



F.O (Minor suing through next friend)

P.K.A.....APPLICANT

VERSUS

GEORGE WAKABA NDUNGU..... 1ST RESPONDENT

JOSEPH MWANGI MUGUKU.....2ND RESPONDENT

RULING

1. George Wakaba Ndungu and Joseph Mwangi Muguku, hereinafter referred to as the respondents, lodged an appeal in this Court, through their memorandum of appeal which was filed on the 17th October, 2007. On the 1st February, 2008, the respondents moved the Court for an order of stay of execution pending the hearing and determination of the appeal. On the 18th February, 2008, the application for stay of execution pending appeal was allowed on condition that the decretal sum is deposited in Court within 21 days. Accordingly, the decretal sum was deposited in Court on the 6th March, 2008.

2. F O, a minor suing through his next friend P K As, (hereinafter referred to as the applicant) is the respondent to the appeal. The applicant has now moved this Court under Order VI Rule 13 of the Civil Procedure Rules, Section 3A and Section 63e of the Civil Procedure Act, seeking orders as follows:

(i) That the Honourable Court be pleased to strike out the appellants appeal dated 15th October, 2007 and filed on 17th day of October, 2007 for want of prosecution.

(ii) That the Honourable Court be pleased to consequently discharge the order of stay obtained by the appellants.

(iii) That the Honourable Court do issue direction for the release of Kshs.329,000/= to the respondent/applicant without further delay.

(iv) Costs of this application be provided for.

3. The application is brought under the following grounds:

(a) The appellants filed a memorandum of appeal on the 17th day of October, 2007 and proceeded to obtain an order of stay of execution pending the hearing of their appeal.

(b) It has been more than a year now since the appellants' application dated 17th October, 2007 was heard, and an order of stay granted, pending the hearing of the appellants' appeal.

(c) The appellants have since failed to show the slightest of intention to prosecute their appeal, since they have even failed, refused, and/or ignored to fix the application (appeal?) for full hearing, and it is therefore an abuse of the Court process.

(d) Had the appellants been serious, genuine and or honest they would by now have moved the Court to have their appeal heard.

(e) The respondent/applicant feels frustrated as he can no longer access basic medical attention and other needs for lack of money and further his inability to feed for himself.

(f) The appellants have deliberately removed the respondent/applicant from the seat of justice and have continued to do so by failing to prosecute their appeal.

(g) The appellants have taken advantage of the order of stay to frustrate the respondent and avoid the rendition of justice.

(h) In view of the foregoing, it is only fair, equitable and just that the said appeal be struck out, with costs, and the respondent be allowed to enjoy the fruits of the delivered judgment by the lower Court.

4. Counsel for the applicant has urged the Court to dismiss the appeal as the appeal is an abuse of the Court process, no record of appeal has been filed two years after the appeal was filed. The respondents have objected to the application through a replying affidavit sworn by Timothy K. Wamiti, an advocate having conduct of the matter on behalf of the respondents.

5. Mr. Wamiti depones that the respondents have shown interest in pursuing the appeal. He maintains that the respondents have taken steps towards the preparation of the appeal for hearing. Copies of the proceedings, judgment and decree have been obtained, and a record of appeal has been prepared. Mr. Wamiti explains that the delay in the preparation and lodging of the appeal, which was inadvertent, was not inordinate. Mr. Wamiti further urged the Court to reject the application as it has been brought under the wrong provisions of the law and does not properly invoke the jurisdiction of the Court.

6. Mr. Ngira who appeared for the respondent maintained that the application for dismissal of the appeal was pre-mature as no directions had been given by the Court under Order XLI Rule 8B. In support of their submissions, counsel for the respondents cited the following authorities:

- ***Theresia Njoki Njeru vs. Triposa Njeru Embu HCCA. 8 of 2001***

- ***Juliana Wawira Njeru vs. Susana Waguama Muciga Nyeri HCCA 43 of 2003***

- ***Musa Mudhaka Shimimi et al vs. David Lugalia HCCA.53 of 2001***

- ***Devji Meghji & Brothers vs. Thika Ltd. et al Nairobi HCCC 524 of 2004***

- ***Florence I. Makotsi t/a Connections & Another vs. Fortune Properties Limited & Another, Nairobi HCCC 253 of 2006***

7. I have carefully considered the application, the affidavit in support and in reply, as well as the annexures thereto. It is evident to me that the respondents went to sleep after obtaining the orders of stay of execution on the 18th February, 2008. Therefore, the respondents did not make any efforts to prepare the record of appeal or file the appropriate decree to facilitate the speedy disposal of this appeal. The respondents have apparently only been woken up from their slumber by the applicant's current application which was filed on 29th July, 2009. It is only thereafter that the applicant prepared a record of appeal which was filed on the 8th October, 2009.

8. The applicants have moved the Court under Order VI Rule 13 of the Civil Procedure Rules for striking out of the appeal for want of prosecution. Nevertheless, Order VI Rule 13 deals with striking out of pleadings and not appeals. The striking out of appeals for want of prosecution is not provided for in the Civil Procedure Rules. The only provision nearest in this regard, would be Order XLI Rule 31 of the Civil Procedure Rules which provides for dismissal of appeals for want of prosecution.

9. The applicant could only move the Court for dismissal of appeal for want of prosecution, under Order XLI Rule 31(1) of the Civil Procedure Rules, if no action is taken to have the appeal set down for hearing, three months after the giving of directions under Rule 8B. In this case, the appeal not having been admitted to hearing, nor directions given under Rule 8B, an application for dismissal of appeal for want of prosecution would be premature. It is only the Deputy Registrar who could move the Court under Order XLI Rule 31(2) of the Civil Procedure Rules for dismissal of appeal for want of prosecution. To that extent the application for striking out the appeal, is incompetent and same is rejected.

10. Nevertheless, it is apparent that the respondents are abusing the process of the Court by dragging their feet in the finalization of this appeal, to the detriment of the minor applicant who is being denied the fruits of his judgment by the order of stay of execution which remains in force. It is in the interest of justice that this Court moves to prevent the evident abuse of the Court process. Accordingly, the Court exercises its inherent powers to set aside the order of stay of execution pending appeal which was issued on the 18th February, 2008. The decretal sum may therefore be released to the applicant.

11. The upshot of the above is that prayer No.(i) of the Chamber Summons dated 23rd July, 2009 is

rejected. Prayer No.(ii) and (iii) are hereby granted. Costs shall await the outcome of the appeal.

Orders accordingly.

Dated and delivered at Nairobi this 27th day of October, 2009.

H.M. OKWENGU

JUDGE

In the presence of:

Musyoki for the applicant

Ngira for the respondent/appellant

Eric, court clerk