REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL APPEAL NO. 79 OF 2006

NEW SIMBA SECURITY GUARDS ..... APPELLANT

V E R S U S

KAKAMEGA PAPER CONVERTERS LTD. ..... RESPONDENT

R U L I N G

The appellant filed suit before the subordinate court seeking judgment for the sum of Kshs.181,355.60 which it claimed was owed to it on account of services that it rendered to the respondent. The respondent filed defence denying that it owed the said sum to the appellant. The appellant did not prosecute its case after pleadings were closed. On 18th March 2006, the respondent filed an application pursuant to the then **Order XVI Rule 5(d)** of the **Civil Procedure Rules** seeking to have the appellant's suit dismissed for want of prosecution. The appellant opposed the application. After considering the merits of the application, the trial court ruled in favour of the respondent. At page 3 of its ruling, the court had this to say:

"The respondent (the appellant) did not take any step to have the suit listed for hearing for a period of over 20 months. It cannot therefore hide the guise that there were negotiations which as I have indicated hereinabove were never was (sic). The upshot of this is that I find merit in the applicant's application. I allow the application with the result that the suit herein is dismissed for want of prosecution with costs to the defendant/applicant."

The appellant was aggrieved by this decision and duly filed an appeal to this court against the said decision. In the memorandum of appeal, the appellant, inter alia, faulted the decision of the trial magistrate's court on the ground that the said court had applied the wrong principles of the law in arriving at the decision dismissing the appellant's suit for want of prosecution. The appeal was lodged on 20th September 2006. The appeal was admitted to hearing on 1st April 2008. From the record of the court, it was clear that since the appeal was filed, other than seeking directions from the court in regard to the manner in which the appeal was to be heard, the appellant took no action to fix the appeal for hearing.

On 14th December 2010, the respondent filed an application pursuant to the then **Order XVI Rule 5(d)** (now **Order 17 Rule 2 (3)**) of the **Civil Procedure Rules** seeking orders of this court for the appeal herein to be dismissed for want of prosecution. The respondent stated that since directions were taken before this the court allowing the appellant to fix the appeal for hearing on 1st October 2009, the appellant had not taken any step to fix the appeal for hearing. The respondent further stated that it would be in the interest of justice that the appeal be dismissed for want of prosecution. The application is supported by the annexed affidavit of Kenneth Amondi, the advocate of the respondent. The application is opposed. Richard Onsongo, the advocate for the appellant swore a replying in opposition to the application. In the said affidavit, the said advocate explained that he had lost touch with his client and therefore was not in a position to prosecute the appeal due to post-election violence. He urged the court to take this into consideration and thereby proceed to dismiss the appellant's application with costs.

At the hearing of the application, this court heard oral rival arguments made by Mr. Ogutu for the respondent and Mrs. Muleshe for the appellant. This court has carefully considered the said submissions. It has also considered the grounds put forward by the parties herein in support of their respective opposing positions. The issue for determination by this court is whether the respondent made an appropriate case for this court to dismiss the appeal herein for want of prosecution. The principles to

be considered by this court in determining whether or not to dismiss a suit for want of prosecution were set out in the case of **Ivita v Kyumbi [1984] KLR 441**. In that case, the court held that the test to be applied by the courts in determining whether or not to dismiss a suit for want of prosecution is whether the delay is prolonged and inexcusable, and, if it is, whether justice can be done despite the delay. The court further held that even if the delay is prolonged, and if the court is satisfied with the plaintiff's excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that the suit be set down for hearing at the earliest available time. It is a matter in the discretion of the court.

In the present application, it was clear that the appellant lost interest in the prosecution of this appeal. This is because the appellant had not contacted his advocate for a period of more than three years. The appellant's advocate explained that the appellant was a victim of post-election violence. That could be the case. However, it does not explain why the appellant has not bothered to contact his advocate to enable the appeal to be prosecuted. Since this court issued directions, it is only the respondent who has bothered to take further steps in this case with a view to prosecuting it. In the circumstances therefore, it is evident that the appellant cannot prosecute this appeal even if this court were to fix this case for hearing.

In the premises therefore, this court finds the respondent's application has merit. It is hereby allowed with costs to the respondent. The appeal herein is dismissed with costs for want of prosecution.

DATED AT KAKAMEGA THIS 20TH DAY OF JULY 2011

L. KIMARU
J U D G E