



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KITALE
CIVIL APPEAL 30 OF 2005

WILLIAM KIPKOLUM MATUL.....APPLICANT
VERSUS
HILL BARRET & CO LTD.....RESPONDENT

RULING

By a Notice dated 8th October 2008 for dismissal for want of prosecution pursuant to order XLI rule 31(2) of the Civil Procedure Rules, the court informed the applicant of its intention to dismiss the appeal unless cause be shown why the same should not be dismissed.

The said Notice was served on the parties effected by Monica Njuguna, a court appointed process server, on 9th October 2009.

In response thereto Mr Peter Kiarie Ndarwa advocate filed an affidavit sworn on 13th November 2009. He canvassed several reasons why the appeal should not be dismissed for want of prosecution. Among them he cited the fact that he lodged the appeal on 31st October 2005. Subsequently the High Court Registry called for the lower court file. Several reminders have been written by the High Court to the lower court calling for the typed record in vain. His last and final position is that since neither the appeal has been admitted nor record of appeal compiled, the appeal is prematurely listed for dismissal since order XLI Rule 8A has not been complied with.

On behalf of the respondent, it was argued that no cogent reasons had been shown by the appellant why the appeal has not been set down for hearing all this while, yet there is a stay. There is a money decree and the respondent is entitled to enjoy the fruits of the judgment.

Order XLI Rule 31(2) of the Civil Procedure Rules provide:

“If, within one year after the service of the
Memorandum of appeal, the appeal shall not have
Have been set down for hearing, the registrar
Shall on notice to the parties list the appeal
Before a judge in chambers for dismissal.”

It is clear to me, on the evidence, available that the appeal was filed on or about 31st October 2005.

Order XL1 Rule 8A and 8B has not yet been complied with. Accordingly, this appeal is prematurely listed for dismissal.

In the circumstances, of this case I order that the Deputy Registrar of the High Court do notify the appellant to serve the mandatory appeal on the respondent (See order XL1 Rule 8A). Thereafter the Registrar shall move with speed to comply with order XL1 Rule 8B.

It is so ordered.

Dated and delivered at Kitale this 1ST .day of FEBRUARY 2010.

N.R.O. OMBIJA
JUDGE

Mr Njoroge for Kiarie for Applicant

Mr Wasike for Onyancha for Respondent