

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU Civil Appeal 19 of 2008

RIFT ROADWAYS.....APPELLANT

VERSUS

MELLEN NYANGAU OMANWA

(Suing as the Legal representative of the estate of

VICTOR OMANWA (Deceased).....1ST RESPONDENT/APPLICANT

SPIN KNIT KENYA LIMITED.....2ND RESPONDENT/APPLICANT

KARWITHA KIUGU.....3RD RESPONDENT/APPLICANT

RULING

This Ruling relates to an application by way of Notice of Motion dated 28th November 2009 and filed on 30th November 2009 and purportedly brought under **Order XLI Rule 1A, Order L Rule 1** of the **Civil Procedure Rules, Section 3A of the Civil Procedure Act** and other enabling provisions of the law. It seeks two orders: that the appeal herein be dismissed for want of prosecution and that costs of the application be provided for.

The Motion is based upon the Supporting Affidavit of the Applicant's Counsel Kiugu Paul Murimi sworn on the 29th September 2009 and is also based on the grounds on the face thereof.

The motion was argued before me on the 19th January 2009 by **Mr. Mbago** holding brief for Mr. Murimi. He relied on the said affidavit and on the grounds on the face of the motion. His submission was that the Appellant has failed to prosecute the appeal since it was filed on 14th February 2008, that is, over twenty two (22) months ago. He argued that the Appellant has failed to take out directions for the hearing of the appeal nor taken other preliminary steps therein. He has not filed a record of appeal since the appeal was filed. Consequently he submitted that the Appellant has lost interest in the appeal which now warrants dismissal. He urged the court to note the principle that litigation must come to an end. The judgment appealed from was delivered on the 17th January 2008 and as a result of the appeal the Respondent has continued to incur costs and no excuse for the delay has been forthcoming from the Appellant and appeal should, for those reasons, be dismissed.

On his part **Mr. Nduhiu** who represents the Appellant/Respondent in this application opposed the Motion. He relied upon the Replying Affidavit of Victor Nduhiu sworn on 13th January 2010 and referred the court to paragraphs 4, 7-8, 9-10, 12 and 13 which all set out reasons for the delay in the preparation and filing of the record of appeal. All These facts demonstrate that the delay in filing the decree and record was not due to the indolence of the Appellant. Mr. Nduhiu submitted the following authorities where the court declined to dismiss an application for striking out an appeal for lack of prosecution. The cases are:-

1. **James Oluoch v. Hamid Dine Abdi** [2006] eKLR
Civil Appeal No. 137 of 2002
2. **Gabriel Wanyonyi & 2 Others v. Hudson Walera** [2006] eKLR

Civil Appeal No. 108 of 2000

3. **Catholic Diocese of Bungoma & Anor v. Bramwell Agwata** [2006]
eKLR Civil Appeal No. 75 of 2000

I have considered the arguments by both counsel. I have also perused the rival affidavits and the above authorities. I am of the view that the delay in filing the decree and record of appeal is excusable and the Appellant has demonstrated that he has taken necessary steps to have the appeal record prepared and filed. It would therefore be inappropriate to dismiss or strike out the appeal at this stage. The Appellant is granted six months within which to prepare the record of appeal serve and seek disposal/prosecution of the appeal.

In the upshot the application dated 28th November 2009 is declined and the same is dismissed. Because the delay is not that of the Appellant each party herein shall bear its own costs.

Dated, delivered and signed at Nakuru this 29th day of January 2010

M. J. ANYARA EMUKULE

JUDGE