REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEALl 13 OF 2002

YUSSUF MOHAMED SALAT .....APPELLANT

VERSUS

IDRIS ALI AHMED.....RESPONDENT

R U L I N G

The Notice of Motion application dated 27-2-09 is brought under Order XLIV Rule 1 Civil Procedure Rules and Section 3A and 63(e) of the Civil Procedure Act seeking that the order made by this court on 25th November 2008 granting leave to discontinue this appeal be reviewed and the appeal be reinstated for hearing.

It is premised on grounds that the applicant is keen to prosecute his appeal and that the application for leave to discontinue the appeal was made without consulting the appellant. Further that the discontinuance of the appeal will result in grave injustice to the appellant and the review orders will not prejudice anyone.

The application is supported by the affidavit sworn by Yusuf Mohamed Salat who depones that he lodged an appeal against the ruling of the lower court in Garissa SPMCC 4 of 2002, dismissing his application for review. In that case, he had acted in person and his application for review followed exparte judgment in favour of the respondent – this was as a result of his non attendance at the hearing. Incidentally the case in the lower court had not been fixed for hearing on the days it proceeded and this is what had led applicant to apply for review. The subject before the lower court was a commercial plot which he had been given in 1987 and he had developed and established a business there. Respondent had sued him seeking eviction on the basis of letter issued by Garissa County Council in 2001.

Applicant then instructed the firm of Mouko and Co. Advocates to prosecute the appeal but when applicant came to Malindi on 5-12-08 to find out the state of his appeal, he was informed by his advocate that he had decided to discontinue the appeal so that applicant could proceed with his case in Garissa – this was done without consultation and he says he had not given his advocate such instructions. He therefore prays for a review of the orders so that he can be heard and he has now instructed another firm of advocates to represent him.

The application is opposed and in the Replying Affidavit the respondent states that the application is brought in bad faith and is a gross abuse of the court process. Respondent argues that after obtaining stay orders, the applicant took a long period with no steps towards prosecuting the appeal and respondent was so frustrated and greatly prejudiced by the stay orders which remained in force for 5 years that he eventually instructed his advocate to prepare the record of appeal for the sake of the appeal being heard –

The record was subsequently filed on 11-9-07.

Meanwhile respondent made many trips to Malindi accompanied by his better educated brother, just so as to ensure the expeditious disposal of the appeal, incurring expenses on transport and accommodation.

On 18-10-08 he made an application seeking for the dismissal of the appeal but was unsuccessful and points out that the only progressive steps taken in that appeal were engineered by his advocates on

21st November 2006 – invitation to fix hearing date

23rd October 2006 – Invitation to fix hearing date

15th October 2007 – application to adopt the respondent's record of appeal.

24th August 2007 – fixing for mention

28th August 2007 – notice to appellant

9th September 2007 – Application to adopt the respondent's record of appeal

13th November 2007 – letters including Notice to Show Cause

Yet seven (7) years applicant did nothing.

On 16th January, Notice was given to the applicant to comply with requirements for directions as the appeal had been admitted – respondent made the efforts to invite the applicant to have the matter fixed for directions as per letter IAA 2 – but there was no attendance by applicant as his representative.

Nonetheless, the matter was placed for directions on 12th May 2008 and a notice to that effect dated 14-4-08 sent – this was received under protest and no application for directions was made, as a sign of good faith.

Another invitation was sent out on 18th September 2008 and copied to court, but it too was ignored.

The court then issued a notice to have appeal dismissed and the notice to show cause why appeal should not be dismissed was listed for hearing on 24-11-08 – now that is when counsel for respondent and counsel for applicant (Mr. Mouko) appeared and Mr. Mouko indicated his intention to withdraw the appeal and undertook to liaise with his client and confirm the position on 25-11-08.

On 25-11-08, Mr. Mouko sent his partner Samson Gekanana who sought leave to have the appeal withdrawn, thus confirming the position Mr. Mouko had alluded to the previous day.

