REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

Civil Appeal 180 of 2006

KEBIRIGO TEA FACTORY …… APPELLANT

VERSUS

KALENI NYANCHOKA AINYA ……. RESPONDENT

RULING.

This is an application by way of a notice of motion brought under Section 3A of the Civil Procedure Act and Order 50 rule 1 of the Civil Procedure Rules. The respondent is seeking an order of dismissal of this appeal for want of prosecution. In the alternative, the respondent prays that the stay of the execution that was ordered be lifted. The application was supported by an affidavit sworn by Miss Rose Obaga, the respondent's advocate. She deposed that the appeal was filed on 17th July 2006 but the memorandum of appeal had not been served upon her firm. Following finalization of the hearing before the trial court, the appellant obtained a stay of execution of the judgment pending hearing and determination of the appeal herein. It was a condition of the order of stay that the decretal sum be deposited in an interest earning account in the joint names of the advocates for the parties. Since the filing of the appeal the appellant had not taken any step towards hearing and disposal of the same. Counsel further deposed that the delay in prosecuting the appeal was inordinate and had caused prejudice to the respondent in that he had been denied enjoyment of the fruits of his judgment. The appellant had also failed to file a copy of the decree appealed from as required under Order XL1 rule 1A of the Civil Procedure Rules despite the fact that the court had requested the appellant's counsel to do so.

Ms Obaga cited several authorities in support of her application and I will refer to some of them in due course.

Mr. Migiro for the appellant filed grounds of opposition to the said application. He stated, *inter alia*, that the application is premature because the appeal had not yet been admitted and directions taken. He further stated that the application was bad in law because it had been commenced by way of a chamber summons instead of a notice of motion. He added that Section 3A of the Civil Procedure Act should not be relied upon in bringing an application of this nature as there are specific provisions under the Civil Procedure Rules which ought to have been invoked. He said that the delay in prosecuting the appeal was caused by negotiations that were ongoing although the same broke down in December 2008. He urged the court to allow the appellant some more time to prosecute the appeal.

I have considered the brief submissions made by counsel as hereinabove stated. It is not in dispute that the memorandum of appeal was filed on 17th July 2006. The appellant's counsel did not comply with the provisions of Order XLI rule 1A of the Civil Procedure Rules which states as follows:

"Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such a certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under Section 79B of the Act until such certified copy is filed."

The above provision of the law is clear beyond peradventure. Counsel for the appellant ought to have known that the deputy registrar of this court could not cause the appeal file to be placed before a judge for perusal to determine whether to admit the same or not in the absence of the decree appealed against. No explanation was given as to why a certified copy of the decree was not filed as by law required.

Counsel for the appellant stated that there were ongoing negotiations between the parties herein but there is no evidence to that effect. The appellant did not file any affidavit to bring to the court's attention such negotiations, if any. But even if there were such negotiations, the same could not have prevented the appellant from taking appropriate steps to process the appeal and particularly by filing a certified copy of the decree and the record of appeal. The proceedings were typed and certified way back in April 2008. The appellant ought to have obtained the same from court and prepared a record of appeal.

Mr. Migiro submitted that the respondent's application was bad in law in that it was brought under the provisions of Section 3A of the Civil Procedure Act. He cited, *inter alia,* WANJAU –VS- MURAYA [1983] KLR 276. In that decision it was held that Section 3A of the Civil Procedure Act should not be cited where there is an appropriate section or order and rule to cover the relief sought.

Ms Obaga responded by stating that the application for dismissal of the appeal could not be brought under Order XLI rule 31 of the Civil Procedure Rules which was only applicable in respect of an appeal which had been admitted and directions taken. The application was seeking dismissal of the appeal for want of prosecution because the appellant had failed to take the necessary steps as would have caused the appeal to be admitted to hearing. In such a case it was only Section 3A of the Civil Procedure Act which was appropriate. She cited SALKAS CONTRACTORS LIMITED –VS- KENYA PETROLEUM COMPANY LIMITED, Civil Appeal No. 250 of 2008. The aforesaid appeal arose from a ruling by Hayanga J. where the learned Judge allowed an application by way of notice of motion under Order XVI rule 5 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act for orders that the appellant's suit be dismissed for lack of prosecution. The Court of Appeal reviewed several decisions including ALLEN –VS- SIR ALFRED McALPINE & SONS LIMITED [1968] 1 ALL ER 543 where Salmon, L.J. stated as follows:

"A defendant may apply to have an action dismissed for want of prosecution either (a)because of the plaintiff's failure to comply with the Rules of the superior court or (b) under the court's inherent jurisdiction. In my view it matters not whether the application comes under limb (a) or (b), the same principles apply. They are as follows: In order for such an application to succeed, the applicant must show:

"(i) that there has been inordinate delay. It would be highly undesirable and indeed impossible to attempt to lay down a tariff so many years or more on one side of the line and a lesser period on the other. What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case but it should not be too difficult to recognize inordinate delay when it occurs.

(ii) that this inordinate delay is inexcusable. As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable.

(iii) that the defendants are likely to be seriously prejudice by the delay. This may be prejudiced at the trial of issues between themselves and the plaintiff, or between each other, or between themselves and the third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial."

Ms Obaga also cited the decision of Waweru, J. in ADNAN KARAMA PETROLEUM LIMITED –

VS- NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY, Civil Appeal No. 878 of 2005 at Nairobi. The respondent in that appeal had applied for the striking out of the appeal for want of prosecution. The application had been brought under Order XLI rule 31 (2) of the Civil Procedure Rules as well as Section 3A of the Civil Procedure Act. In allowing the application, the learned Judge recognized that such an application could verily be brought under Section 3A of the Civil Procedure Act.

In ALMAGALMATED SAW MILLS –VS- GLADYS IMBUKA, Civil Appeal No. 96 of 2000 at Nakuru, this court held that:

"An appellant must be proactive in pursuing his appeal once filed. A party cannot sit back and do nothing for nearly four (4) years on the pretext of waiting for certified copies of proceedings and judgment, …the court is empowered to act in any matter where it appears that a party is abusing the court process."

From the above cited authorities it is clear in my mind that in an application of this nature where the appellant has failed to take a necessary step as may cause the appeal to be admitted to hearing, the respondent can move the court under Section 3A of the Civil Procedure Act to dismiss the appeal not only for want of prosecution but for being an abuse of court process, more so where the appellant, having obtained an order of stay of execution is happy with the status quo.

I find that there has been inordinate delay on the part of the appellant and that delay has not been explained and is therefore inexcusable. The respondent was awarded judgment in the sum of Kshs. 72,000/= as general damages and Kshs. 3,500/= as special damages way back on 21st June 2006 but since then he has been kept out of his money. The respondent has therefore been prejudiced by the delay. Whether the money is held in a joint account or not, the respondent wants the appeal finalized one way or the other. Money losses value with passage of time and between 2006 todate the judgment sum has considerably lost its value.

For the aforesaid reasons I allow the respondent's application and dismiss the appeal herein for want of prosecution and being an abuse of the court process. The order of stay of execution that was granted by the trial court is vacated. The decretal amount that is held in the joint names of the advocates for the parties herein should be released to the respondent's advocate.

DATED, SIGNED AND DELIVERED ON 15TH DAY OF JUNE, 2009.

D. MUSINGA

JUDGE

16/6/2009

Before D. Musinga. J

Mobisa –C. c

Miss Obaga for the applicant.

Mr. Nyasimi for Mr. Migiro the respondent.

Court: Ruling delivered in open court on 16th June, 2009.

D. MUSINGA

JUDGE