

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

Civil Appeal 152 of 2006

STEVEN MUTISYA

T/A STERO PRINTERS & GENERAL SUPPLIERS.....APPELLANT

VERSUS

SCHOOL EQUIPMENT CENTRE LTD.....RESPONDENT

R U L I N G

1. By a notice of motion dated 26th may, 2006, the applicant, School Equipment Centre Ltd, who is the respondent in this appeal seeks to have the appeal dismissed or struck out under Section 3A and Section 63e of the Civil Procedure Act, on the grounds that the appellant has failed to take any or reasonable steps to prosecute the appeal. The applicant's advocate has sworn an affidavit in which he contends that it is more than 2 years since the memorandum of appeal was filed and served but that no steps had been taken towards the disposal of the appeal. The applicant maintains that the continued pendency of the appeal is highly prejudicial to it and it cannot realize the fruits of the judgment obtained more than 2 years ago.
2. Counsel for the appellant relied on *HCCA No.878 of 2005 Adnan Karama Pretroleum Ltd vs Nema* and *HCCA No.452 of 2003 Laban Onono & Another Vs Dan Owiti*. He maintained that the court has powers to strike out the appeal where there has been indolence on the part of the appellant.
3. Counsel for the respondent objected to the application contending that it was premature, incompetent, bad in law and abuse of the court process as no directions under Order XLI Rule 8B of the Civil Procedure rules have been taken. Counsel maintained that the appeal can only be dismissed under Order XLI Rule 31(1) & (2) of the Civil Procedure Rules where directions under Order XLI Rule 8B have been given. It was therefore maintained that the circumstances for dismissal of the appeal had not arisen. Further, it was contended that the applicant is trying to usurp the powers of the court to dismiss appeal summarily. Counsel contended that Section 3A of the Civil Procedure Act cannot be applicable where there were specific express provisions. He urged the court not to follow the cited authorities as they were only of persuasive value and appropriate law was not considered.
4. I have carefully considered the application. It is evident that the appellant filed a memorandum of appeal on the 15th March, 2006. On the 11th May, 2007, a letter was addressed to the appellant's counsel requesting him *inter alia* to prepare and file a record of appeal and serve the respondent and also have the appeal fixed for directions. No action has apparently been taken by the appellant hence the application filed by the respondent for dismissal of the appeal.
5. Order XLI Rule 31(2) of the Civil Procedure Rules gives the Registrar of the High Court powers to list an appeal before a Judge in chambers for dismissal, where no action has been taken to list the appeal for hearing one year after the service of the memorandum of appeal. It is clear that this appeal is ripe for the Registrar to take action under that rule. There is therefore no need or justification for this court to exercise its inherent jurisdiction under Section 3A of the Civil Procedure Act as there are clear provisions governing the situation.
6. For the above reasons, I dismiss the respondent's motion and direct that the appellant shall file and serve a record of appeal within 21 days from the date hereof, failing which the Registrar shall forthwith

list the matter before me for dismissal.

Those shall be the orders of this court.

Dated and delivered this 18th day of December, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Advocate for the applicant/appellant absent

Advocate for the respondent absent