



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

Civil Appeal 53 of 2003

GATEWAY INSURANCE CO LTD APPELLANT

VERSUS

PAMELA ADHIAMBO OBATH..... RESPONDENT

RULING

The application by the respondent dated 13th August 2008 is made pursuant to Order XLI Rule 31(2) and Order L Rule 1 of the Civil Procedure Rules and Section 3 and 3A of the CPA. It seeks orders that:-

- (i) The appeal be dismissed with costs.
- (ii) In the alternative, the appellant do furnish security for costs before making any further steps.
- (iii) The order of dismissal and / or security do apply to Kisumu HCCA numbers 54, 55 and 56 all of 2003
- (iv) Costs of the application

The basic ground in support of the application is that the memorandum of appeal was served on the 3rd June 2003 and five years thereafter the appellant has not taken any steps to process the appeal for hearing thereby causing delay prejudicial to the applicant. In his supporting affidavit, the respondent's advocate depones that he has written several letters to the appellant's advocates asking them to prepare the appeals for hearing but all in vain. Annexetures marked 'FO3' are such letters and are dated 29th September 2003 and 3rd March 2006 respectively.

The appellant was served with the application but did not file any response neither did he appear for the hearing thereof.

Be that as it may, Order XLI Rule 8B (1) CPR provides that:-

“ On notice to the parties delivered not less than twenty one days after the date of service of the memorandum of appeal the registrar shall list the appeal for the giving of direction by a judge in Chambers”.

The memorandum of appeal was filed by the appellant on 28th May 2003 and the respondent says that she was served on the 3rd June 2003. Since then, the matter has not been listed for directions as required by Order XLI Rule 8 B (1) CPR. Neither has the matter been listed before a judge for dismissal pursuant to

Order XLI Rule 31 (2) CPR which provides that:-

“ If, within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal”.

The registrar has yet to list the matter for dismissal. Yet the respondent moves this court under the said Order XLI Rule 31 (2) CPR to have the appeal dismissed for want of prosecution.

The provision does not give the respondent the right to make an application for dismissal. Such right is given by Order XLI Rule 31(1) CPR but only after directions have been given.

The present application is therefore misconceived. It would have been more prudent for the respondent to apply to the registrar to have the appeal listed for direction or for dismissal.

An attempt was made in the year 2006 when the respondent's advocate wrote to the Deputy Registrar vide his letter dated 31st May 2006 to have the matter listed for dismissal on account of the appellant's disinterest in the appeal. However, nothing seems to have happened and no follow up was made.

The present application is not the correct follow up and is in contravention of the set procedure. Nonetheless, the application is also for the furnishing of security for costs by the appellant. However, the Notice of Motion does not indicate that the application is under Order XLI Rule 9 CPR which provides for security for costs. In any event an application under the said provision is made by way of Chamber Summons.

The inclusion of an order for security for costs may have been an afterthought on the part of the respondents. The entire application is incapable of withstanding the procedural test and must fail.

It is accordingly dismissed with costs.

Dated, signed and delivered at Kisumu this 3rd day of October 2008.

J. R. KARANJA

JUDGE

JRK/aao