



REPUBLIC OF KENYA

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

Civil Appeal 572 of 1999

FRIDAH N. MAINA.....APPELLANT

VERSUS

BHANUPRASHAD M. PATEL.....1ST RESPONDENT

THE CITY COUNCIL OF NAIROBI.....2ND RESPONDENT

R U L I N G

On the 24th of December, 1999 Fridah N. Maina (hereinafter referred to as the appellant) lodged an appeal against the judgment of J.R. Karanja, PM delivered on the 17th of December, 1999 in Nairobi CMCC No.5896 of 1998. The judgment was in favour Bhanuprashad M. Patel and the City Council of Nairobi (hereinafter referred to as the 1st and 2nd respondent respectively).

On the 18th of October, 2000 an order was made for a stay of execution pending the hearing and determination of the appeal. By a letter dated 7th January, 2004 the appellant's advocate was informed that the appeal had not been admitted to hearing as the appellant was required to comply with order XLI Rule 8B (4) of the Civil Procedure Rules. However, the appellant apparently has taken no action to file or serve the required documents.

The 1st respondent has now moved to this court under Order XLI Rule 31(1) & (2) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking to have the appeal dismissed for want of prosecution. The application was served on the respondent's advocate but no relying affidavit or grounds of opposition have been filed. The appellant's advocate also failed to attend court for the hearing of the motion.

Having considered the application and the entire court record it is evident that although the appellant is enjoying interim orders of stay of execution which were issued more than 7 years ago the appellant has taken no action to prosecute her appeal since the filing of the memorandum of appeal. To date no appropriate record of appeal has been filed or served.

No directions have been given under Order XLI Rule 8B (1) of the Civil Procedure Rules, and therefore this is not an appropriate case for dismissal of the appeal for want of prosecution under Order XLI Rule 31(1) of the Civil Procedure Rules. However, the appellant is clearly abusing the process of the court by enjoying orders of stay of execution pending appeal whilst doing nothing to facilitate the disposal of the appeal.

Under Order XLI Rule 31(2) the court of its own motion, can dismiss an appeal for want of prosecution, where within one year after the service of the memorandum of appeal, the appeal has not been set down for hearing. Such an action can only be taken where the Registrar has on notice to the parties listed the appeal for dismissal before a judge in chambers.

In this case, though the registrar did not serve a notice on the appellant under Order XLI Rule 31(2) of the Civil Procedure Rules, the appellant had due notice of the respondent's motion to dismiss this suit for want of prosecution but did not attend court. Clearly there is an abuse of the court process and there is need for the intervention of this court to prevent such abuse.

Accordingly, in exercise of this courts inherent jurisdiction as read together with Order XLI Rule 31 (2) of the Civil Procedure Rules, I do set aside the order for stay of execution and dismiss this appeal. The respondent shall have costs of the appeal.

Dated and delivered this 14th day of May, 2008

H.M. OKWENGU

JUDGE