

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

Civil Appeal 71 of 2003

ISAYA SIMIYU MATETE APPLICANT

VRS

MOSES WASIKE MATETE RESPONDENT

(Arising from original WBY SRM CC Case No.32 of 2000)

RULING

The applicant/respondent in the appeal has moved this court under OXLI r.31 (1) and (2) of the Civil Procedure Act for an order that the appeal be dismissed for want of prosecution. Same is based on what counsel for the applicant calls a “*schedule*” but which should actually be ‘*grounds*’ on the face of the application. According to the applicant, the appellant has not set down the appeal for hearing 3 months since directions were taken and that it is more than 1 year since the Memorandum of Appeal was filed and served on the respondent. The application is also supported by the applicant’s affidavit dated 20.2.2007.

According to counsel for the respondent, the application is defective and thus incompetent. He asks that the same be dismissed accordingly. I have considered the application along with the said affidavit and grounds of opposition. I have also considered carefully the address to court by both counsel herein. Upon perusal of the court record, I have confirmed that the appeal was admitted on 16.9.2004. The appellant did not set it down for hearing as would be expected. Counsel for the respondent instead filed an application for directions dated 17.05.2005 and directions were taken on 29.5.2005. All this time, the appellant had taken no action. After the directions were taken, one would expect the appellant to now go ahead and have the matter fixed for hearing. Instead, he just went into deep slumber and did absolutely nothing. The record shows that it is counsel for the respondent who has always moved the court to give hearing dates for this appeal – until finally, the respondent concluded that the appellant was not interested in the appeal and consequently filed this application. According to the appellant, the respondent is now stopped from applying for dismissal because he did set down the appeal for hearing himself. Unfortunately, I do not buy that argument. The fact that a respondent moves the court to fix an appeal for hearing where the appellant has displayed inexplicable lethargy, he does not become divested of his right to apply for dismissal of the appeal under OXLI r. 31 (2). The court cannot allow the appellant to have his cake and eat it as is the case in this appeal. He fails to move the court to take directions. He refuses to set down the appeal for hearing and he says that the court cannot dismiss it? That in my considered view would be a travesty of justice. Contrary to what Mr. Kassim told the court, there is not a single date that Wasilwa & Co. Advocates who were then appearing for the appellant or his office ever moved the court to take a date. Ocharo Kebira & Co. Advocates who were appearing for the respondent prior to Wanyonyi & Co. Advocates coming on record are the ones who took all these dates.

Although he submitted that the appellant has always been keen on pursuing the appeal, he has not shown what steps he had taken to move the court. The appellant has clearly failed to move the court because he has a stay in his favour and it will not be in his interest to have the appeal set down for hearing. This is a clear abuse of the process of the court and it should not be allowed. In this case, the respondent complied with OXLI r. 31 (1) and took a hearing date for directions. He made several attempts to have it set down for hearing while the appellant did nothing. My interpretation of OXLI r.31 (2) is that, that rule should be invoked when the appellant fails to set

down the appeal for hearing within 1 year after service of the Memorandum of appeal. He has not done so in this appeal. The respondent cannot be punished for having gone out of his way to seek an expeditious disposal of this appeal.

Accordingly, Justice demands that the appellant's shenanigans be put to an end. Accordingly, I allow this application and dismiss the entire appeal with costs of the appeal being awarded to the respondent. Any stay orders granted earlier on are hereby lifted. Orders accordingly.

W. KARANJA

JUDGE

***DELIVERED*, Dated and Signed at Bungoma this 12th day of March, 2008 in presence of Mr Kraido for the appellant.**

W. KARANJA

JUDGE

12/3/2008