



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

Civil Appeal 836 of 2005

MINI BAKERIES LIMITED.....APPELLANT

VERSUS

EDWARD MBUTA KOMU.....RESPONDENT

RULING

This is an application by way of notice of motion brought under Order XVI Rules and Order L Rule 1 of the Civil Procedure Rules seeking orders that the appellant's appeal be dismissed for want of prosecution. The applicant says that there has been inordinate delay. In support of the application Penina Oloo, Advocate for the Respondent has sworn an affidavit giving grounds for the application. The memorandum of appeal was filed on 26th October 2005 and since then no action has been taken by the appellant to proceed with the appeal. That is now 1½ years since the last step was taken and it is apparent that the appeal is unlikely to proceed and it would be to the interest of justice that the appellant's appeal be dismissed for want of prosecution.

The application is opposed by the respondent who has filed a replying affidavit sworn by Adera Oyonke, advocates for the respondent who avers that the appellant is ready and willing to pursue his appeal to its logical conclusion save that certified copies of the proceedings of the lower court have not been ready or typed despite several reminders to the Executive Officer. That he has persistently followed the matter but the proceedings have not been availed and in support of such efforts he annexed a letter dated 27th September 2007 in which the applicant sought confirmation as to whether or not the proceedings had been typed.

This is an application for dismissal of the appeal for want of prosecution but the record does not show that the same has been admitted. That being the case I would say that this application is premature since the appellant cannot set down the appeal for hearing before the same has been admitted.

Further a certified copy to the decree/order appealed against ought to be filed with the memorandum of appeal.

Section 79 of the Civil Procedure Act provides:-

“Every appeal to the High Court shall be filed within a period on thirty days from the date of the decree or order appealed against.”

An appeal to the High Court from the subordinate court can only be against a “decree” or order. The

appeal can be lodged in the High Court without a decree or order, but the appeal need not be dealt with until the decree or order is drawn-up and filed.

Order 41 Rule 1A of the Civil Procedure Rules provides:-

“where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the applicant shall file such certified copy as soon as possible and in any event within such a time as the court may order, and the court need not consider whether to reject the appeal summarily under Section 79B of the Act until such certified copy is filed.”

For the purpose of consideration under Section 79B of the Act, all that is required is certified copy of the decree or order appealed against to be filed with the memorandum to appeal. The typing of the entire proceedings is only necessary after the appeal has been admitted for the purpose of preparing the record of appeal.

As I have said earlier this appeal having not been admitted, the application for its dismissed is premature and the same should fail.

Accordingly this notice of motion is dismissed. But I order that the appellant do file a certified copy of the decree or order appealed against within 14 days from the date of this ruling and the appeal be pleaded before the judge for consideration under Section 79B of the Civil Procedure Act without any further delay.

Costs be costs in the appeal.

Dated and delivered at Nairobi this 3rd day of March 2008.

J. L. A. OSIEMO

JUDGE