



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MALINDI**

**Civil Appeal 20 of 2006**

**MALINDI MANAGEMENT STRATEGY T/A  
MALINDI CASINO .....APPELLANT**

**VERSUS**

**STEFANO SCHIAPPACASE .....RESPONDENT**

**RULING**

The Notice of motion dated 04-05-09 is made under Order XVI Rule 5(d) and Order L Rule 11 of the Civil Procedure Rules, as well as section 3A of the Civil Procedure Act.

It seeks that the appeal filed herein be dismissed for want of prosecution. Further that once that happens then the order made on 29<sup>th</sup> June 2007 staying the execution of the decree consequential to the judgment entered in favour of the Respondent on 5<sup>th</sup> July 2006 be vacated and the Respondent (now applicant) be at liberty to execute.

It is premised on grounds that;

- (1) The appellant has not set down the appeal for hearing since their application dated 25<sup>th</sup> July 2006, was allowed by Hon. Justice W. Ouko on 29<sup>th</sup> June 2007.
- (2) The appellant has since taken no steps to prepare or set the Appeal down for hearing.
- (3) No record of Appeal has been filed since the year 2006.
- (4) The delay on the part of the appellant is prejudicial to the respondent as he cannot enjoy the fruits of his judgment and the respondent will continue to suffer unnecessary prejudice as long as the appeal remains pending.
- (5) The appellant is not keen on prosecuting its appeal as they have not obtained the records of proceedings nor paid the requisite fees.
- (6) The appellant is guilty of inordinate delay and/or laches – having taken no action for a period of our two years to prosecute this appeal and/or file the Record of Appeal or obtain copy of the court proceedings, and the same amounts to abuse of the court process.

The application is supported by the affidavit sworn by Jackline Chepkurui Chepkwony, counsel for the Respondent/applicant which basically reiterates grounds on the face of the application. She points out that on 20<sup>th</sup> July 2006, 28<sup>th</sup> March 2008 and 2<sup>nd</sup> May 2008, the appellant applied to the Court for copies of the proceedings to enable them prepare the record of appeal but since then no follow up has ever been made and/or deposit paid as required by the court – the letters are annexed as JCC 2 and the court has been invited to take notice of the comments made on them by the Executive Officer. She urges the court to vacate the stay orders in the interest of justice.

The application is opposed, and in the Replying Affidavit sworn by William Mogaka counsel for Applicant he depones that appellant is desirous of prosecuting the appeal and invites this court to consider a letter dated 30/03/09 from the appellant's insurer as well as correspondences annexed. It is his contention that the delay in preparing the record of Appeal was due to procedural requirements involving supply of typed and certified proceedings, Judgement and decree of the subordinate court. He denies that the court even pointed out to his firm, the deposit required which in any ever they have already paid. He urges this court to consider the fact that the failure to pay the deposit was due to a lapse by his firm which should not be visited on an innocent party.

Mr Mwadilo who prosecuted the application repeated what applicant has stated in the body of the application and termed the delay as inordinate. He pokes holes at the replying affidavit, saying it does not place any reasonable grounds for the delay since it is a prerequisite that fees be paid and appellant's counsel cannot say they were not told the amount to be paid, as he had on duty to find out how much was required.

Mr Mwadilo has invited the court to consider the decision in **South Coast Fitness and Sports Centre V Clarkham Notcutt Ltd EALR(2000) page 230** as a guide in this matter.

Mr Mabeya in response argues that the delay is not entirely on the appellant's part as Order ILI sets out what is to be done before an appeal can be set down for hearing. He points out that the memorandum of appeal was filed on time – and the application for record was done on time and it was up to the Deputy Registrar to organize for preparation of the record and send it to this court – which has not been done. He maintains that it is only upon this court getting the record from the lower court that it can either admit or reject the appeal and it is only after advise that the Deputy Registrar sets down the appeal for family of directions by the Judge – this too has not been done, so the appellant could not have listed the appeal for hearing before the Deputy Registrar acted because that would be premature. He heaps blame on the Deputy Registrar for the delay and absolves the appellant of any blame.

Mr. Mabeya submits that appellant had prepared the record and filed it on 17<sup>th</sup> April 2009, so that the court can now give directions. He urges the court to hold that issues must be determined on merit and not wished away by technicalities. He also asks the court to consider that the comments by the Executive Officer were only on the letters in the court record, and no letter was ever sent to the appellant to be made aware of those sentiments.

He distinguishes the present situation given that in the **South Coast case, saying the same is inapplicable as it concerned section 80 of the Court of Appeal Rules which do not apply here and explains that under the Court of Appeal Rules, it is the appellant who takes all the steps unlike in High Court where it is the Deputy Registrar. He urges this court to dismiss the application.**

**Mr Mwadilo is response is that the delay has been inordinate and the principle used in South Coast case concerning delay in presenting our appeal is applicable.**

It is not in dispute that judgement was entered in the lower court in favour of the Respondent/Applicant, in July 2006. Thereafter stay pending appeal, orders issued in July 2007 and since then nothing has happened in terms of prosecuting the appeal. Initially after obtaining the orders, there was a flurry of activity by the appellant as evidenced by the numerous correspondences requesting for proceedings etc, so as to prepare for the appeal. Thereafter things came to a halt – could it be that appellant was happy with the status quo, since no execution would take place, and therefore did absolutely nothing or was it the Deputy Registrar to blame for the inactivity.

In response to the request for proceedings, the Executive Officer Malindi Law Courts constantly made remarks on the letters indicating that no deposits had been made, but it is unclear whether these sentiments were ever made known to the appellant's counsel since there is not a single letter written by the Executive Officer Malindi addressing the issue. Of course, without the proceedings and with no response in writing by the Executive Officer on such request, then no other step could be taken.

The last correspondence by the appellant's counsel to Malindi Court on this matter rested at 2/5/08. I think the principle in South Coast is a useful one – for the court to examine and determine whether the appellant took any affirmative steps to obtain the proceedings. I fail to comprehend why the appellant's counsel did not deem it prudent to address the issue with the Deputy Registrar, my view is that the most prudent step, after failing to elicit a response would have been to pursue the issue with the Deputy Registrar. This was not done and to that extent the appellant and its counsel were indolent. Yet the court is not completely free of blame – not on the Deputy Registrar part – since nothing demonstrates that the issue had been drawn to the Deputy Registrar's attention – rather it is in the manner the Executive Office handled the matter. There is no correspondence in writing to the appellant's advocate informing him that proceedings would not be prepared unless he paid the deposit – those comments on the letters seem to have simply remained in the court file and it is from this that the appellant reaps a benefit.

I will therefore not allow for dismissal of the appeal. However I direct that appellant must take steps towards having the file placed before the Deputy Registrar and follow up in all the appropriate steps to ensure the path to prosecuting the appeal begins – this must be done within seven (7) days from today.

The application is dismissed. Costs shall be in cause.

Delivered on this 17<sup>th</sup> day of **June 2010** at Malindi Law Courts.

H A OMONDI  
JUDGE