REPUBLIC OF KENYA

IN THE HIGH COURT

AT MOMBASA

Civil Case 126 of 2006

ALI NJENGA……..APPELLANT

-VERSUS-

C.I.S. HAULIERS LTD……...…….RESPONDENT

RULING

The respondent in an appeal case moved the Court by Notice of Motion dated 13th July, 2009, brought under Orders *XVI* rule 5, L rule 1 of the Civil Procedure Rules, and s.3A of the Civil Procedure Act (Cap 21, Laws of Kenya). The respondent/applicant's main prayer was that the appeal be dismissed for want of prosecution.

The general grounds founding the application were, firstly, that the appeal was commenced from a ruling of the Chief Magistrate's Court in CMCC No. 1563 of 2005, *C.I.S. Hauliers Ltd v. Ali Njenga*, delivered on *27th July, 2006* – the appeal being filed on *25th August, 2006*. It is stated that the appellant and his advocates have failed, refused, ignored and/or neglected to serve the applicant with the record of appeal, or indeed to take any steps in prosecuting the said appeal. The applicant states that it "continues to suffer unnecessary anxiety and uncertainty due to the delay in the prosecution of [the] appeal." The facts relating to the said grounds for the application, are set out in the supporting affidavit of Issa Said Salim, the Managing Director of the applicant, sworn on 13th July, 2009.

In a replying affidavit sworn on 27th July, 2009, *Kamau Mungai*, the advocate for the appellant/respondent, depones that "the [respondent/applicant's] application is fatally defective and incurable and the same is an abuse of ..Court process and should be dismissed with costs". That contention, of course, is of a submission nature, rather than of an evidentiary nature.

In relation to evidence, the deponent avers that he had written to the Executive Officer at the Mombasa Chief Magistrate's Court on *17th August, 2006* requesting for certified copies of proceedings together with the ruling to enable his firm to construct, file and serve the record of appeal. The deponent states that he and his clerk have since then been following up on the request, but unsuccessfully, "being given different reasons, i.e. limited [supply of] computers within the Judiciary, typist being overwhelmed [with]

work…, the file had been misplaced". The deponent avers that, upon receipt of the respondent/applicant's Notice of Motion application of 13th July, 2009 he personally visited the Court Registry and discussed the matter with the Executive Officer. As an outcome, the deponent, on *22nd July, 2009* received certified copies of the proceedings – but as at now he has not been able to read the same. The deponent states:

"*…since we have received the said…typed copies of the proceedings, we are ready to construct, file and serve the record of appeal as …..…may be directed by this honourable Court."*

The deponent depones that "the appellant is desirous [of] bringing this matter to [a] conclusion at the earliest opportunity possible, [and] in good faith the appellant deposited [the] sum of Kshs. 1,046,230/= in a joint interest-earning account held by [the] advocates of both parties….."

The deponent avers that the appellant has a good appeal against the respondent.

Learned counsel, *Mr. Oddiaga* submitted that there has been inordinate delay in prosecuting the appellant's appeal – and the delay cannot be explained or excused. Counsel urged:

"It is the duty of a party who chooses to file an appeal to ….follow its proceedings and make sure that they are ready in time." It was contended that the appellant had shown no more than one letter, dated 17th August, 2006 asking for certified copies of proceedings. Counsel noted that the appellant by his own admission, had stated that certified copies of proceedings were obtained on 22nd July, 2009 – and that several months thereafter, no further action had been taken.

Mr. Oddiaga urged that the appellant had not complied with Order XVI rule 5 of the Civil Procedure Rules (relating to dismissal of suit for want of prosecution); and that this Court has an obligation under rule 6 to take action, on its own motion, to dismiss the suit since no step had been taken within three years.

Counsel contested the claim that a deposit in a joint account of kshs. 1,046, 230/=, by the appellant, was by itself evidence of the appellant's seriousness with the appeal: "what was deposited was not made *ex gratia*, but through [an] order of the Court".

