



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 290 of 2004

**PAYLESS CAR HIRE & TOURS LTD.....APPELLANT**

**VERSUS**

**DICK NYAMETA MOCHACHE & ANOTHER..... RESPONDENT**

### **R U L I N G**

The Chamber Summons herein, dated 27/4/06 and filed in Court on 10/5/06, under Order 41 Rule 3 (2) and Section 3A of the Civil Procedure Rules and Cap. 21, Laws of Kenya, seeks the following orders:

1. The Registrar does list this appeal before a Judge for directions and subsequent dismissal for want of prosecution.
2. This appeal be dismissed for want of prosecution with costs to the 1<sup>st</sup> Respondent.

The application is on the grounds that: the appeal was filed on 26/4/04, a period of over two years; since then the appellant has taken no steps to prepare the same for hearing or in the least have it listed for directions.

In opposition, the Respondents aver, **inter alia**, that: the delay lies in failure to obtain typed court proceedings, without which Record of Appeal cannot be prepared; three letters to the court requesting for the same have not yield any fruit; that application should be dismissed with costs against the applicant and in favour of the Respondent, the application is under Order 41 rule 31(2) which is invocable by the Registrar, not the parties to the appeal; the application is under Chamber Summons whereas under Order 41 the application should be under Notice of Motion; the appeal has not been given directions by the court and no prosecution can be undertaken before directions; the delay lies with the court, not the appellant; the appellant has deposited in court K.Shs.300,000/- hence no motivation for delay.

I have carefully read the pleadings and considered the submissions by learned counsel for both sides and have reached the following findings and conclusions.

On whether the application is properly before this court by virtue of being brought as a Chamber Summons rather than a Notice of Motion, it is the case by the Applicant that justice should not be subverted by technicalities.

I have difficulties with that position. Under Order 50 Rule 1 of the Civil Procedure Rules, “**all**

**applications to the court, save where otherwise expressly provided for under these Rules, shall be by motion....”** I have not been shown any other express provision by Counsel for the applicant, under which this application can be brought otherwise than under the mandatory provisions of a Notice of Motion. In the absence of such express provisions to the contrary, the application should be under Notice of Motion, not under Chamber Summons.

As a matter of fact, even where the provision is invoked by the Registrar – that is Order 41 rule 31(2) which is what the applicant has done, the provisions state **“the registrar shall on notice to the parties.....”**

This court has persistently held that an indolent appellant should not be allowed to hide behind the differences between the provisions of Order 41 rule 31(1) and 31(2) See [MUGUKU POULTRY FARM VS. MADRIS WANJA KIGERA HCCA 589 of 2002]. The rationale behind the court’s position is that the major steps necessary to move the appellate process, namely procurement of the certified copy of the proceedings from the lower court; the preparation, filing and serving of the Record of Appeal and the admission of the appeal, are all in the control of the appellant, not the Respondent. Until the appeal is admitted, the question of invoking the provisions of Order 41 rule 31(1) by the Respondent does not arise since until then, the court cannot give the directions.

For avoidance of doubt and for the sake of clarity, the above position and rationale is only applicable where the appellant has slept on his obligations to move the appellate process.

In the current application, all evidence points to the appellant/respondent doing all in its power to move the process. The delay lay in the production of the proceedings and judgment of the lower court.

I have satisfied myself that the relevant requests for the certified copy of the proceedings and the judgment were made, and the correspondence to that effect, duly stamped by the lower court, vouch to that.

Accordingly, I find and hold that whereas there is delay, the same is sufficiently explained.

All in all therefore, and for the above reasons, the application for dismissal of the appeal herein fails.

The applicant/Respondent to bear the costs of this application.

It is so ordered.

DATED and delivered in Nairobi, this 24<sup>th</sup> Day of April, 2008.

**O.K. MUTUNGI**

**JUDGE**