directions. The application dated 2nd June 2011 was however never filed.

My view of the matter going through the steps set out above as borne by the record is that between the period 2006 and 2011, the appellant made feeble steps towards preparation for his appeal. It appears that he only began taking decisive and concerted steps in the year 2011 as demonstrated by payment towards the typing of the proceedings which was done on 29th July, 2011; and a letter written on 30th July, 2011 inquiring when the said proceedings would be ready. He has in his replying affidavit and submissions stated that he is still waiting for the court to reply to the said letter.

The court's duty is to balance the scales of justice between the parties. I find that the appellant after obtaining a stay in 2006 failed to take effective and concerted steps towards the filing and prosecution of his appeal similar to the ones he has taken in the year 2011. The delay was inordinate. The respondent has had to wait that long to realize the fruits of the judgment. It cannot be fair to allow further delay. See **Abdul and Anor –vs- Home Overseas Insurance Co. Ltd (1971) E. A 564**. The court must prevent such an injustice and prevent abuse of its process as mandated by Section 3A of the **Civil Procedure Act**.

For the foregoing reasons, I allow the application dated 3rd February, 2011. The appeal stands dismissed. The respondent shall be at liberty to execute the decree together with interest thereon from the date of the trial court judgment. He shall also have the costs of this application.

Orders accordingly.

Judgment dated, signed and delivered at Kisii this 21st day of September, 2012.

R. LAGAT-KORIR
JUDGE

In the presence of:

..... for applicant

..... for respondent

..... court clerk

R. LAGAT-KORIR
JUDGE