



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

Civil Appeal 140 of 1994

NAHASHON MWANGI HITI & 2 OTHERS..... APPELLANTS/RESPONDENTS

VERSUS

PETER CHEGE KAMUYU & 3 OTHERS..... RESPONDENTS/APPLICANTS

RULING

By chamber summons dated 13.02.08 stated to be brought under Order XLI rule 31(2) of the Civil Procedure Act, Cap.21, the respondents applied for the following orders:-

- a) That the appellants' appeal be dismissed.
- b) That costs of this application be provided for.

The application is based on the ground that it is more than 14 years since the appeal was filed and that it has not been fixed for hearing.

The application is supported by the 1st respondent's/applicant's affidavit sworn on 13.02.08.

At the hearing of the application on 03.11.08, the respondents/applicants were represented by learned counsel, Mr K. Wandai. There was no appearance for the appellants/respondents.

Respondents'/applicants' counsel informed this court that service of the application was served on the appellants/respondents but they failed to appear on the date of hearing. Counsel urged the court to grant the orders sought.

There is an affidavit of service by Simon Kamau Ngigi, process server sworn on 30.10.08 deponing that he served the application on all the appellants/respondents on 17.10.08 at Ndundori Village in Nakuru Town, that they accepted service but declined to acknowledge such service by signing at the back of his principal copy. I have no reason not to accept the process server's evidence of service on the appellants/respondents.

Rule 31(2) under which the application was stated to be brought provides:

'31. (2) 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.'

This is clearly the wrong provision. The correct provision would have been rule 31(1) which provides:

‘31. (1) 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 dismissal for want of prosecution.’

I deem the application to have been brought under Order XLI rule 31(1).

Respondents’/applicants’ counsel informed the court that the appeal was filed on 26.05.94, that directions were taken that year that the appellants should file a record of appeal and take a hearing date but they have never done so todate. Counsel added that the respondents/applicants have been prevented from executing a decree of the lower court because the original file from Thika has been held by the High Court as part of the record.

Respondents’/applicants’ counsel surmised from the appellants’/respondents’ inaction in this matter that they are not interested in pursuing their appeal. I agree.

In view of the foregoing, there is only one appropriate course to be taken in this matter, i.e. dismissal of the appellants’ appeal. The said appeal is hereby dismissed with costs to the respondents/applicants.

Orders accordingly.

Delivered at Nairobi this 1st day of December, 2008.

B.P. KUBO

JUDGE