



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL APPEAL NO. 150 OF 2008

JAMES NJOROGE WAINAINA.....APPELLANT

VERSUS

NYAKIO NJOROGE.....RESPONDENT

RULING

By the Notice of Motion dated 14/5/2010, the respondent prays for an order that this court do dismiss the appellant's appeal dated 22/7/08 for want of prosecution and non compliance with the court's orderS and directions. The grounds and facts upon which the Notice of Motion is predicated are found on the face of the application and supporting affidavit of Ndegwa Wahome, the respondent's advocate. The application was opposed and Ms Gatu Magana, counsel for the appellant filed grounds of opposition and a replying affidavit sworn by the counsel.

The appeal was filed on 22/7/08, accompanied by an application under certificate of urgency seeking interim orders which were issued on 15/10/08. The application was never prosecuted and on 30/6/09 the respondent conceded to have the status quo maintained pending the hearing and determination of the appeal and the appellant was directed to prepare the record of appeal by 28/7/09. That was not to be. The respondent paid for the typing of proceedings at Naivasha Court. On 16/3/2010 the appellant was directed to file the record of appeal by 11/5/2010 but the appellant failed to attend or prepare the record of appeal. The respondent is of the view that the appellant is not keen on prosecuting the appeal and that is why he filed this application. Counsel urged this court to proceed as did the court in **VIRENDRA NARSIDAS PONDA V DR. MADDINENI SUBBA RAO CA 227/01**.

In opposing the application, Ms Magana argued that the application is incompetent as the order invoked **Order SXLI Rule 3** is non-existent. Counsel urged that the appeal was filed in Nairobi in 2009, transferred to this court and stay was granted on 30/6/09. Counsel denied that the court ever made an order that the record of appeal be prepared but instead the court ordered that the original record be forwarded to this court from Naivasha. She wrote to the Deputy Registrar on 17/7/09 asking him to request for the lower court file from Naivasha. On 15/7/2010 counsel met counsel for the respondent at the court and it is when they went to Registry and confirmed that the lower court file was there otherwise before that this court's file had gone missing from the registry and she could not have taken any steps therein. By the time she saw the file on 15/7/2010, this application had been filed. They expected to take directions on 11/5/2010 but the case was not listed. It is the appellant's contention that they are keen to proceed as the issue is about land and the appellant holds the title which the lower court ordered that it be cancelled.

The order under which that application was brought, that is **SXLI** is **Rule 3(1)** does not exist. It is obvious that there was an error on the provisions of law that were cited by the applicant. The applicant must have intended to bring the application under **Order XLI Rule 3(1)** of the **Civil Procedure Rules** because the orders sought are clear, that the appeal be dismissed for want of prosecution. This court should not lose sight of the overriding objective of the **Civil Procedure Act** that is to do substantive justice to the parties and consider the issues raised in the application on merit. The objection that the application is incompetent cannot be sustained. The court will grant consider the merits of the application.

I have carefully considered the rival arguments, the steps that the appellant has taken to have this appeal prosecuted. After J. Ouko ordered that the original record be availed before 28/7/2010, on 16/3/2010, J. Maraga ordered that the record of appeal be prepared. The only effort made by the applicant is its letter to the Deputy Registrar dated 17/7/09 asking for the calling for the lower court file. After that, the appellant did nothing in the form of writing to the Deputy Registrar reminding him of the need for the file being procured from Naivasha Court. Even though Ms Magana claim to have checked with the registry severally there is no documented evidence to that effect. Counsel also contends that at one time the court file went missing and that is why she was not able to file a record of appeal or appear for the mention. On 11/5/2010 as the matter was not on the cause list. As pointed out earlier, this is a court of record and there is nothing on record to show that Ms Magana ever requested for the court file. A party who is keen on prosecuting their appeal would remind the Deputy Registrar and that can be evidenced by letters addressed to the Deputy Registrar.

Appellant's counsel blamed the Deputy Registrar for not placing the file before the High Court for admission.

The orders appealed from were made on 17/7/2008 over 3 years ago. The appellant has been enjoying interim orders. I have considered all that has transpired since the appeal was filed and I come to the conclusion that the appellant has not been diligent in having this appeal prosecuted. Instead, counsel keeps on blaming the court for the delay, but has not shown efforts made as a follow up. Since the original file is now before this court and the appellant claims to be desirous of prosecuting the appeal, this court will exercise its discretion and direct that the appellant do prepare the record of appeal and have it placed before the judge for admission within the next 45 days hereof, in default the appeal will stand dismissed. Costs of this

application will be borne by the appellant.

DATED and DELIVERED this 27th day of May, 2011.

R.P.V. WENDOH
JUDGE

PRESENT:

Mr. Simiyu holding brief for the appellant.

Mrs. Magana for the respondent.

Kennedy – Court Clerk.