



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 166 of 2002

EAST AFRICAN PORTLAND CEMENT CO..... PLAINTIFF

VERSUS

RICHARD MUEMA NYAMAI..... RESPONDENT

R U L I N G

The Chamber Summons, dated 28/11/05, under Order 41 Rules 31(1) of the Civil Procedure Rules seeks dismissal of the appeal herein for want of prosecution, then costs.

The application is on the grounds that:

- a) the appellant filed the Memorandum of appeal on 12/4/2002, and since then no steps have been made to prosecute the appeal.
- b) It is in the interest of justice that the applicant/respondent be allowed to pursue the lower court's judgment, delivered on 19/3/2002.
- c) Litigation must come to an end, and that rule applies in this case.

In opposition to the application, the Respondent avers, **inter alia**, that: by oversight the matter was not followed up to admission, since they wrote applying for certified copies of the judgment and proceedings; they have never been notified of the admission of the appeal as required by Order 41 Rule 8A of the Civil Procedure Rules, by the Registrar; that no directions have been given by the court as required by Order 41 of the Civil Procedure Rules and hence the current application does not lie as against the appellant.

Finally, the Respondent admits that the Record of appeal was filed and served upon the Respondents after receipt of the application herein.

Having perused the pleadings and considered the submissions by learned Counsel for both sides – Mr. Orange and Mwanthi – for the applicant and Respondent, respectively, I have reached the following findings and conclusions.

By their own admission, the Respondent went to sleep after filing the Memorandum of Appeal and did nothing to ensure that the appeal was admitted, until the current dismissal application was filed and served upon the Respondent by the applicant. This was after close to four years after the memorandum of appeal was filed.

Given the above admission by the Respondent, the rest of the Respondents submissions/averments have no ground on which to stand. First, it is the duty of the appellant to obtain the certified copy of the judgment, prepare and file the Record of Appeal as per Order 41 rule 8B of the Civil Procedure Rules. It is only after the filing of the Record of Appeal that the appeal can be admitted. That was not done till this application for dismissal was filed and served.

According to the Civil Procedure Rules, it is only after admission of the appeal that the parties are summoned by the Registrar, to appear before the judge for directions.

It is the Respondent/appellant's case that the application under Order 41 Rule 31(1) of the Civil Procedure Rules is premature as directions have not been given by the court.

With due respect to the Learned Counsel for the Respondent, the above submission does not afford the appellant a viable defence against the application. This court has repeatedly held that lack of directions by the court does provide a shield to an indolent appellant. Thus in ANNE W. CHEGE & ANOTHER VS. PETER KISUNA MUASYA, HCCA NO. 840 OF 2003 the court, said in part:

“an indolent appellant cannot, and should not, hide behind Order 41 rule 31(1) as a defence when the Respondent has moved the court under sub-rule (2) on the basis that sub-rule (2) is only available to the court/Registrar. That is because the steps preceding the applicability of sub-rule (1) entirely lie within the control of the appellant, not the Respondent/applicant. For it is the duty of the appellant, after launching the appeal by filing the Memorandum of appeal to obtain certified copy of the proceedings from the lower court, prepare the Record of Appeal before the same can go for admission by the Judge. Once the appeal has been admitted, the file goes back to the Registrar, who, through a Notice; summons the parties to appear before the Judge for directions. It is thus an abuse of the court process for an indolent appellant to use the absence of directions as a shield against a Respondent who seeks dismissal of the appeal for want of prosecution.”

I adopt the above quotation and hold that the Respondent's submission has no legal or equitable basis. To accept such an argument is to encourage an indolent appellant to hold the Respondent at ransom by his own failure to prosecute the appeal with diligence and speed.

Accordingly, and in light of the foregoing, the appeal herein is hereby dismissed for want of prosecution. Costs of this application are awarded in favour of the applicant/respondent and against the Respondent/appellant.

It is so ruled and ordered.

DATED and delivered in Nairobi this 7th Day of February, 2008.

O.K. MUTUNGI

JUDGE