

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Civil Appeal 57 of 1996

PAUL KARANJA)

CHEGE KAHIA)

FRASIA WANJIKU) APPELLANTS

VERSUS

KIMARI KAHIA)

MUCHIRI KAHIA)

LUCY WAMATHIOYA) RESPONDENTS

RULING

By a Notice of Motion dated 7th July 2008 and filed in court on 16th July 2008, **Kimari Kahia, Muchiri Kahia** and **Lucy Wamathioya** hereinafter referred to as “*the applicants*” moved the court for orders; that this appeal be dismissed with costs for want of prosecution. The applicants too asked for costs of the application. The application was anchored on the grounds that since filing of the appeal on 16th May 2000 **Paul Karanja, Chege Kahia** and **Frasia Wanjiku**, hereinafter referred to as “*the respondents*” had taken no steps at all to prosecute the appeal either by complying with order XVI rule 8B and or otherwise. The application was further supported by the affidavit of the 1st applicant who in the main deponed that on 30th June 2004 the judge ordered the matter to be mentioned on 16th July 2004 with a view to deciding on the way forward, on which date it was stood over generally. That since then no further action had been taken by the appellants or their advocate to prosecute the appeal.

The application was met with stiff resistance from the respondent. Through **Messrs M.K. Kiminda Esq.**, learned counsel, the respondents filed grounds of opposition in which they alleged that the delay in prosecuting the appeal was occasioned by the fact that the appeal was referred to arbitration by consent of the parties, that though the appeal was last in court on 6th July 2004 the appeal was only admitted to hearing vide notice dated 1st December 2006. Therefore the instant application was premature as directions had not been given. Finally, the respondents stated that they were still desirous of having the appeal heard.

At the hearing of the application, **Mr. Karweru**, learned counsel appeared for the applicant’s and orally submitted that from the time the appeal was filed, the appellants had not done anything to prosecute the same. That the appellants were using bottlenecks in civil procedure rules to subvert the cause of justice. Accordingly the appeal ought to be dismissed for want of prosecution.

On his part, **Mr. Kiminda** countered the applicants’ submissions by stating that until directions are given by nthis court, the instant application was premature. It is only the Registrar who on Notice to parties can place the appeal before a judge for dismissal for want of prosecution. Following the filing of the appeal, it was by consent of the parties herein referred to arbitration. The delay therefore cannot wholly be blamed on the respondents.

I have now considered carefully the application and rival arguments advanced herein by learned

counsel. I agree with **Mr. Kiminda** that under order XLI rule 31(1) of the Civil Procedure Rules until directions are given by this court the instant application has no legs to stand on. The appeal can only be dismissed for want of prosecution on the application of a party if within three months after the giving of directions under rule 8B, the appeal shall not have been set down for hearing. No directions have been taken in this appeal. The rule is couched in mandatory terms. That being the case this application is premature.

How about subrule 2 of the same rule. It provides that if within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal for want of prosecution. From the wording of this subrule, a party need not move the court for dismissal of the appeal for want of prosecution. Rather it is the court on its own motion through the registrar and on Notice to the parties concerned dismiss the appeal for want of prosecution. In the premises, the applicants by filing the instant application, they would appear to be usurping the powers of the registrar. That cannot be right. Again on this ground, the application must fail.

Yes the appeal was filed in 1996 almost, 13 years ago. It should not be alive in our records. However the law has tied the hands of this court in terms of the aforesaid rules. It is also apparent that when the appeal was filed, it was referred to arbitration by the consent of the parties. The process of arbitration took long before the award was filed and read out to the parties. The delay is therefore not blameable perse on the respondents.

For all the foregoing reasons, I find no merit in this application. Accordingly it is dismissed with no order as to costs since the respondents have not acted with despatch as expected in having the appeal set down for hearing. The dismissal of the application is however on condition that within the next fourteen (14) days from the date hereof, the respondents shall move this court for directions pursuant to rule 8B of order XLI failing which the appeal shall stand dismissed with costs to the applicants.

Dated and delivered at Nyeri this 29th day of January 2009

M. S. A. MAKHANDIA

JUDGE