



**REPUBLIC OF KENYA**

**IN THE HIGH OF KENYA AT MOMBASA**

**Civil Appeal 50 of 2007**

**KENYA PORTS AUTHORITY.....APPELLANT**

**VERSUS**

**OLIVER K. MWASARU.....DEFENDANT**

**RULING**

1. This is an application dated 18<sup>th</sup> April, 2011. It is brought under Section 3A and Order 51 Rules 1 and 2, and Order 17 Rule 2 by the Respondent. It seeks:

- That the Appellant's appeal be dismissed with costs for want of prosecution and the decretal sum deposited in court be released to the Respondent's advocates.
- Alternatively, that the Appellant be compelled to prepare records of appeal within 14 days and thereafter the appeal be listed for direction within fourteen days thereafter.

2. The grounds in support of the application are that the appeal was filed on 2<sup>nd</sup> April 2007; that no steps have been taken to prosecute the appeal; and that the Respondent has been unjustifiably and inordinately denied the fruits of the judgment delivered in his favour on 23<sup>rd</sup> June, 2006.

3. The background of the matter is contained in the Supporting Affidavit of the Respondent on 15<sup>th</sup> April, 2011. He says he sustained injuries on 12<sup>th</sup> February, 2003 whilst in the course of his employment with the Appellant. He then instituted a suit SRMCC 521 of 2004, Mombasa, in which Judgment was delivered in his favour on 23<sup>rd</sup> June, 2006. The appeal was then filed in April, 2007 and has since been hanging over his head depriving him of the fruits of his Judgment.

4. In his written submissions filed on 19<sup>th</sup> September, 2011, the Respondent says the court found liability in the ratio 15:85 for the Plaintiff and Defendant/Appellant respectively. Applicant points that it is a misuse of the court to delay justice.

5. The Appellant's submissions are that the delay is neither inordinate nor inexcusable. The application is premature since under Order 42 Rule 35 an appeal can only be dismissed if:

- Within three (3) months after giving of directions under Rule 13 it has not been set down for hearing.
- Within one year after service of the memorandum of appeal the appeal has not been set down for hearing, the Registrar shall on notice to the parties list the appeal before a judge for dismissal.

Directions have neither been taken in the matter, and neither has the Respondent set the matter for hearing or the Registrar listed the matter before a judge for dismissal.

6. Appellant further asserts that there are triable issues in the appeal that should be ventilated by the parties at a full hearing. Further, that dismissal of a suit is a drastic measure to be used sparingly and only in the clearest of cases. Counsel argues that there has been delay in proof reading the proceedings which were forwarded to the Registry on 25<sup>th</sup> February, 2011, hence delaying the production of the record of appeal. Counsel then relies on the decisions in **Wachira Waruru Vs The Standard Ltd. and Another** HCCC 1293 of 2004, and **William Bomani Vs Ecolab E. Africa (Kenya) Ltd** HCCC No. 725 of 2002.

7. Order 17 Rule 2 under which the application is brought provides for dismissal of a suit in which no application has been made or step taken by party for one year. Dismissal may be at the instance of the court, upon notice, or under Rule 3 at the instance of a party. This relates to suits generally.

8. Procedures specifically for appeals are treated under Order 42 of the Civil Procedure Rules. Rule 11 requires the Appellant to cause the matter to be listed before a judge, within thirty days of filing, for directions under section 79B. If a judge refuses to reject the appeal, then under Rule 12 the Registrar shall notify the appellant who, shall serve the memorandum of appeal within seven days on every respondent. Rule 13 then kicks in and requires the Appellant within twenty one days of service of the memorandum, to cause the appeal to be listed for directions.

9. In this matter, none of the steps under Order 42 Rules 11 -13 have been taken. The Appellant has not submitted any evidence that, after filing the Memorandum of appeal, it has itself taken any interest in pursuing the proceedings or record of appeal. And this is perhaps because of the condition created by Rule 35 which requires the giving of directions under Rule 13 before dismissal action can be taken. To that extent, the application herein is premature.

10. The appeal cannot be listed before a Judge for directions under Section 79B if there is no Judgment or Ruling of the lower court before him to enable him to consider it for summary rejection.

In the circumstances the most prudent way forward is to order, in the interests of justice, as I hereby do, as follows:

**1. The Appellant shall file a photocopy of the lower court's handwritten or typed Judgment duly certified, within Ten (10) days from the date of this Ruling to enable the court to act under Section 79B.**

**2. The Appellant shall file its appeal within fourteen (14) days after the filing of the Judgment of the lower court.**

**3. A mention shall be held within thirty (30) days from the date hereof to confirm compliance and for further directions.**

11. The application herein is accordingly granted to the extent of the orders herein. Costs shall be in the cause.

Orders accordingly.

**Dated, signed and delivered this 12th day of September 2012**

**R.M. MWONGO**  
**JUDGE**  
**Read in open court**  
**Coram:**

1. Judge: Hon. R.M. Mwango

2. Court clerk: R. Mwadime

**In Presence of Parties/Representative as follows:**

a) .....

b) .....

c) .....

d) .....