



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI

Civil Appeal 8 of 2004

KINDY MODERN BAKERYAPPELLANT
VERSUS
AGESA KADENGE ABDALLARESPONDENT

R U L I N G

The application dated 27-10-09 is made by way of Notice of Motion under Order L Rule 1 of the Civil Procedure Rules, and section 3A of the Civil Procedure Act. It seeks for orders that:

- (1) Appellant be compelled to file and prepare the records of appeal within ten (10) days and thereafter the matter be listed for directions within (14) fourteen days from the date of filing the records.
- (2) That in default of the above, then, the appeal be dismissed for want of prosecution, and the decretal sum be deposited in court and be released to the respondent in satisfaction of judgment in CMCC No. 8 of 2003 (Malindi)
- (3) That costs of this application be provided for.

The application is based on grounds that:-

- (a) The memorandum of appeal was filed on 19th May 2004
- (b) It is over one year since the appeal was filed, and no records of appeal have been prepared to date.
- (c) The appellant has failed to file records of appeal thus denying the applicant the opportunity to proceed of hearing and conclusion of the appeal.
- (d) The delay in preparing and/or filing the records of appeal has taken inordinately long
- (e) In the absence of any records of appeal, no directions can be issued by the court for hearing of the appeal and so respondent continues to suffer.

The application is supported by the affidavit sworn by Jane Abuodha, advocate for the applicant on which she points out that on 20-9-06, a consent was filed in court between the parties where the appellant was to file record of appeal within ninety (90) days but failed to date.

The respondent has made attempts to dismiss the appeal for want of prosecution but failed for the reasons that no directions have been issued thus the appeal does not qualify to be dismissed.

The appellant (now respondent in this application) was given a conditional leave to appeal and the decretal sum was to be deposited in court, but as a result of the pending approval respondent has not satisfied the judgment and it is in the interest of justice that the matter be determined.

The matter proceeded exparte as respondent and his counsel failed to attend court for the hearing of the application nor does any response to the prayers sought.

Really there has been complete inaction by the respondent/appellant, who seems to be enjoying the status quo – having filed the appeal, he has done nothing else, taken no steps whatsoever towards having the appeal more in court. No records of appeal have been filed more than two years later and no explanation has been offered. It means the applicant cannot realize he judgment he obtained much to its prejudice.

I therefore find merit in the application and order that:

- (a) Appellant do prepare and file the records of appeal within ten (10) days from the date of this ruling.
- (b) The matter be listed for directions within seven (7) days from the date of filing the records.
- (c) In default of the (a) and (b) above then applicant shall be at liberty to apply for dismissal of the appeal.
- (d) Costs of this application shall be borne by the respondent/appellant.

Delivered and dated this **24TH** day of **March 2010** at Malindi.

H. A. Omondi
JUDGE