



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CIVIL APPEAL NO. 4 OF 2007

JAPHETH GIKANDI NGURU.....1ST APPELLANT
FRANCIS GACHOKI KAMUMO.....2ND APPELLANT

VERSUS

JAMES NJEGA.....1ST RESPONDENT
MARY MUTHONI JOHN.....2ND RESPONDENT
JOHN MUNENE KIBUI.....3RD RESPONDENT

RULING

The Application at bar is one dated 1st July 2010. The Applicant has moved the court under Order XLI Rule 31 of the Civil Procedure Rules but has not indicated whether it is under sub Rule (1) or (2). It was important for counsel to indicate which Rule he is relying on as each Rule provides for different circumstances.

I can only assume however that he is invoking sub-Rule (1) since the matter has been active until 17.02.2010 when the court marked it SOG. The matter had already been fixed for directions but the same could not be taken because the proceedings were ineligible. It was not the Appellants fault therefore that the Appeal could not be fixed for hearing earlier.

According to the Applicant however, as at the time this Application was filed, 3 months had passed since the ***“Appellants were ordered to prepare the record of Appeal”***.

He has therefore moved the court to dismiss the entire Appeal.

The Respondent’s counsel has on the other hand asked the court to dismiss the application saying that directions as envisaged under Rule 8B have not been taken. The Appeal is not therefore ripe for dismissal. I have considered the Application, the supporting Affidavit and grounds of opposition.

If I were to assume that the Application is premised on sub Rule (1) OF Order XLI Rule 31, then the same would certainly be premature as directions have not been taken. Sub Rule (2) on the other hand would still not apply as there are valid reasons on record as to why the Appeal had not been set down for hearing since the service of the memorandum of Appeal. The reason was that the Record was illegible and the court had to order the retying and reconstitution of the Record of Appeal. That process was not within the control of the Appellant.

Contrary to ground (b) on the Applicant’s Application, this court never ordered the Appellants to prepare the record of Appeal on 17.02.2010. All the court did was to direct the Deputy Registrar to supply copies of the freshly typed proceedings to counsel to enable them reconstitute the Record of Appeal. That was not a mandatory order directed at the Appellants whose non-compliance would attract this court’s sanctions against them.

I must therefore agree with counsel for the Respondent that the Application is misconceived and does not lie.

I therefore dismiss the same with costs to the Respondents. I nonetheless order that the Appellants do prepare and serve the fresh Record of Appeal within 60 days from the date hereof failing which the Appeal will be dismissed.

W. KARANJA

JUDGE

Delivered, signed and dated at Embu this 22nd day of November 2010

In presence of:- Mr. Magee for Mr. Kahiga for Applicant.