

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

(MILIMANI LAW COURTS)

CIVIL APPEAL 161 OF 2005

ROSAVIE (EPZ) LTD.....APPELLANT

VERSUS

STANLEX MBITHI JAMES.....RESPONDENT

R U L I N G

1. Stanlex Mbithi James, (hereinafter referred to as the applicant), seeks to have the appeal filed herein struck out for failing to comply with the provisions of Order XLI Rule 31(2) of the Civil Procedure Rules. In the alternative the applicant seeks to have the appeal dismissed for want of prosecution.
2. Rosavie (EPZ) Ltd, who is the appellant, has raised a preliminary objection to the application, contending that it is bad in law, and an abuse of the court process. Mr. Mbidyo who appeared for the appellant, submitted that the application is premature, as the appeal has not been admitted to hearing under Section 79B of the Civil Procedure Act, nor has any directions been taken under Order XLI Rule 8B of the Civil Procedure Rules. Mr. Mbidyo further contends that the application is bad in law as it is brought under Order XLI Rule 31(2) which empowers the registry, not the party, to have the appeal listed for dismissal for want of prosecution.
3. On his part, Mr. Onyancha, who appeared for the applicant, urged the court to overrule the preliminary objection. He argued that no record of appeal having been filed either party could move the court. He explained that the applicant's efforts to have the Registrar list the appeal for dismissal for want of prosecution had not been successful hence the application.
4. I have considered this application. I do concur with the appellant's counsel that under Order XLI Rule 31(2) of the Civil Procedure Rules, it is only the Registrar of the court who can place the appeal before the court for dismissal where no action has been taken to prosecute it. The respondent to an appeal can only move the court under Order XLI Rule 31(1) of the Civil Procedure Rules where directions have been given by the court under Order XLI Rule 8B of the Civil Procedure Rules for the hearing of the appeal.
5. In this case, the original record has not been received from the lower court, nor has the appeal been admitted to hearing. The court cannot therefore give directions under Order XLI Rule 8B of the Civil Procedure Rules and the issue of the applicant applying for dismissal of the appeal for want of prosecution under Order XLI Rule 31(1) does not arise. The applicant has no power to move the court under Order XLI Rule 31(2) of the Civil Procedure Rules. Therefore, the application is improperly before the court. Accordingly I uphold the preliminary objection and strike out the application dated 13th February, 2008.

Dated and delivered this 13th day of May, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Mrs Wambugu for the appellant

Mr. Onyancha for the respondent

Erick – Court clerk