



NO. 360

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII

CIVIL APPEAL NO. 326 OF 2004

KENYA TEA DEVELOPMENT
AGENCY.....APPELLANT

-VERSUS-

GEORGE MORARA
MOSE.....RESPONDENT

(An appeal from the Judgment of Hon. SMS Soita (Principal Magistrate) in KISII-CMCC No. 302 of 2004 dated 10th November, 2004.)

RULING

Before me is an application by way of Notice of Motion dated 6th October, 2010 and filed in court on 8th October, 2010. That Notice of Motion is expressed to be brought under **order XLIV rule 1,3 (2) of the Civil Procedure rules, Sections 3A and 63(e) of the Civil Procedure Act and all other Enabling Provisions of the Law.** Primarily, the Notice of Motion seeks “ *That this Honourable court be pleased to review and or set aside the orders made on 20th September, 2010 dismissing the appellants’ appeal for want of prosecution.....*”. There is also the prayer that I should review and or set aside the orders made by **Hon. G.H. Oduor** on 21st September, 2010 ordering the release of the decretal sum deposited in the joint names of the appellants’ and respondents’ advocates at Credit Bank, Kisii branch. However, I do not think that I have jurisdiction to make such order considering that the said **Hon. G.H. Oduor** is still insitu. In any event, going by the replying affidavit of the respondent which is uncontested, such an order will be in vain or vacuum as the order has been acted upon and the decretal sum released to the respondent.

The order of review is premised on the grounds that on 20th September, 2010, this court dismissed this appeal for want of prosecution when the same had been scheduled for the taking of directions on 5th October, 2010. Accordingly, the order of dismissal in those circumstances was irregular. Otherwise the appellant was still desirous of prosecuting the appeal to its logical conclusion.

In support of the application, **Anthony Wachira**, learned counsel for the appellant swore the affidavit. He deponed in the main that this appeal was filed on 17th December, 2004 and the record thereof on 28th September, 2009. On 15th July, 2010 he received a letter from this court inviting him to attend court on 5th October, 2010 with a view to Taking Directions in the appeal. However on 30th September, 2010 he received a call from Credit Bank, Kisii branch advising him that the bank had been served with a court order for the release to the respondent's advocates the decretal sum held by the said bank in the joint names of his firm and that of the respondent's. He was surprised by the information and on perusing the court records, he noted that the appeal had in fact been dismissed for want of prosecution on 30th September, 2010. In his view, the said order of dismissal of the appeal was irregular as the appeal already had a date for Taking Directions. There is therefore an apparent error on the face of the record and an order of Review ought to issue.

In opposing the application, the respondent swore an affidavit through **George Morara Mose**, learned counsel. Where pertinent he deponed that having filed the appeal, the appellant for six years took no steps at all to prosecute the same for no apparent reasons. That the Deputy Registrar had never invited him for purposes of taking directions and therefore the appeal was dismissed by the court on its own motion after waiting for its determination for a span of six years. Once the appeal was dismissed, the decretal sum deposited in the joint account at Credit Bank, Kisii branch, was released to him. Accordingly, the application had been overtaken by events and therefore ought to be dismissed for want of merit.

When the application came up for interpartes hearing before me on 2nd November, 2010, parties agreed to canvass the same by way of written submissions. Subsequently, they filed and exchanged written submissions which I have carefully read and considered.

Going through the court record, I have no doubt at all that the order dismissing the appeal for want of prosecution was made properly. The court record speaks for itself. There is no minute at all in the record indicating that the appeal was scheduled for the Taking of Directions on 5th October, 2010 as alleged. The only minute in the court record relevant to this application is that dated 26th July, 2010. That minute indicates that the appeal was fixed for dismissal on 20th September, 2010 and that Notice was to issue. Being a court of record, we can only go by what the court record reveals. I have no doubt at all in my mind that had the appeal been fixed for directions as alleged by the appellant, certainly there would have been a minute to that effect duly endorsed by the Deputy Registrar. In the absence of such entry I am unable to agree with appellant's contention to that effect.

Further I have seen Notice of Taking Directions annexed to the affidavit in support of the application. Surprisingly there is no copy of the same record. Ordinarily a copy of such Notice would be retained in the court file. The respondent has submitted and indeed deponed to the fact that he was never invited to attend court for purposes of Taking Directions on 5th October, 2010. In the absence of a copy of the alleged Notice of Taking of Directions, I have no reason to doubt what the respondent has said in response. Is it possible therefore that the said Notice was generated purposely for this applicant? Perhaps!

It cannot be true that the appeal was dismissed for want of prosecution without Notice to the appellant. The court was satisfied that the appellant had been duly served with Notice of dismissal dated 20th July, 2010. The Notice infact had been posted to the appellant using its last postal address on the record. Since the Notice was not returned as unclaimed, the court deemed that the same was received by the appellant and since there was no response to the same, it was only fair that the order of dismissal be made. Accordingly I do not discern any error on the face of the record as would compel me to review and or set aside the order of dismissal of the appeal made on 20th October, 2010 as urged by the appellant.

The application dated 6th October, 2010 is therefore dismissed with costs to the Respondent.

Ruling dated, signed and delivered at Kisii this 31st January, 2011.

ASIKE-MAKHANDIA

JUDGE