



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 176 OF 2006

PATEL COFFEE ESTATES LTD.....APPELLANT

VERSUS

BENARD NDIRANGU.....RESPONDENT

RULING

By chamber summons dated 14th January 2010, the applicant/Respondent prays that the Memorandum of Appeal filed herein and dated 28th November 2006 be dismissed for want of prosecution with costs to the Applicant/Respondent and that the decretal sum that was deposited in an interest earning account of both advocates for the parties herein, in National Bank of Kenya – Nakuru Branch, Account No. 0132 720 707 300, be released to the counsel for the Respondent for transmission to the Respondent.

The chamber summons is premised on grounds found on the face of the application. It is the contention of the applicant/Respondent that despite the proceedings having been ready, the Respondent/Appellant has failed to compile the record of appeal, take directions and have it set down for hearing. **Mr. Maragia**, appearing for the Respondent urged that the typed proceedings were ready by 27th July 2006 and it is not until **24th February 2010** that the Respondent/Appellant took steps after the instant application for dismissal had been served on them.

Mr. Maragia further argued that the Respondent has not sworn any affidavit or availed any correspondence to demonstrate the steps taken towards the prosecution of the appeal.

The application was opposed and **Mr. Mahida** filed grounds of opposition dated 24th February 2010 and an affidavit sworn by **Gladwell Wachaga**. Mr. Mahida, counsel for the Respondent urged that they had taken steps towards the prosecution of the appeal as demonstrated in the affidavit of Gladwell Wachaga, an employee of Jones & Jones Advocates who deponed that she had been checking with the court registry for the certified proceedings and that it is not till **22nd February 2010** that she was able to file a letter written by **Jones & Jones** requesting for court proceedings as the court file could not be found and by then, the applicant had filed the chamber summons dated **13th January 2010**. Upon obtaining the court file, she found only one set of proceedings and she got photocopies after paying for them.

I do agree with Mr. Maragia's submission that indeed the Respondent has exhibited nothing to show when they applied for proceedings and any efforts made by them to procure the proceedings since the appeal was filed on 28th November 2010. No steps were taken by the Respondent/Applicant towards prosecuting the appeal.

Mr. Mahida referred this court to page 37 of the record of appeal filed by the Respondent, in which the Lower Court dismissed an application seeking to stay execution and on that page there is a certificate of the court dated 5th February 2008 which was made before the court's ruling. The proceedings could not have been typed before the court's ruling made on **27th July 2008**. That certificate is erroneous. It seems these proceedings were not typed and ready as of 25th July 2008.

The Respondent has now filed the record of appeal. Despite the unexplained delay, the Respondent has shown its keenness to proceed with the appeal and this court will direct that the Respondent do ensure that directions are taken and the appeal is set down for hearing within 30 days of today's date. In default, the appeal will be dismissed. Costs to the Applicant/Respondent.

DATED and **DELIVERED** this 14th day of February 2011.

R. P. V. WENDOH
JUDGE

PRESENT

Mr. Nyambane for Appellant/Respondent
No appearance for Respondent
Ken Oguma – Court Clerk