

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Appeal 122 of 2003

KENYA NATIONAL SHIPPING LINE LTD.APPELLANT

VERSUS

**CONSTATINE OKUMU MASINDE
RESPONDENT**

R U L I N G

The Respondent herein, Constatine Okumu Masinde, took out a motion pursuant to Order XLI rule 31 (1) of the Civil Procedure rules in which he applied to this appeal to be dismissed for want of prosecution. The motion is supported by the affidavit of the Respondent sworn on 28th March 2005. Kenya National Shipping Line Ltd, the appellant herein, resisted the motion by relying on the replying affidavit of Peter Khaemba Walunywa sworn on 10th June 2008.

It is the averment of the Respondent that since the admission of the appeal the appellant has not taken any steps to have the appeal heard or settled, hence it is just and equitable to have the appeal dismissed. The Appellant on the other hand has urged this court to dismiss the motion because the delay to list the appeal for hearing was the court registry in that it has been unable to give a hearing date because the trial court's file has not been forwarded to this court. It is also said that directions have not been taken pursuant to the provisions of order XLI rule 8B of the Civil Procedure Rules hence the motion was prematurely taken.

I have taken into account the submissions of both learned counsels and the grounds set out on the face of the motion and the facts deponed in the affidavits filed for and against the motion. It is not in dispute that this appeal was filed on 7th August 2003. the same was admitted to hearing on the 15th day December 2003. It is also not in dispute that the appeal has not been fixed for hearing. The record indicates that the Deputy Registrar of this court requested for the subordinate court's record by a letter dated 18th August 2003. The record further shows that when the motion dated 17th October 2005 came up for hearing interpartes before Justice Njagi on 17th May 2006, the learned judge directed that the appeal to be fixed for hearing within 90 days. It would appear from the nature of that order that the application was compromised. It is not clear why the parties did not talk about the fate of the motion. What the Respondent sought in the aforesaid motion was for the appeal to be dismissed for want of prosecution. The court opted to lend the appeal a new lease of life by limiting the time for the listing of the appeal for hearing. It would appear nothing was done to have the appeal listed for hearing as directed by the court. Instead the Respondent caused the motion to be listed for hearing hence this ruling. The appellant has not complied with the court order. I have considered the arguments of Mr. Ouma, learned advocate for the Respondent and Mr. Omondi, learned advocate for the appellant. Mr. Ouma, has clearly stated that his application is premised on order XLI rule 3 1 (1) of the Civil Procedure Rules. For such an application to succeed under the aforesaid sub-rule one must show that three months have passed from the date directions were taken. It is obvious directions have not been taken, hence such a right has not accrued. I find the motion premature. The other aspect is the apparent compromise reached by the parties over the same motion on 17th May 2006. This court appears to have opted not to dismiss the appeal but instead gave the appellant 90 days to list the appeal for hearing. The appellant has not given any explanation as to why it has failed to comply with that order. It is clear from the record that the appellant is disinterested to pursue the appeal. It has done nothing completely even when this court stepped in to limit the time it should take to have the appeal concluded. In the end I am satisfied that the motion is premature. The same is hereby ordered struck out with no order as to cost. I have already

given the details of the chronology of events from the date of filing appeal up to date. The appeal has been pending for over 5 years and no steps have been taken despite previous steps having been taken to have it dismissed. It is apparent the appellant would be most happy to see the appeal pend. The pendency of the appeal amounts to an abuse of the court process. In such a case this court has the inherent power to do justice by dismissing such appeals. I ex-debito justitae hereby dismiss the appeal for being an abuse of the court process with no order as to costs.

Dated and delivered at Mombasa this 29th day of July 2008.

J. K. SERGON

J U D G E

In open court in the presence of Mr. Ouma for the Applicant

Mr. W'bwoto for the Respondent.