



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Appeal 1013 of 2005

POLYPHASE SYSTEMS CO. LTD..... APPLICANT

VERSUS

JOSEPH NGUMI THUO.....RESPONDENT

R U L I N G

On the 21st December, 2005, Polyphase Systems Co. Ltd (hereinafter referred to as the applicant) being dissatisfied with the judgment of the Senior Resident Magistrate, delivered on 1st December, 2005, in CMCC No.147 of 2004, filed a memorandum of appeal against the judgment.

Subsequently the applicant filed an application for stay of execution which was allowed by consent of the parties on 6th July, 2006 on condition that the applicant paid the respondent ½ of the judgment sum, costs of the subordinate court suit, and interest.

On the 4th May, 2007, Joseph Ngumi Thuo the respondent in the appeal, filed an application under Order XVI rule 5, Order XLI Rule 31 of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act, seeking to have the appeal dismissed for want of prosecution. This application came up for hearing before Waweru J. on 12th July, 2007 when an order was made by consent of both parties as follows: -

“by consent, it is hereby agreed that if the appeal herein shall not have been disposed off within 6 months of today, it shall be deemed withdrawn and the parties shall thereafter agree on costs. The chamber summons dated 2nd May, 2007 is therefore marked settled upon the above terms. Costs in the cause.”

The applicant has now moved this court under Sections 3A and 95 of the Civil Procedure Act and Order XLIX Rule 5 of the Civil Procedure Rules seeking orders as follows: -

- (1) That this court be pleased to set aside the consent order made on the 12th July, 2007
- (2) That this honourable court be pleased to enlarge the time fixed for the disposal of the appeal
- (3) That the costs of the application be provided for.

The application is anchored on two grounds: -

Firstly that the advocate who held brief for the applicant’s advocate on 12th July, 2007 agreed to a consent in terms which were *ultra vires* his instructions, the advocates brief having been limited to applying for adjournment only.

Secondly, it was contended that it was not possible to comply with the consent recorded on 12th July, 2007 due to the failure by the Chief Magistrate’s Court at Kiambu to forward the original court file to facilitate the prosecution of the appeal.

The applicant therefore contended that failure to have the appeal prosecuted within the period of 6 months was due to factors beyond his control. The applicant therefore urged the court to enlarge the time to enable it prosecute the appeal. Counsel who argued the application on behalf of the applicant contended that the court has powers to extend time under order XLIX Rule 5 of the Civil Procedure Rules.

The application was strenuously opposed by the respondent. It was maintained that all facts were within the knowledge of the counsel who entered into the consent, and that the counsel had the discretion to make a decision on behalf of the applicant.

Relying on the case of *Flora N. Wasike vs Destimo Wamboko (1982-88) 1 KAR 625*, counsel for the respondent submitted that the circumstances in which a consent order can be set aside had not arisen in this case to justify the granting of the orders sought. It was further submitted that an appeal cannot lie against a decision which has been recorded by consent. In this regard, the case of *Ismail sunderji Hirani vs Noorali Esmail Kassam Civil Appeal No. 11 of 1952* was relied upon.

I have carefully considered the application, the submissions of counsels and the authorities cited. I have also perused the entire court record. I note that as at 12th July, 2007, when the consent order was recorded, the applicant had already filed a record of appeal. However, the original record of the lower court had not been forwarded to this court. Notwithstanding the letter written by the Deputy Registrar and the applicant's advocate to the executive officer of the lower court, calling for the original record of the lower court, it was not until 4th January, 2008 when the original record of the lower court was forwarded to this court.

Under Section 79B of the Civil Procedure Act, before an appeal from a Subordinate Court to the High Court is heard, a Judge of the High Court must peruse the appeal and either admit the appeal to hearing or reject the appeal summarily.

In this case, the appeal could not be placed before a Judge for perusal under Section 79B of the Civil Procedure Act without the original record of the lower court. It was not until 15th February, 2008, after the original record of the lower court had been received that the appeal was placed before a Judge who admitted the appeal for hearing. It was after the refusal of the Judge to reject the appeal under Section 79B of the Civil Procedure Act that the Registrar was required under Order XLI Rule 8A of the Civil Procedure Rules to notify the applicant to serve the memorandum of the appeal on the respondent. After the service of the memorandum of appeal, the Registrar is required on notice to the parties to list the appeal for directions under Order XLI Rule 8B of the Civil Procedure Rules.

In this case the appeal was listed for directions on 25th April, 2008, but no directions were given in view of the applicant's application dated 18th March, 2008 which was pending for hearing.

It is evident from the above that as at 12th July, 2007 when the consent was recorded to have the appeal disposed of within 6 months, the original record had not been forwarded to the High Court nor had the appeal been admitted to hearing. These were mandatory pre-requisite to the disposal of the appeal. However, the pre-requisite were factors which were not within the control of the applicant.

The consent order appeared to have been anchored on the mistaken belief that the applicant was the one in control of the process of prosecution of the appeal. This was a fallacy as it was actually the Registrar of the High Court and the Executive Officer of the lower court who had to facilitate the process for the disposal of the appeal within 6 months by availing the original record of the lower court and having the appeal placed before a Judge for admission.

In my considered view, the consent entered on 12th July, 2007, cannot stand, as it was anchored on a mistaken belief that the applicant was the one in control of the process of disposal of the appeal. The applicant had done all that was necessary for him to do to facilitate the prosecution of the appeal by filing a memorandum of appeal and a record of appeal. Before the admission of the appeal to hearing by a Judge there was nothing further that the applicant could have done to facilitate the disposal of the appeal. Further, in the absence of the original record of the lower court the prosecution of the appeal was at a standstill.

For the above reasons I find that the consent order made on 12th July, 2007, cannot stand. It is accordingly set aside. The appeal having now been admitted to hearing, I order that the appeal be fixed for hearing within the next 30 days.

Costs of the application shall be in the cause.

Orders accordingly.

Dated and delivered this 17th day of September, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Otindo H/B for A. B. Shah for the applicant

Advocate for the respondent absent