

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Appeal 30 of 2007

TIMSALES LIMITED.....APPELLANT

VERSUS

ELIJAH MACHARIA.....RESPONDENT

RULING

Under **Order 41 rule 31(2)** of the **Civil Procedure Rules**, if within one year after the service of the memorandum of appeal, the appeal is not listed for hearing, the registrar shall, on notice to the parties, list the appeal before a judge for dismissal.

The memorandum of appeal in this appeal was filed on 5th March, 2007. On 14th November, 2008, the registrar issued a notice to counsel for both the appellant and the respondent to appear before the judge on 15th December, 2008 to show cause why the appeal should not be dismissed for want of prosecution. The appeal was dismissed after counsel for the applicant failed to attend before the judge. The applicant has subsequently been served with a notice of taxation. It now seeks with a motion dated 1st March, 2010 that there be a stay of taxation and proceedings and the setting aside of the order dismissing the appeal. It is the applicant's contention that it became aware of the dismissal of the appeal for want of prosecution upon perusal of the court file following service of notice of taxation upon its counsel on 22nd February, 2010; that both the applicant and the applicant's advocates were not served with the registrar's notice; that the applicant's appeal has an overwhelming prospects of success; that the applicant will suffer substantial loss and damage if the appeal is not reinstated.

The application is opposed by the respondent on the grounds that the applicant deliberately failed to attend court on 15th December, 2008 in order to delay the finalization of this matter; that the applicant has not approached the court with clean hands as it is guilty of indolence in prosecuting the appeal and therefore undeserving of the orders sought.

I have considered these rival arguments. At this stage, the court is concerned with the question of whether or not there was a notice by the registrar as required by **order 41 rule 31(2)** aforesaid before the appeal was dismissed. Whether there has been delay in the prosecution of the appeal and whether the applicant stands to suffer loss are not matters for consideration at this stage.

I have perused the record and I am satisfied that the registrar issued a notice to both counsel for the parties.

As a matter of fact, the respondent's advocate attended court on 15th December, 2008, I suppose as a result of that notice. The applicant's advocates has stated under oath that they were not served with that notice. There is no evidence to the contrary and I give the benefit of doubt to the applicant and in exercise of my discretion and in order to do justice to the parties under **sections 1A and 1B** of the **Civil Procedure Act** and **Order 41 rule 27** of the **Civil Procedure Rules**, allow the application dated 1st March, 2010 and set aside the order dismissing the appeal, which is hereby reinstated.

The applicant must ensure the appeal is listed for hearing without delay and in any case not later than three months from the start of the new court term.

Costs to the respondent.

DATED, SIGNED and DELIVERED at Nakuru this 12th day July, 2010.

W. OUKO
JUDGE