



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

OF KISII

Civil Appeal 115 of 2006

KENYA TEA DEVELOPMENT AGENCY.....APPELLANT

-VERSUS-

SOFIA NYABOKE KENANDA.....RESPONDENT

RULING

On 7/5/2009 this court allowed the application dated 26/3/2009 in which the respondent sought the dismissal of the appellant's appeal filed on 18/5/2006 for want of prosecution. Mr. Ogweno for the respondent informed court that the application had been served on the appellant but had not elicited any response. The Affidavit of Service date 6/5/2009 and filed on 7/5/2009 indicated that service had been effected on 23/4/2009 on the firm of M/s. Nyatundo and Company Advocates who did not attend.

The appellant has applied to have the appeal reinstated on basis that it was not heard on the application to dismiss it. It states that it had no notice of it because on 27/1/07 it changed its advocates from M/s. Nyatundo & Company Advocates to M/s. Oguttu-Mboya & Company Advocates and Notice of Change of Advocates lodged into court and served on 26th and 30th May, 2007 to all concerned. The new advocates were therefore not served with the respondent's application, it states.

The respondent's response is that the appellant required leave of court under *Order 3 rule 9A of the Civil Procedure Rules* to change advocates, and yet no such leave was sought or granted. According to the respondent, therefore, M/s. Nyatundo & Company Advocates were still properly on record for the appellants and that is why they were the ones served. Mr. Ogweno for the respondent referred the court to the decision in *U.D.V. (K) Limited .V. Jackline Kwamboka Nyaata, HC.Civil Appeal No. 141 of 2007 at Kisii.* Mr. Ochwangi for the appellant was of the view that the Notice of Change of Advocates was sufficient and that M/s. Oguttu-Mboya & Company Advocates were properly on record and ought to have been served with the application.

Order 3 rule 9A of the Civil Procedure Rules is in mandatory terms and therefore the authority of court was required to enable the change. It follows that the firm properly on record was M/s. Nyatundo & Company Advocates and the respondent was right when he served it with the application to dismiss the appeal.

The other complaint by the appellant was that the appeal ought not to have been dismissed because, although the same had been admitted, no directions had been given by a Judge as is required by by *Order 41 rule 8 of the Civil Procedure Rules*. Mr. Ochwangi relied on the decision in *John Njiru Muya .v. Nguu Muya and Daniel Mukunya, Civil Appeal no. 270 of 1999 at Nairobi.* Mr. Ogweno was of the view that an appeal can be dismissed for want of prosecution notwithstanding the fact that directions have not been

given and submitted that Mr. Ochwangi had misunderstood the Court of Appeal decision.

Directions by Judge are given under *Order 41 Rule 8B (1) of the Civil Procedure Rules*. Ideally , an appeal should not be dismissed for want of prosecution until it is admitted under *section 79B of the Civil Procedure Act* and directions given under *Order 41 rule 8B (1) of the Civil Procedure Rules*. However, the court has discretion to dismiss an appeal for want of prosecution in the exercise of its inherent powers under *section 3A of the civil Procedure Act*. (See *Mukisa Biscuit Company Ltd .V. Westend Distributors [1969] EA 497*). It is notable that the respondent invoked the inherent jurisdiction of the court under *section 3A* in his application.

The appeal herein was admitted on 29/11/2006 and M/s. Nyatundo & Company Advocates informed of the admission on 5/2/2007. It was the duty of the Registrar to ensure directions are taken within 21 days after the date of service of the Memorandum of Appeal. However, the appeal belonged to the appellant and it was its duty to ensure the Registrar's compliance with *Order 41 rule 8B* so that there was no delay in the processing of the appeal or the overall administration of justice. (See *Eliakim A. Aketch .V. National Housing Cor-poration and another, HC.Civil Appeal No. 72 of 2001 at Kisumu*). It would appear the firm of M/s. Nyatundo & Company Advocates did nothing to have directions taken. M/s. Oguttu –Mboya & Company Advocates were instructed and filed notice on 26/1/2007. Mr. Joseph Mboya Oguttu swears that they wrote to the duty Magistrate's Court to be supplied with typed and certified copies of proceedings and judgment, etc. It would appear that was the only action. If the advocates had checked the High Court registry they would have found that on 18/10/2006 the original Court file together with typed copies of proceedings and judgment were received from the Chief Magistrate's Court. It did not make sense to communicate with the lower court. It would appear that since the receipt of the original file and the admission of the appeal the appellant or its lawyer did not take any steps to have the appeal heard. The appeal was pending for three years without any reasonable step to prosecute it. The matter would have been different had M/s Oguttu Mboya & Company Advocates , although not properly on record, moved with speed to have directions taken and the appeal listed for hearing. They also went to sleep, as it were.

However, the application that was allowed was brought under *Order 16 rule 5 of the Civil Procedure Rules* and *sections 3A and 63 (e) of the Civil Procedure Act* and was by way of Chamber Summons. *Order 16 rule 5 of the Civil Procedure Rules* does not provide for the procedure of bringing application for dismissal of suit for want of prosecution. By dint of *Order 50 rule 1 of the civil Procedure Rules*, the application should be by way of Notice of Motion .(See *Devji Meghji & Brothers Ltd .V. Prospectus Thika Limited And Others, H.C.(Milimani Commercial Court) C.C No. 534 Of 2004*). It is also true that where a party seeks to invoke the inherent jurisdiction of the court under *section 3A of Civil Procedure Act* he has to come by way of Notice of Motion. (See *Salume Namukasa .V. Joseph Bukya [1966] E.A.433*). It follows that the respondent's Chamber application that led to the dismissal of the appeal for want of prosecution was incompetent for want of procedure and therefore not properly before the court. It was an error on the part of the court to have entertained it, leave alone allowing it. Consequently, the order dated 7/5/2009 dismissing the appeal is reviewed and set aside. The application dated 26/3/2009 by the respondent is struck out with costs. Costs of the present application shall be paid by the respondent.

Dated, signed, delivered at Kisii this 10th day of November, 2009.

A.O.MUCHELULE

JUDGE

10/11/2009

10/11/2009

Before A.O.Muchelule-J

Mongare court clerk

Mr. Ochwangi for appellant

COURT: Ruling in open court

A.O.MUCHELULE

JUDGE

10/11/2002