REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA

CIVIL APPEAL 63 OF 2004

MUMIAS SUGAR CO. LTD. :::::::::::::::::::: APPELLANT

V E R S U S

1. GALIFANO WAFULA JUMA

2. NAZIBAU KASSAMIALI BHATIA

3. SHABAN MALABA WECHULI:::::::::::::: RESPONDENTS

RULING

The learned trial magistrate delivered his verdict on 17/11/2004. By the said judgement, the trial court awarded to the plaintiff Kshs.170,000/= as general damages for pain and suffering; and Kshs.4,000/= as special damages. The plaintiff was also awarded costs and interest at the court rates.

Those awards were made against the Third Party, MUMIAS SUGAR COMPANY LIMITED.

Being dissatisfied with the judgement, the said Third Party filed a Memorandum of Appeal on 24/11/2004.

According to the respondents' advocates, the Memorandum of Appeal was served upon them on 14/12/2004. Thereafter, the appellant had not taken steps to prosecute the appeal, prompting the respondents to write to the learned Deputy Registrar to this court, asking that the appeal be listed before the judge for dismissal.

Before the respondents wrote to the Deputy Registrar, they had written to the advocates for the appellant on 3 occasions, urging them to take steps to fix the appeal for hearing. It is only when the appellant's advocates failed to respondent to those letters either through correspondence or by way of taking steps in the appeal, that the respondents then deemed it necessary to write to the court.

It is the respondents' contention that the appellant did not have any interest in the appeal. Therefore, the respondents submitted that the appeal should be dismissed pursuant to **Order 41 rule 31 (2)** of the Civil Procedure Rules.

In answer to the application the appellant first pointed out that the Provisions of Order 41 rule 8A of the Civil Procedure Rules had not been complied with. It is the appellant's understanding of that rule, that the deputy registrar of the High Court is required to list an appeal for directions, on notice to the parties.

It is the appellant's submission that it is not the duty of an appellant to move the court. The duty to do so is said to vest in the deputy registrar.

Secondly, the appellant has explained that there had been a problem between their insurer and their advocates. At one point, the insurer told the advocate not to take any steps in prosecuting the appeal. Thereafter, and only very recently, the insurer did instruct the advocates to proceed with the case.

As the instructions to proceed with the case were only issued through a letter dated 3/3/2008, the appellant said that if it is given a little more time, it would prepare the record of appeal and prosecute the appeal.

In determining the application before me, I will first give consideration to the provisions of Order 41 rule 8A of the Civil Procedure Rules. That rule reads as follows:

"***After the refusal of a Judge to reject the appeal under section 79B of the Act, the registrar shall notify the appellant who shall serve the memorandum of appeal on every respondent."***

Clearly, that rule has no application to the matter before me.

Perhaps the appellant had intended to rely upon the provisions of **Order 41 rule 8B (1)** of the Civil Procedure Rules, which stipulates as follows:

"***On notice to the parties delivered not less than twenty-one days after the service of the memorandum of appeal the registrar shall list the appeal for the giving of directions by a Judge in chambers."***

A plain reading of that rule indicates that after 21 days or more have lapsed from the date when the memorandum of appeal was served, the registrar is to list the appeal before a Judge, for directions. It is true, as was asserted by the appellant herein, that that rule does not expressly impose any obligation on the appellant, in relation to the listing of the appeal for directions.

However, the question that is not addressed expressly in that rule is how the registrar is expected to become aware of the date when the memorandum of appeal was served.

For instance, in this case, it was not until 3/8/2007, when the respondents' advocates wrote to the Deputy Registrar, that the court was first informed that the memorandum of appeal had been served on 14/12/2004.

In effect, although it is not specified in black and white that the appellant has a role to play in ensuring that the appeal was moved along towards its prosecution, in reality the appellant cannot just sit back after filing an appeal, and wait for the registrar to take action.

Pursuant to the provisions of **Order 41 rule 8B (4)** of the Civil Procedure Rules, an appeal cannot proceed to hearing before the High Court, before the judge gives directions concerning the appeal generally and in particular directions as to the manner in which the evidence and exhibits presented to the court below shall be put before the appellate court. Other directions may be necessary as to the typing of the record of the proceedings before the lower court and any exhibits or other necessary documents, and the payment of the costs for such typing whether in advance or otherwise.

After directions have been given, if the appellant does not within three months, have the appeal set down for hearing, the respondent may either set down the appeal for hearing or alternatively the respondent can apply for the dismissal of such an appeal. That is provided for by **Order 41 rule 31 (1)** of the Civil Procedure Rules.

As no directions had yet been given in the matter before me, sub-rule (1) was inapplicable.

But sub-rule (2) provides as follows:

"***If, within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a Judge in chambers for dismissal."***

To my mind, that sub-rule serves as a wake-up call to any appellant who believes that after he had filed his appeal, he could simply sit back and wait for the registrar to list the appeal for directions. An appellant who takes no steps in prosecuting his appeal risks having the appeal dismissed if the appeal is not fixed for hearing within one year of service of the memorandum of appeal.

In the case before me the appellant has not disputed the respondents' assertion that the memorandum of appeal was served on 14/12/2004. That being the position, I find that that was the date of service.

That being the case, the appeal herein was liable for dismissal for want of prosecution any time from January 2006.

When it is borne in mind that the respondents' advocates wrote to the appellant's lawyers on 6/1/2006, 20/2/2006 and 27/10/2006, urging them to take steps to fix the appeal for hearing, I find that the respondents went beyond the call of duty in trying to have the appeal heard.

Secondly, I have given consideration to the letters from Messrs Kenindia Assurance Company Limited, who are the insurers of the appellant. The two letters are dated 25/10/07 and 3/3/2008.

Neither of the two letters makes any reference to the appeal before this court. In the first of the said letters, the insurer says that it would not be liable whatsoever;

"***In the event of judgement being entered in favour of the claimant herein."***

That implies that as far as the insurer was concerned, the case had not yet been determined.

My interpretation of the insurer's understanding is further fortified by their letter dated 3/3/2008, in which they say to their advocates;

"***Let us know once fresh hearing dates are taken."***

As no hearing dates had ever been fixed for the appeal, that statement must be in relation to the case before the Chief Magistrate's Court. And if any confirmation is necessary about that fact, it is to be found in the reference points in the two letters from the insurer. Both of them are on the following subject matter;

"***RE: KAKAMEGA CMCC NO. 511 OF 2001 GALIFANO W. JUMA VS NAZIBALI K. BHATIA & 2 OTHERS."***

In a nutshell, the explanation offered by the appellant's advocates does not hold water. It cannot be the reason why there has been a failure by the appellant to take steps to have the appeal listed for hearing, as the insurers do not even appear to have any idea that the case had been heard and determined.

In the result, as the appellant has failed to satisfy me that there is a satisfactory explanation for the delay in taking steps to fix the appeal for hearing since 24/11/2004, I hereby exercise the authority bestowed upon me by Order 41 rule 31 (2) of the Civil Procedure Rules, and order that the appeal be and is dismissed with costs.

Dated, Signed and Delivered at Kakamega, this 13th day of May, 2008.

FRED A. OCHIENG

J U D G E