



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 78 OF 2007

(Appeal from the ruling of the Principal Magistrate dated the 20th day of April, 2007 in Naivasha Resident Magistrate’s Court Civil Case No. 678 of 2006)

LABEX SCIENTIFIC AGENCIES
LTD.....APPELLANT

VERSUS

JOEL AMENYA
GEKONGE.....RESPONDENT

RULING

The Notice of Motion dated 8/12/2010 was filed pursuant to **Order XLIX Rule 5** and **Order L Rule 1** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act**. The applicant is Labex Scientific Agencies Ltd who had preferred an appeal against the ruling of the trial court in Naivasha RMCC 678/06 in which the applicant sought to set aside the interlocutory judgment that had been entered against it. On 12/5/2010, the applicant was allowed 6 months to prosecute its appeal but did not do so. That is why the applicant has filed this application seeking orders that the time allowed to prosecute the appeal be extended and the court do issue any further orders it deems fit to grant. The application is based on grounds found in the body of the application and an affidavit sworn by Dilipsinh Prabhatsinh Mahida, counsel for the applicant. Counsel deponed that the record of appeal was filed on 15/10/2009 but he could not list the appeal for directions or hearing because the lower court file had not been received by this court. At the counsel’s request a 2nd reminder was sent to Naivasha Principal Magistrate’s on 15/4/2010 for the lower court to forward the file (DPM1). The applicant made several attempts through Mburu F.I. & Co. Advocates as evidenced by the letter dated 5/8/2010. That the lower court forwards the date – 10/8/2010 as evidenced by the letter DPM II. The Deputy Registrar gave directions on 12/10/2010 and the counsel tried to have the appeal fixed for hearing as per letter of 23/9/2010 – DPM IVA and B, but the diary for the year 2010 was already closed. Mr. Mahida submitted that the applicant has no control over movement of files from one court to another and that is why this application has been preferred.

The application was opposed and a replying affidavit was sworn by the respondent. He deponed that on 12/5/2010, when the court directed that the appeal be heard within 6 months, the applicant’s counsel never indicated to the court that the record of appeal was not yet ready and what is contained in this application is a falsehood. It is also submitted that the respondent has lost interest in the case, the application is brought in bad faith and should be dismissed. Mr. Juma, counsel for the respondent submitted that the applicant should have applied for setting aside of the order of 12/5/2010 before making this application and the orders sought cannot lie.

When the court allowed the appellant 6 months within which to prosecute the appeal on 12/5/2010, the appeal had not even been admitted. It was admitted on 29/9/2010. The applicant has exhibited DPM III, a letter from High Court Nakuru, to the Principal Magistrate's Court Naivasha, acknowledging that the court file accompanied by letter dated 19/7/2010 in SPMCC 678/06, had been received by the Nakuru High Court. A hearing date could only be taken after the original record of the lower court had been received by this court.

It is the applicant's contention that when the original file was received they invited the respondent vide their letter dated 23/9/2010, with a view a view to taking hearing date and another dated 14/10/2010 but that by that time, there were no dates available in the diary for that year. I do appreciate that the applicants could not have any control over the original proceedings in PMCC 678/06. It was the duty of the lower court to forward the file to this court so that the appeal could be set down for hearing. That delay cannot be visited on the applicants. The applicant could only request for the file and wait. For the above reasons and in exercise of this court's discretion there is good ground to have the period within which the appeal was to be prosecuted extended. I therefore direct that the parties do take a hearing date at the registry for the appeal to be heard for hearing within the next 4 months from today's date. In default, the appeal stands dismissed. The applicant to bear costs of the application.

DATED and DELIVERED this 13th day of April 2011.

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. Mwangi holding brief for Mr. Mahida for the applicant.

Mr. Simiyu holding brief for Mr. Gekonga for the respondent.

Kennedy – Court Clerk.