



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

Civil Appeal 319 of 2002

F. NDEGWA T/A KINGBULL AGENCIES..... APPELLANT

VERSUS

MALOSO INVESTMENT CO. LTD.....RESPONDENT

R U L I N G

On 28th of June, 2002, F. Ndegwa T/A Kingbull Agencies (hereinafter referred to as the appellant), filed a memorandum of appeal against the judgment of the Principal Magistrate delivered on 3rd June, 2002 in Milimani CMCC No.2190 of 2001. On the 1st July, 2002 the Deputy Registrar of the High Court called for the original record from the lower court to facilitate the prosecution of the appeal. The record was forwarded to the High Court by a letter dated 6th July 2006 which letter was forwarded to the appellant's advocate.

On the 14th July, 2006, the Deputy Registrar wrote a letter to the appellant's advocate, informing them that the appeal had not been admitted to hearing as he had not complied with order XLI Rule 8B(4) of the Civil Procedure Rules, with regard to the preparation and signing of the record of appeal. No action was however taken by the appellant and to date no record of appeal has been filed or served.

Maloso Investments Company Limited who are the the respondent in the appeal, has moved the court under Order XLI Rules 27 and 31 of the Civil Procedure Rules, and Section 3A and 63e of the Civil Procedure Act, seeking to have the appeal dismissed for want of prosecution. The respondent also seeks to have the original lower court file remitted back to the lower court to enable the respondent proceed with the execution proceedings. The respondent contends that the failure to prosecute the appeal is detrimental to it as it has not been able to execute the decree due to the pending appeal.

Grounds of opposition have been filed on behalf of the appellant contending that the application is misconceived, premature, and an abuse of the process of the court. It is contended that the appellant has never received any letter from the Registrar of the High Court and that the appellant is yet to be supplied with a certified record of the lower court proceedings to enable it compile a record of appeal.

I have considered the application. A respondent to an appeal can only initiate an application for dismissal of the appeal for want of prosecution under Order XLI Rule 31(1) of the Civil Procedure Rules. Such an application can only be brought where the appellant has taken no action to prosecute the appeal for more than 3 months after the giving of the directions under Order XLI Rule 8B of the Civil Procedure Rules. In this case, the appeal has not reached directions stage as no record of appeal has been filed. In such a

situation the process of dismissing the appeal for want of prosecution should have been initiated by the Registrar of the High Court under Order XLI Rule 31(2) of the Civil Procedure Rules. However, the appellant has also invoked the inherent powers of this court. It is apparent that the appellant has taken no action to prosecute the appeal. Although it is contended that the appellant never received the letter from the Registrar requesting for the record of appeal, no affidavit has been sworn by the appellant specifically denying receipt of the notice nor has the appellant shown any efforts that it has made to obtain the proceedings and judgment of the lower court. Moreover, the appellant was under an obligation to file the record of appeal and did not require any notice from the Registrar to do so. The appellant has not demonstrated any concern or interest in this appeal. The continued delay in the prosecution of the appeal is a clear abuse of the process of the court. The court is not helpless in such a situation. It must step in to prevent such abuse. I am fortified in this by the statement of Law J.A. in the case of *Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd (1969) EA 696* as follows:

“I am of the opinion that the provisions of the Civil Procedure Rules for the dismissal of suits for want of prosecution do not purport to be exclusive, and do not fetter the court’s inherent jurisdiction to dismiss suits in circumstances not falling directly within those provisions, if it is necessary to do so to prevent injustice or abuse of the process of the court.”

I believe the statement would equally apply to the provisions of the Civil Procedure Rules relating to dismissal of appeals for want of prosecution. Accordingly, I exercise this court’s inherent jurisdiction to prevent the abuse of the court process by dismissing the appellant’s appeal. I direct that the lower court file be returned back to the lower court to enable the respondent proceed with the execution of the decree.

Those shall be the orders of this court.

Dated and delivered this 22nd day of September, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Moya H/B for Agimba for the appellant

Advocate for the respondent absent