

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 48 of 2006

TELKOM KENYA LIMITED.....APPELLANT

VERSUS

MATHEW OTIENO ONWONGA.....RESPONDENT

R U L I N G

By a chamber summons dated 25th April, 2007, Mathew O. Onwonga, who is the respondent in this appeal has brought an application under Section 79G, 3A and 63E of the Civil Procedure Act, and Order XLI Rule 31(2) of the Civil Procedure Rules seeking orders as follows: -

- “1. That the memorandum of appeal dated 30th day of January, 2006 and filed on the same date be and is hereby dismissed, for want of prosecution and all other subsequent orders therein be and are hereby set aside.
2. That the said memorandum of appeal was filed after the mandatory period without leave of the court, hence the dismissal of the same.
3. The decretal sum of Kshs.512,382.00 deposited in PMCC No.6767 of 2002 Milimani Commercial Courts on the 28th March, 2006 be released to the applicant’s advocates – M/s K. Getanda & Co. Advocates.
4. The costs of the application be provided for in any event.”

It is contended that the memorandum of appeal which was filed on 30th January, 2005 is defective as it was filed more than 30 days from 16th December, 2005 when the judgment appealed against was delivered. It is maintained that no leave of the court was granted for the appeal to be filed out of time. Further, it is stated that the appellant has lost interest in the appeal as no action to prosecute the appeal has been taken since the appeal was filed. The court was urged to reject the appellant’s contention that it was unable to prosecute the appeal as the lower court file could not be traced. The court has therefore been urged to dismiss the appeal

Relying on *Wanguhu vs Kania 1987 KLR 51* and *Nailani vs Patel & Others 1969 EA 340*, the court was urged to take control of its process for the ends of justice to be met.

In response to the application, Kenneth Nganga Mungai, the advocate for the appellant has filed a replying affidavit. Mr. Mungai depones that the appellant has deposited a total sum of Kshs.512,382/= in court as security. The advocate explains that the delay in prosecuting the appeal was caused by their inability to trace the lower court file to enable them obtain copies of the proceedings and judgment. Counsel maintains that the appeal was not filed out of time as the period between 21st December and 6th January is excluded from computation of time by virtue of Order XLIX Rule 3A of the Civil Procedure Rules. It was further maintained that the judgment subject of the appeal was delivered on 16th December, 2005 and not 10th December, 2006 as alleged by the respondent. The counsel maintained that the application dated 25th April, 2007 was made in bad faith and actuated by malice.

I have carefully considered the application before me. It is evident that the judgment subject of the appeal was delivered on 16th December, 2005, and that the memorandum of appeal was filed on 30th January, 2006. Under Order XLIX Rule 3A of the Civil Procedure Rules, the period between 21st December, and 6th January (both days included), are excluded in computing the time for filing the appeal. This means that the memorandum of appeal filed by the appellant on 30th January, 2006 was filed within 30 days as provided under Section 79G of the Civil Procedure Act.

As regards the prayer for dismissal of the appeal for want of prosecution, following the filing of the memorandum of appeal the Deputy Registrar by a letter dated 30th January, 2006 requested the lower court to furnish the original records. To date that has not been done and no reminder has been sent to the lower court.

Order XLI Rule 31(2) of the Civil Procedure Rules cannot be applicable herein as the Registrar has not served any appropriate notices on the parties nor has he listed the matter before a judge for dismissal of the appeal for want of prosecution. I do not find any merit in this application and do therefore dismiss it. I make no orders as to costs.

Orders accordingly.

Dated and delivered this 16th day of June, 2008

H. M. OKWENGU

JUDGE