

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 514 of 2004

KENBLEST LIMITED..... APPELLANT

VERSUS

ARTHUR OMONDI WANGOMA.....RESPONDENT

R U L I N G

I have before me an application brought under Section 3A of the Civil Procedure Act and Order XVI Rule 5 of the Civil Procedure Rules, seeking an order for dismissal of the appeal filed herein for want of prosecution. In the alternative, an order varying or discharging the orders for stay of execution is sought.

The order for stay of execution was issued on the 3rd March, 2005 when the appellant deposited security of Kshs.500,000/= in court. Since then no action has been taken in the prosecution of the suit. The appellant is urging the court to invoke its inherent powers under Order XLI Rule 31(2) of the Civil Procedure Rules, to have the appeal dismissed for want of prosecution. It is maintained that the failure to prosecute the appeal is causing serious prejudice to the respondent who cannot work having been incapacitated by the accident subject of the suit. It is further contended that the court has powers under Order XVI Rule 5 of the Civil Procedure Rules, to dismiss the appeal for want of prosecution. Further the court is urged if not inclined to dismiss the suit, to set aside or vary the order of execution.

The respondent objects to the application contending that it is misconceived. It is submitted that an application under Order XLI Rule 31 of the Civil Procedure Rules, can only be initiated by the Registrar. It was also maintained that Order XVI Rule 5 of the Civil Procedure Rules, does not apply to appeals.

I have carefully considered this application and the submissions made by the Counsels. It is clear from the record that no action has been taken by the appellant to prosecute this appeal, since 3rd March, 2005 when the order for stay of execution was granted. The appeal was admitted on 22nd November, 2004. Although it is the Registrar to list the appeal before a judge for directions under Order XLI Rule 8B, the appellant has the right to demand that the Registrar complies with Order XLI Rule 8B of the Civil Procedure Rules. In this case, the appellant has apparently been complacent as no request has been made to the Registrar for the appeal to be listed for directions. While the Registrar is to blame for failing to list the appeal for directions, the appellant must shoulder part of the blame for the failure to push this process.

Although the court was urged to dismiss the appeal under Order XLI Rule 31 of the Civil Procedure Rules, the motion was not brought under that rule. Moreover, the rule is not applicable as Order XLI Rule 8B of the Civil Procedure Rules, has not been complied with nor has the Registrar listed the matter before the court for dismissal. Order XVI Rule 5 of the Civil Procedure Rules, was cited. However, Order XVI Rule 5 of the Civil Procedure Rules deals with the dismissal of suits, not appeals. Specific provisions have been provided for dealing with dismissal of an appeal for want of prosecution and that is Order XLI Rule 31 of the Civil Procedure Rules, which in the circumstances of this case has not been properly invoked.

It is evident that the respondent is being prejudiced by the apparent delay in finalizing this appeal. Accordingly, I find it necessary in the interest of justice to make orders varying the order of stay of

execution which was made on 3rd March, 2005. I order that the appellant shall prosecute this appeal within 6 months from the date hereof. In default the orders for stay of execution shall stand discharged. I award costs of this application to the respondent in any event.

Dated and delivered this 27th day of July, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Advocate for the appellant absent

Muturi for the respondent