



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA**

Civil Appeal 67 of 1999

HORTIQUIP LIMITED :::::::::::::::::::: APPELLANT

V E R S U S

EDWARD UKIRU CHASIA :::::::::::::::::::: RESPONDENT

RULING

The respondent has moved the court pursuant to the provisions of Order 16 rule 5 (d) of the Civil Procedure Rules, as read together with section 3A of the Civil Procedure Act.

It is his prayer that the appeal herein be dismissed for want of prosecution.

The record shows that the appeal was filed on 27th July 1999. Thereafter, the Hon. Waweru J. gave directions on 10th July 2001. As at that date, the court was satisfied that the appeal was ready for hearing. Therefore, the court directed that the hearing dates could be fixed at the registry.

As the respondent points out, the appellant has never taken any steps to fix the appeal for hearing.

On record, there is an application by the respondent, dated 2nd July 2001, seeking to have the appeal expunged from record.

On 14th November 2002, the court dismissed that application.

Meanwhile, on 31st October 2002, the Appellant had filed an application for stay of execution. After giving consideration to that application, the court dismissed it on 15th January 2005.

Clearly, some steps were taken in the appeal. However, both steps were intended to advance interlocutory applications within the appeal, but never the appeal itself.

In the result, I am satisfied that the appellant has taken no steps to have the appeal set down for hearing.

By virtue of the provisions of Order 41 rule 31 (1) of the Civil Procedure Rules;

“Unless within three months after the giving of directions under rule 8B the appeal shall have been set down for hearing by the appellant, the respondent shall be at liberty either to set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.”

I am aware that the respondent herein did not cite Order 41 rule 31 of the Civil Procedure Rules, as the basis for his application. Instead he had relied on Order 16 rule 5 (d), which is only applicable to the dismissal of suits for want of prosecution.

But, by virtue of Order 50 rule 12 of the Civil Procedure Rules, whereas every order, rule or other statutory provision under or by virtue of which any application is made, must ordinarily be stated,

“but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.”

Having taken into account the fact that the appeal herein was filed in 1999, and that the directions were given in July 2001, I hold the considered view that the appellant has lost interest in the appeal, as he has taken no steps to have the appeal set down for hearing. This is, therefore, a fit and proper appeal for dismissal for want of prosecution.

Accordingly, the appeal is hereby dismissed for want of prosecution. The appellant shall pay to the respondent the costs of the appeal, together with the costs of the application herein.

Dated, Signed and Delivered at Kakamega, this 16th day of September, 2008.

FRED A. OCHIENG

J U D G E