



IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 141 OF 2010

ROHAN MERCHANDISE LIMITED.....1ST APPLICANT/APPELLANT
NIXON BARUSI.....2ND APPLICANT/APPELLANT

VERSUS

ALICE WANJIKU GATUMBI.....RESPONDENT

RULING

On 12th May, 2010, the court below (Mr. Atyang', S.R.M.) dismissed the applicants' application which had sought the dismissal of the respondent's suit for want of prosecution. The applicants have filed this appeal to challenge that decision. In the meanwhile, they have brought the instant notice of motion dated 12th October, 2010 praying that the proceedings in the lower court, being Nakuru C.M.C.C. No.2004 of 2006, **Alice Wanjiku Gathumbi Vs. Rohan Merchandise Limited**, be stayed pending the hearing and determination of this appeal.

The applicants contend that having lodged this appeal, the same would be rendered nugatory if the proceedings in the lower court were not stayed; that the appeal herein has overwhelming prospects of success. The application is opposed by the respondent on the ground that the learned trial magistrate dismissed the applicants' application after considering all the relevant facts; that the respondent is keen to prosecute the suit; that the appeal herein and this application are intended to delay and frustrate the hearing of the suit in the court below; that the applicants have not demonstrated what prejudice they will suffer if the hearing of the suit proceeded; and that it is not clear if leave to file this appeal was obtained.

After due consideration of these averments and the submissions by counsel, I propose first to dispose of this last ground. I reiterate that this is an appeal arising from an interlocutory decision. By dint of **Order 42 rule 1** of the revoked **Civil Procedure Rules**, an appeal lay as of right from an order under **Order 16 rule 5** (dismissal for want of prosecution). Under the **2010 Rules**, however, such an appeal does not lie as of right. See **Order 43** of the new rules. The instant appeal was filed on 9th June, 2010 before the new rules came into force. On the aspect of this matter, I come to the conclusion that the applicants did not require leave to appeal.

On the substance of the application, **Order 41 rule 4** of the revoked rules, a stay of proceedings may be ordered by this court in its appellate jurisdiction and in so doing, may make such other order as may to it seem just. The court in that context therefore has unfettered discretion in considering whether or not to stay proceedings. Without going into the merit of the appeal, it ought to be remembered that judicial philosophy and thinking on technical dismissal or striking out of suits has tremendously shifted with the promulgation of the Constitution, the publication of the 2010 rules and the enactment of **sections**

1A and 1B of the Civil Procedure Act.

Section 159(2)(d) of the **Constitution** enjoins the courts to administer justice without undue regard to procedural technicalities. The overriding objective of Civil Procedure Act and the rules made under it is to, among other things, facilitate the just, expeditious resolution of civil disputes. For the purpose of furthering the overriding objective, the court must aim at, *inter alia*, the just determination of the proceedings.

Under the **2010 Civil Procedure Rules**, a suit will only be dismissed for want of prosecution if no application has been made or step taken by either party for a period of one year and only after the court has given notice in writing to the parties to show cause why the suit should not be dismissed and cause is not shown to its satisfaction. See **Order 17 rule 2(1)(2)**.

This is a complete departure from the provisions of **Order 16 rules 5 and 6** of the revoked **rules**. Apart from extending the period to one year, the new rules only mandate the court to dismiss the suit for want of prosecution on its own motion and after notice to the parties. Going by this philosophy, I am of the considered view that justice will be served if the suit in the court below is heard and determined on merit and not if it is stayed.

In **Kishor Kumar Dhanji Varsani Vs. Mrs. Punny Bar bir Kaur**, Civil Application NAI. No.132 of 2010, the Court of Appeal considering an application for stay of proceedings under its rules emphasized that as one of the requirements of the overriding objective, the court has to be broadminded in its endeavour to do justice.

For these reasons, I decline to exercise my discretion as prayed and order that this application be and is hereby dismissed with costs.

Dated, Delivered and Signed at Nakuru this 31st day of May, 2011.

**W. OUKO
JUDGE**