



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 339 OF 2006

(Being an appeal from the judgment and decree of the PM's court

at Kisii in CMCC No. 973 of 2005 – S.R. Wewa, RM)

BETWEEN

TOMBE TEA FACTORY CO. LTD. APPELLANT

VERSUS

KENNEDY AUKA RESPONDENT

RULING

The respondent's application dated 15th January, 2010 seeks dismissal of this appeal for being an abuse of the court process and for want of prosecution. Upon grant of that prayer, the respondent further prays that the sum of Kshs. 106,175/= together with interest held in a joint interest earning account in the names of Kibichiy & Co. Advocates and Khan & Katiku Advocates be released to the respondent's counsel. The application was made on grounds that:

- **It is more than three years since the appeal was filed and the appellant has neglected and/or refused to prosecute it.**
- **That neither a record of appeal nor a decree has been filed and there is no proof that the appellant is trying to prosecute the appeal making it impossible to have the appeal admitted to hearing or taking directions.**
- **That the appellant went to sleep immediately after stay of execution of the lower court judgment was granted and the aforesaid sum deposited.**

The appellant's advocate, M. Nyolei, filed a replying affidavit. Although in paragraph 3 of his affidavit he states that his firm has done all within its power to have directions taken and the appeal proceed to hearing, it is clear that the appellant did not comply with the mandatory provisions of **order XLI rule 1A** of the **Civil Procedure Rules** by filing a certified copy of the decree appealed against. Without doing so the deputy registrar cannot place the appeal file before a judge to consider whether the appeal ought to be admitted to hearing or not in terms of the provisions of **section 79 B** of the **Civil Procedure Act**. That is a basic requirement which is well known or ought to be known to the appellant's counsel.

On 7th April, 2009 the appellant filed an application seeking to have directions taken. However, that application was neither served upon the respondent's advocate and neither was it set down for hearing. No explanation was given as to why no date had been fixed for the hearing of that application,

more than one year from the date it was filed. In any event, directions cannot be given if an appeal has not yet been admitted to hearing.

The appellant and his counsel have not been diligent in prosecuting this appeal. Where a party files an appeal and for nearly 4 years he fails to comply with mandatory provisions of **order XLI rule 1 A** leading to non admission of the appeal, the appellant, in my considered view, is abusing the court process. The respondent's application that was anchored on **sections 1 A and 3 A** of the **Civil Procedure Act** is well merited in the aforesaid circumstances. The court has power to make such orders as are necessary to prevent abuse of its process, see **ABDUL & ANOTHER –VS- HOME & OVERSEAS INSURANCE CO. LTD.** [1971] E.A. 564.

The respondent has not been able to enjoy the fruits of his judgment and ought not to be kept out of his money if the appellant is not keen on prosecuting its appeal. I grant the orders as sought in the respondent's application. The respondent shall have the costs of the appeal and the application.

DATED, SIGNED AND DELIVERED AT KISII THIS 29TH DAY OF JULY, 2010.

D. MUSINGA

JUDGE.

29/7/2010

Before D. Musinga, J.

Mobisa – cc

Mr. Nyagwencha HB for Kibichy for the Appellant

Mr. Ogweno for the Respondent

Court: Ruling delivered in open court on 29th July, 2010.

D. MUSINGA

JUDGE.