



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI**

Civil Appeal 57 of 2004

SHADRACK KAMAU KIROMO.....APPELLANT

VERSUS

THE MANAGEMENT COMMITTEE OF

MUTIRIITHIA MIIRI SELF HELP GROUP.....RESPONDENT

RULING

By a Notice of motion dated 9th February, 2006 and filed in court on 21st February, 2006, the respondent in this appeal has sought that the instant appeal be dismissed for want of prosecution. The respondent has also asked for costs of the application to be awarded to him.

The grounds upon which the application is hoisted are that it has been more than a year since the memorandum of appeal was filed and no steps have been taken to fix the appeal for giving of directions or to list the same for hearing, that the intended appeal is not meritorious but only seeks to delay the execution of the decree issued in the lower court and to protract litigation, that as long as this appeal remains pending the respondent continues to suffer anxiety and unnecessary stress and finally that it was just and equitable that the appeal be dismissed.

The application was further supported by the affidavit of Mr. Maina Wachira, learned counsel who in pertinent paragraphs deponed as follows; that the memorandum of appeal was filed on 25th June, 2004 and since then the appellant has not taken any steps to prosecute the pending appeal, the delay has caused the respondent anxiety and stress as it cannot execute the decree, that the appellant's desire is not to prosecute the appeal but only frustrate the respondent and finally it was just and equitable that the appeal be dismissed as it was an abuse of the court process.

The appellant on being served with the application, responded by filing grounds of opposition to the application couched in the following terms:

1. "That the said application is misconceived, incompetent, lacks merit and an abuse of the process of the Honourable Court.
2. That the orders sought are not capable of being granted because the appeal herein has not been admitted for hearing and no directions have been taken.
3. That the orders sought by the applicant are only available after the giving of directions and there are no provisions for dismissing an appeal before directions are given....."

In her oral submissions in support of the application, Ms Gathaiga, learned counsel relied and expounded further on what had already been stated in the grounds and affidavit in support of the application aforesaid. In further support of the application, counsel relied on several authorities though which I have had the benefit of reading.

In response, Mr. Chomba, learned counsel orally submitted that the wording of *order XLI rule 31 (1) & (2)* of the Civil Procedure Rules were such that the prayers sought in the application could not be granted as no directions had been given in the appeal. Counsel also submitted that it was preposterous at this stage to consider the merits of the appeal.

I have now considered the application the supporting affidavit, the grounds of opposition, rival oral submissions and the authorities cited. The application was expressed to be brought under *order XLI Rule 31 (1) & (2)* of the Civil Procedure Rules, *Section 3A* of the Civil Procedure Act and all other enabling provisions of the law. Since the Civil Procedure Rules has elaborate provisions for the dismissal of appeals, it is not necessary to fall back onto the provisions of *Section 3A* of the Civil Procedure Act.

Under *order XLI Rule 31 (1) & (2)* of the Civil Procedure Rules, an appeal may be dismissed for want of prosecution if within three months after the giving of directions, the appeal shall not have been set down for hearing. In the circumstances of this case, it is conceded by both the appellant and respondent that directions have yet to be taken in this appeal. Accordingly, the respondent cannot invoke this rule to have the appeal dismissed for want of prosecution. Whose responsibility is it to have directions taken and appeal set down for hearing. The answer is pretty obvious to me. It is the appellant. The appellant apart from setting in motion an appeal by filing a memorandum of appeal from the judgment of the subordinate court, he is also expected to prepare, file and serve on the respondent a record of appeal. It is only then that directions can be given. These steps must be taken with necessary dispatch. The correspondence on the file particularly from respondent's counsel leave no doubt at all in my mind that the appellant has been unenthusiastic to prosecute the appeal. I am tempted to agree with the respondent's contention that the filing of the appeal was merely aimed at delaying the execution of the decree and to unnecessarily prolong this litigation. What explanation can the appellant have for not taking steps to have the appeal set down for hearing at least on directions when the appeal from the record, was admitted to hearing on 16th September, 2004. The appellant has not by word or deed demonstrated his desire to have the appeal heard and determined expeditiously. He has not said what the stumbling block towards the setting down of the appeal for hearing is. He has not complained of his inability to access the typed proceedings, judgment, decree e.t.c. He did not even deem it necessary to explain himself by a replying affidavit. As stated by the court of appeal in the case of Kenya Commercial Finance Company Limited V Mulji Lalji Pindoha, Civil Application No.Nai.178 Of 1997.

“.....It is upto the respondent to satisfy us that despite his due diligence in the matter, the High Court had failed to provide the said proceedings to him, and he, although still interested to file the intended appeal, is unable to do so for no fault of his own. We are far from satisfied that the respondent has shown proper diligence that this court has come to expect of those who seriously pursue their right to appeal. There is a certain limit upto when a successful party can be expected to wait and be deprived of the immediate fruits of the judgment in his favour.....”

These propositions apply with equal force to the circumstances obtaining in this case. It is the duty of the appellant to expeditiously prosecute the appeal. It is not enough for him to merely file a memorandum of appeal, and then sit back on his laurels. Time is first approaching when this court may be compelled to take drastic actions against such appellants. It is now in vogue for would be appellants to merely file memorandum of appeal and sit back knowing very well that the appeal is not liable for dismissal for want of prosecution before directions are given. They are in the least bothered to take out directions knowing that execution of the decree by the respondent will be a shot in the wilderness as the subordinate court's file will have been called up by the appellate court.

Under *subrule (2)*, this court is also empowered to dismiss the appeal for want of prosecution if within

one year after service of the memorandum of appeal, the appeal shall not have been set down for hearing. However, this is only after the Registrar would have issued notices to the parties and listed the appeal before the judge in chambers for dismissal. It would appear from this provision that the court acts *suo moto* but with notice to the parties. The court does not have to be moved by any of the parties as it has happened in the circumstances of this case. It also appears that before the court takes the aforesaid steps, it must be satisfied that the memorandum of appeal filed was served on the respondent. From the record and correspondence exchanged between counsel for the respondent and appellant, it does appear to me once more that upon filing the memorandum of appeal, the appellant never bothered to serve the same upon the respondent. It is not hard to imagine the reason behind the appellant's actions. The intention is clearly to derail the hearing of the appeal if at all.

I cannot help feeling some sympathy for the respondent who has been locked out from the fruits of its judgment. However my hands are tied. The provisions of the law invoked by the respondent in support of the application are not available. As said by Apaloo JA in Kyuma V Kyema (1988) KLR, "...But my sympathy is not substitute for law...."

Accordingly and for the moment I would dismiss the application with costs however to the applicant as clearly the respondent has demonstrated singular lack of interest to prosecute the appeal timeously. Further the respondent herein must prepare, file and serve on the respondent the record of appeal within the next fourteen (14) days from the date hereof failing which the appeal shall stand dismissed with costs to the applicant.

Dated and delivered at Nyeri this 30th day of June, 2008.

M.S.A. MAKHANDIA

JUDGE

Delivered by;

MARY KASANGO

JUDGE