REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

Civil Appeal 18 of 2002

ZAKAYO SHILOSIO

TERESA KUMONYE

JULIANA SHILOME ……..……... PLAINTIFFS

MAHUKU FELISTAS

CATHERINE KHAKALI

V E R S U S

BAKARI SHIVACHI MATSILI ……..…… DEFENDANT

R U L I N G

The application before me was made pursuant to the provisions of Order 41 rule 31 of the Civil Procedure rules. It seeks the dismissal of the appeal for want of prosecution.

There is no dispute about the facts leading up to the application. First, it is clear that the appeal herein was filed on 12/3/2002. The appeal then came up for hearing on 24/3/2004, and the judgment was delivered on 26/11/2004.

By his judgment, the Hon. G. B. M. Kariuki, J. dismissed the appeal with costs, as he was persuaded that the appeal had been filed out of time.

Being dissatisfied with the judgment, the appellants filed an application dated 19/1/2006, through which they sought the review or setting aside of the judgment. That application was premised on the applicants' contention that there was an error apparent on the face of the judgment.

After giving due consideration to the application, the learned judge was satisfied that there was an error apparent on the face of the record. This is what he said:

"***It is clear that the court proceeded on the wrong footing, in that it was premised on the fact that the decision was read to the parties more than 60 days before the appeal was filed. It now emerged that the period of 60 days from the date of the reading of the decision to the date when the appeal was filed had not lapsed."***

On those grounds, the court proceeded to set aside the dismissal of the appeal. As a consequence thereof, the appeal was restored on 16/3/2006.

It is now the respondent's case that since 16/3/2006, until 2/11/2007 when this application was filed, the appellant had failed to take any action to have the appeal set down for hearing. It is for that reason that the respondent requested this court to dismiss the appeal for want of prosecution.

The respondent believes that the inaction on the appellants' part is reflective of the appellants lack of interest in the appeal.

However, the appellants first faults the application, as being incompetent and untenable in law. In their view, the respondent had failed to denote which of the two sub-rules under Order 41 rule 31 of the Civil Procedure Rules, was applicable to this application. That alone is a fault, in itself.

Secondly, if sub-rule (1) were invoked, the appellants submitted that it could not be applicable to this matter as the appeal had previously been set down for hearing on several occasions after directions had been given.

On the other hand, if sub-rule (2) were to be invoked, the appellants believe that that too was not applicable to this case because a period of one year had not yet lapsed between 5/7/2007 when the appeal was scheduled for a mention, and 2/11/2007 when this application was filed in court.

At this stage, I deem it appropriate to set out herein the provisions of Order 41 rule 31 of the Civil Procedure Rules, so as to facilitate a better understanding of the respondent's submissions relating thereto. The said rule provides as follows:-

"***(1) Unless within three months after the giving of directions under rule 8B the appeal shall have been set down for hearing by the appellant, the respondents shall be at liberty either to set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.***

(2) 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."

According to the respondent herein, the application had been made pursuant to sub-rule (1). He emphasized that the application could not have been made under sub-rule (2), as directions had already been given.

In my reading of sub-rule (2), it is the registrar who is empowered to list the appeal for dismissal if the more than one year had lapsed from the date when the memorandum of appeal had been served, yet the appeal had not been set down for hearing. In such a scenario the registrar is to give notice to the parties that the appeal was to be listed before the judge in chambers, for its dismissal.

Therefore, it does appear to me that the respondent to an appeal can only invoke Order 41 rule 31 (1) of the Civil Procedure Rules, if three months or more had lapsed from the date when directions had been given under rule 8B.

By invoking that sub-rule the respondent could either set down the appeal for hearing or he could apply to the court for the dismissal of the appeal for want of prosecution.

As it is only sub-rule (1) which was available to the respondent, the failure to specify it in the title to the application was not fatal.

In any event, and by virtue of the provisions of Order 50 rule 12 of the Civil Procedure Rules;

"***Every order, rule or other statutory provision under or by virtue of which any application is made***

must ordinarily be stated, <u>but no objection shall be made, and no application shall be refused merely by reason of a failure to comply with this rule."</u>

- emphasis added.

The next question that arises to be determined is whether or not directions have been given in this appeal.

There is no doubt at all that directions were given on 27/1/2003. Subsequent thereto, the appeal was heard on 24/3/2004. However, as already stated earlier herein, the judgment which was founded upon the submissions made on 24/3/2004, was thereafter set aside.

In my considered opinion, although the judgment was set aside, the directions already given, remained unaffected.

What about the submissions made on 24/3/2004; did they remain unaffected too or are they deemed as spent?

The respondent contends that there was need to set down the appeal for hearing afresh, whilst the appellants submitted that all that now remains is for the court to give its judgment on the strength of the submissions made on 24/3/2004.

It is my considered opinion that as the judgment dated 26/11/2004 was based on the submissions made on 24/3/2004, when that judgment was set aside, so too were the submissions which informed the said judgment. I say so because by virtue of Order 20 rule 4 of the Civil Procedure Rules;

"***Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision."***

By analogy, the judgment on the appeals must be deemed to contain a concise statement of the appeal, the submissions by the parties, the points for determination, the decision thereon, and the reasons for such decision.

Ideally, decisions ought to be made on all the issues which the parties have raised for determination. However, there sometimes arise cases which can be properly determined on a single issue alone, which then makes it unnecessary for the court to delve into the remaining issues.

Be that as it may, in my humble view, all courts save for the highest appellate court should always strive to deliver their decisions on all the issues placed before them. My view is informed by the fact that there is always a possibility that one or another party to the case can decide to lodge an appeal to a higher court. And if an appeal were lodged, it would be useful for the appellate court to be given the benefit of the decisions on the various issues, in the event that the appellate court should form the opinion that what was deemed as the primary foundation of the decision by the lower court was erroneous.

In effect, whether or not a judgment was not expressive of decisions on all issues, the court delivering the judgment must be deemed to have applied its mind to all the issues canvassed before it.

Therefore, if the judgment was set aside and a retrial was ordered, parties would have to give evidence again.

In the same vain, if the judgment of an appellate court was set aside, and the appeal was to be heard again, the parties to the appeal would be required to make submissions again.

In this case the respondent had earlier submitted that the appeal had been filed out of time. It has since transpired that the appeal was not filed out of time. The respondent would therefore need to consider whether or not that development would have any bearing on whatever other submissions he had made earlier.

Similarly, the appellants are entitled to consider whether or not to limit themselves to the submissions already made, and which formed the basis of the judgment which has since been set aside.

The appellants cannot be right to submit that all that remains is for this court to give judgment on the basis of the submissions made on 24/3/2004, whilst at the same time the appellants were listing the appeal for directions on the same issue.

Although the appeal was not listed for mention on 5/7/2007, it is evident from the court records that the appellants had sought a mention on that date. By fixing the appeal for mention, the appellants did express a desire to proceed with the appeal.

This application was made some 4 months after the mention scheduled for 5/7/2007 failed to materialize.

Much as I do appreciate the anxiety of the respondent in concluding the appeal herein, which is already over six years old, I find that the delay in setting the appeal down for hearing is not so inordinate as to warrant the dismissal of the appeal.

My decision herein is influenced, in part, by the subject matter of the appeal, which is land. In my considered view, it is usually better to determine disputes over land rights through merit, rather than on technicalities.

In the result, the application dated 2/11/2007 is dismissed. However, the costs thereof shall abide the determination of the appeal.

Finally, it is directed that the appeal be set down for hearing on a priority basis.

Delivered, dated and signed at Kakamega this 12th day of May, 2008.

FRED A. OCHIENG

J U D G E