



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KISII

Civil Appeal 205 of 2006
KEBIRIGO TEA FACTORY LTD.....APPELLANT/RESPONDENT

-VERSUS-

SAMWEL NYABICHA ONGAGA.....RESPONDENT/APPLICANT

(FROM KISII CMCC.NO. 722 OF 2004)

RULING

The background of this application is that on 25/6/2004 the respondent filed a suit against the appellant before the Chief magistrate Court at Kisii claiming that he was on 28/12/2002 injured while working for the appellant and sought to be compensated in general and special damages for the injuries. His case was that the injuries were occasioned to him following the breach by the appellant of its statutory duty and that the appellant was negligent. The appellant denied the entire suit was heard and the appellant found liable up to 90% and the respondent 10%. General damages of Kshs. 72000/= and special damages of Kshs. 2000/= were awarded together with costs and interest.

On 14/8/2006 the appellant filed a Memorandum of Appeal being aggrieved by the entire decision of the subordinate court.

On 22/5/2009 the respondent applied under *Order 41 rule 31* of the *Civil Procedure Rules* and *section 3A of the Civil procedure Act* to have the appeal dismissed for want of prosecution. *Order 41 rule 31* provides that unless within 3 months after directions have been given under *rule 8B* the appeal is set down for hearing by the appellant, the respondent shall either get down the appeal for hearing or apply to have it dismissed for want of prosecution. The rule further provides that if, within one year after the service of the Memorandum of Appeal, the appeal shall not have been set down for hearing, and the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal. There is no notice by the registrar to dismiss the appeal and therefore the respondent must be relying on *Order 41 rule 31(1)*.

Section 3A of the civil Procedure Act cannot be invoked as a party who seeks the exercise of the inherent powers of the court has to

come by way of a motion. In any case, *section 3A*, although saving the inherent powers of the court to make such orders as may be necessary for the ends of justice or to prevent the abuse of the power of court, should not be cited where there is an appropriate section or order and rule to cover the relief sought. (See *Wanjau .v. Muraya [1983] KLR 276*).

The last time this appeal was in court for hearing was on 23/4/2008. The appellant sought and was granted adjournment and also allowed to file and serve a supplementary record of appeal within 14 days. The supplementary record was filed on 7/5/2008 and served on the same day. The respondent is complaining that, since that time, the appellant has not taken any steps to set down the appeal for hearing and therefore that he is not interested in the appeal. The appellant's advocate swore a replying affidavit to say that the appellant is interested in prosecuting the appeal but that it was due to oversight on the part of counsel not to set down the appeal for hearing. The respondent swore that the delay in this case was a prolonged one, but the appellant's advocate deponed that the delay was not inordinate and was excusable.

I listened to Mr. Sagwe for the respondent and consider his written submissions and those of Mr. Migiro for the appellant. I have considered the authorities cited by the respondent's counsel.

The delay in this appeal is about one year. The reason given by Mr. Migiro is that there was oversight on his part. The respondent states that the prolonged delay may make it difficult for them to trace documents for the case. That cannot be true as all the documents were produced during the trial and are now contained in the record of appeal. The respondent has therefore not shown that the delay will prejudice it. It is the appellant's advocate who is responsible for the delay, and it cannot therefore be said the appellant is not interested in the appeal. The delay of one year, in the circumstances, cannot be said to be inordinate. It is in any case, excusable. The court should leniently look at the reason given for the delay to be able to allow the appeal to be determined on merits.

I dismiss the application but ask that the appellant pays costs of the same.

Dated, signed and delivered at Kisii this 1st day of February, 2010.

A.O.MUCHELULE

JUDGE

1/2/2010

Before A.O.Muchelule-J

Court clerk-Bibu

Mr. Migiro for applicant/respondent

Mr. Ombachi for Sagwe

COURT: Ruling in open court.

A.O.MUCHELULE

JUDGE