Mr. Waithira, learned counsel for the appellant, urged that this application be dismissed for having been brought under wrong provisions of the law: "The appellant's appeal is not a suit that can be dismissed for want of prosecution under Order *XVI*, rule 5". Counsel urged that the application ought to have been brought by Chamber Summons, and under Order *XLI*, rule 31 (1), (2). Counsel also submitted that it was a premature stage for dismissing the appeal, for want of prosecution, since no directions had as yet been given, and the appeal had a good chance of success. Counsel cited in aid of his submissions the following decisions: *Kariuki and Gathecha Resources Ltd. v. Lucky Summer Estates Ltd & 3 others*, Civil Appeal No. 106 of 2005; *Said Hemed and Bakari Ali Mwacheche v. Joyce Kailu*, Mombasa H. Ct. Civ. Appeal No. 95 of 2000; *Dr. Michael Oling Wanga v. Pharmaceuticals Manufacturing Co. Ltd*, Nairobi H.Ct Civ. Appeal No. 668 of 2003; *Devji Meghji & Brothers Ltd. v. Prospectus Thika Ltd & 2 others* Nairobi HCCC. No. 534 of 2004.

Counsel stated that the required typed proceedings had been received by him on 22nd July, 2009 and this was after the applicant had already filed the application for dismissal of the appeal. Counsel stated that the typing of the proceedings had been hurried, after he informed the Court's Registry of the consequences of any further delay. The delay in the circumstances, it was urged, was excusable. Counsel's last word was: "the appellant having received the typed and certified copies of the proceedings, he is ready and desirous to bring this appeal to rest, upon [the] determination and conclusion of the …..application".

Mr. Oddiaga in his reply, submitted that the provisions of Order *XLI*, rule 31 (1), (2) were not applicable in this case as contended for the appellant – for these rules presupposed compliance with certain

conditions: the filing of an appeal; the taking out of proceedings in time; the preparation of the record of appeal; the taking out of directions. Directions had not been taken, it was submitted, because the appellant had failed to prepare the record of appeal; and since the obligation to prepare the record of appeal rests with the respondent, the provisions of Order *XLI*, rule 31 (1) could not apply. It was urged that, in the circumstances, a party could only move the Court under Order *XVI*.

Counsel urged that failure on the part of the appellant to prepare his appeal for directions "should not be used to penalise the respondent who has a lawfully-obtained judgment and who is now being prevented from enjoying the fruits of the judgment by a reluctant applicant". Counsel submitted that since up to now the record of appeal has yet to be prepared, it may take quite long before directions for the appeal are taken; and that in these circumstances, the appeal ought to be dismissed.

The foregoing review of evidence and submissions, regarding the delay in prosecuting the appellant's appeal, shows that indeed, a period of more than three years has elapsed since the notice of appeal was filed, and that several steps have yet to be taken before directions can be taken regarding the conduct of the appeal. The applicant, not unexpectedly, is anxious to enjoy the fruits of judgment which it obtained in the Court below, and it feels hard done-by, when the appellant takes so long to prosecute his appeal. That position by itself, would have given the applicant's case a certain *prima facie* status calling for favourable orders. However, the appellant has given an account, and made certain indications, which point in the direction of the steps for an appeal being put in place soon. When the claims are thus evenly balanced, it is not, in my opinion, right, as a matter of the exercise of judicial discretion, to come to a radical and ultimate determination which locks out one party altogether; it is better, in my opinion, to give a chance for the merits of the contest to be resolved, by way of a hearing. This principle dictates that a limited period of time be allowed, for the appellant to have the appeal ready for hearing directions.

Consequently, I will make orders as follows:

(a) The Notice of Motion application dated 13th July, 2009 is disallowed.

(b) The costs of the application shall be in the appeal.

Orders accordingly.

DATED and DELIVERED at MOMBASA this 20th day of November, 2009.

J. B. OJWANG

JUDGE

Coram: *Ojwang, J.*

Court Clerk: *Ibrahim*

For the Respondent/ Applicant: *Mr. Oddiaga*

For the Appellant/Respondent: *Mr. Waithira*