REPUBLIC OF KENYA

High Court at Machakos

Civil Appeal 52 of 2008

JACKSON MWILU …… APPELLANT/RESPONDENT

VERSUS

CHARLES MBUSU NYAMAI …… RESPONDENT/APPLICANT

R U L I N G

Before me is an application by way of **Chamber Summons** dated 23rd February 2011. It was filed by the respondent **Charles Mbusu Nyamai** under Order 42 rules 13 and 35 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act (Cap 21). It asks the court to grant the following orders:-

(a) The appeal dated 20th March 2008 be and is hereby dismissed for want of prosecution.

(b) In the alternative the defective record of appeal filed on 21/10/2009 be expunged from the court record and the whole of the appeal struck out.

(c) This honourable court does issue an order directing the money security of Kshs.830,000/= deposited in court to issue to the respondent herein.

(d) Every extra cost together with costs of this appeal be provided for.

The grounds of the application are that the appellant had never taken action towards the prosecution of the appeal; that the appellant stood in the way of the respondent's fruits of justice; and that the record of appeal was incompetent.

The application was filed with a supporting affidavit sworn by the respondent (applicant) on 25th February 2011. It was deponed in the said affidavit, *inter alia*, that an earlier application dated 20th May 2009 for leave of court to have the appeal dismissed was unsuccessful but the appellant had since then not taken any action towards prosecuting the appeal. Secondly, that it was only the applicant who had so far attempted to move the court to progress this appeal.

The application is opposed. The appellant filed grounds of opposition on 13/3/12. It was contended that the application was an abuse of court process; that it did not meet the criteria for granting an order of dismissal of the appeal for want of prosecution; that the appellant's appeal should be heard on merits; and that parties should not be punished for mere mistakes.

Parties' counsel filed written submissions, which I have perused. Several authorities were relied upon, especially by the appellant. On the hearing date Mr Makenzi appeared for the applicant, while Mr Rombo appeared for the appellant. Mr Makenzi highlighted his client's written submissions.

I have perused the file. Since 20th May 2009, only Mr Makenzi for the applicant has come to court and moved it. There is no record that the counsel for the appellant ever did so. Mr Makenzi was on record as having taken a step on 20/5/09, 17.11/09 and 8/2/12. The lack of interest in progressing the appeal by the appellant is rather disheartening when one considers that the appellant filed the appeal and then got orders to deposit the decretal amount in court. Thus the decretal has not been in the hands of the applicant from then till now. In addition, the supplementary record of appeal purportedly filed on 3rd April 2012 does not appear to have been filed with leave of the court. The last order made by Waweru J on 3/2/10 did not cover the filing of supplementary record of appeal. It merely noted that the record of appeal had been filed on 02/10/2009 in accordance with orders made on 02/07/2009. There is therefore no leave to file supplementary grounds of appeal.

I am mindful of the provisions of section 1A and 1B of the Civil Procedure Act (Cap 21) on the overriding objective in Civil Proceedings. I am also aware of the provisions of Article 159 (2) (d) of the Constitution which provides that justice shall be administered without undue regard to procedural technicalities.

In our present case, procedural technicalities would only be avoided if the appellant fixed a hearing date for the appeal, or proposed a hearing date or a programe for steps toward hearing as ordered by Waweru on 3/2/2010. The Judge specifically stated: **"Let the appellant process the appeal for prosecution"**. The appellant has not fixed the appeal for hearing nor taken any step to prosecute the appeal. Even at this 2nd application for dismissal stage, he has not made any suggestion for fixing or planning to fix a hearing date for the appeal. That is not how a litigant who wants substantive justice can behave. The court process should not be abused. I find no blame on the part of the applicant who has made all efforts to progress the appeal for its determination.

Having considered the cases cited, I am of the view that the case of **Albert Kelvin Mutua Kioko & Another –vs- Diamond Trust Bank (K) Ltd – Nairobi Civil Suit No. 568 of 2009** is more similar to the facts in the present matter. The appellant is clearly and consistently showing that he does not wish to prosecute the appeal. He cannot blame the applicant. It is his own fault. For that reason, I will allow the application.

I allow the application, and grant prayer (a), and (c). The applicant will have the costs of this application, and costs of the appeal.

Dated and delivered at Machakos this **15th** day of **October** 2012.

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George Dulu

Judge

In the presence of:
Mr Makenzi for Applicant
Ms. Mumo for Respondent
Nyalo – Court clerk