

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

Civil Appeal 753 of 2005

CELINICO FLOWERS.....APPELLANT

VERSUS

ISAAC IRUNGU MAINA.....RESPONDENT

R U L I N G

The respondent Isaac Irungu Maina, seeks to have this appeal dismissed for lack of compliance with the rules and for want of prosecution. The application is said to be brought under Order XLI Rule 1A and Order XXXI Rule 1 & 2 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.

It is contended that the memorandum of appeal was filed on 30th September, 2005 without a decree. To date no order or decree has been filed. It is further contended that the appellant has failed to comply with Registrar's notices in regard to filing of the record of appeal. It is also maintained that the appellant has failed to move the court as required under Order VIII. The respondent maintains that the appeal is preventing him from realizing the fruits of his judgment as there is an order for stay of execution which was granted by the court on 25th of October, 2005.

The appellant was duly served with this application but has not filed any response. From the court record it is evident that the appellant has not filed any record of appeal nor has he complied with order XLI Rule 8B (4) of the Civil Procedure Rules. It is evident that the appellant appears to have lost interest in this appeal.

The respondent has moved the court for dismissal of the appeal under Order XLI, Rule IA and Order 31 (1) & (2) of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act. Obviously the respondent has not come under the right provisions. Order XLI Rule 1A and Order XXXI do not provide for dismissal of appeals for want of prosecution. I suppose the intention was to bring the application under Order XLI Rule 31(1) & (2) of the Civil Procedure Rules. However under Order XLI Rule 31 (1) of the Civil Procedure Rules, such an application can only be brought by the applicant after directions have been given under Order XLI Rule 8B of the Civil Procedure Rules. In this case, no record of appeal has been filed, and therefore the appeal is not ready for directions. Order XLI Rule 31 (2) of the Civil Procedure Rules can only be applicable where the registrar has on notice to the parties listed the appeal before a judge in chambers for dismissal. In other words it is the court which initiates the process through the registrar and not the respondent who moves the court. I do note that the respondent has written several letters urging the registrar to initiate this process but that his letters have not been acted upon. It is evident that the registrar has failed in his duty in failing to apply order XLI Rule 31 (2) of the Civil Procedure Rules.

Be that as it may, it is evident that the applicant is abusing the process of the court through taking no action in prosecuting this appeal. There is an order for stay of execution pending appeal and the continued delay in the prosecution of this appeal is prejudicial to the respondent. For this reason, this court in exercise of its inherent jurisdiction, in order to prevent the continued abuse of the court process, shall dismiss this appeal for want of prosecution. The respondent shall have costs of the appeal.

Orders accordingly.

Dated and delivered this 5th day of June, 2008

H. M. OKWENGU

JUDGE