The parties were then to meet and discuss the issue of costs but this never materialized as appellant kept giving false promises. It is respondent's contention that applicant has been indolent and cannot now seek the court's discretion to review orders not emanating from this court but from his own duly appointed advocates and this is simply applicant's way of obstructing justice. Respondent maintains that applicant has acted dishonestly and negligently.

Further that if applicant never gave his counsel instructions, then there are remedies provided in law for this and REVIEW IS NOT one of them.

Respondent has outlined all the activities he has been involved in within the 7 years to demonstrate to this court, that if review is allowed, he will be greatly prejudiced.

In arguing the application, Mr. Angima for the applicant urged the court to consider the background of the matter which was before the trial court in Garissa – it's a claim to a portion of land and the fact that the trial magistrate elected to proceed with the case on a day when it was not been fixed for hearing and so the appellant was not given a chance to be heard. Appellant sought for review but this was not granted. He has done this so as to demonstrate to this court the gross abuse of the court process which he states should not stand and therefore appeal stands a good chance of success. He pointed out that this is one of those situations where even the court out of its own motion under section 3A Civil Procedure Act, can recall the record and issue orders to prevent an injustice that is apparent on the face of the record.

He concedes that there has been serious delay in prosecuting the appeal which was filed in 2002 and that indeed there is no good reason for the lethargic handling of this appeal but he asks court to consider that respondent is benefiting from a procedure which was faulty ab initio having deliberately misled the trial magistrate regarding service on the appellant.

There are very serious allegations that Mr. Mouko who was acting for the appellant, out of his own motion decided to withdraw the appeal without consulting the appellant. To this Mr. Angima urges the court to look at the conduct of the advocate in handling this appeal over the 7 year period saying the record speaks for itself.

Mr. Matini for the respondent points out that there has been complete indolence in this matter, once the appellant obtained stay orders he did absolutely nothing and it is respondent who has made attempts to even get the appeal going and he will be greatly prejudiced. He terms it a paradox, that now applicant/appellant can actually turn round and say he wishes to proceed with the appeal, when all along he has shown no interest, then he now appoints a new advocate and turns around to say he had not given any instruction to his former advocate to withdraw the appeal.

There is no denying that there has been inordinate delay in prosecuting the appeal - …..almost seven years. It is also apparent that once the appellant obtained stay orders, then for almost five years he did nothing – the only thing I can infer from that is intentional design to delay the respondent enjoying the fruits of the judgment. All steps to have progress in the appeal were made by the respondent. There is the question of being condemned unheard, losing property, an arguable appeal, versus indolence expenses incurred by respondent, good faith on part of the respondent.

I would agree with Mr. Matini that the sword of justice is double edged and equity aids the vigilant not the indolent. It is the respondent who prepared the record of appeal, sent out invitation to appellant to attend court registry to take a hearing date (which appellant had his counsel proved), applied to have the suit dismissed (which failed) surely respondent has been the vigilant interested party – his action in fact demonstrated bona fides as opposed to the applicant's inaction which clearly demonstrates indolence.

The applicant's counsel applied to withdraw the appeal on the morning of the hearing of the matter and actually requested the court to put off the matter to the next day so as to enable him consult his client (the applicant).

Suddenly after the appeal is marked as withdrawn, the applicant's interest is rekindled – it's the kind of scenario that leaves a very sour image – making the justice system appear like a circus – the refrain "arguable appeal" and being condemned unheard takes on a very faint colour.

If indeed Mr. Mouko withdrew the appeal without instructions from applicant, then appellant has other avenues of redress like the Law Society of Kenya Disciplinary Committee, through the Advocates Complaints Commission and he had better take it up from there.

As far as the record goes, I will be guided by the equitable maxim "equity does not aid the indolent" – seven years is a long time to keep a mater pending in court, withdraw it, then seek to revive it. I find no merit in the application and the same is dismissed with costs to respondent.

Delivered and dated this ***16***th day of **June 2009** at Malindi.

H. A. Omondi

JUDGE

Mr. Angima for applicant

Mr. Mwakisha for respondent