

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Appeal 148 of 2002

ELECTORAL COMMISSION OF KENYA..... APPELLANT

VERSUS

JOHN MUGUKU DEFENDANT

RULING

This application was brought by the respondent in the above appeal. He has sought for order that the appeal herein, be dismissed for want of prosecution. In the alternative, he sought for orders that the decretal sum be deposited in the joint account of both advocates until the determination of the appeal.

This application is premised on the grounds that the appellant is no longer interested in pursuing this appeal as the necessary steps to compile the record of appeal and set it for hearing have not been taken. Further the memorandum of appeal which was filed in August, 2002 is incompetent for failure to annex a copy of the decree or order appealed against. Thus Counsel for the appellant submitted that the appeal cannot be admitted for hearing and the above grounds coupled with the fact that there has been inordinate delay on the part of the appellant in setting the appeal for hearing, which has denied the respondent the fruits of his judgment, this appeal should be dismissed for want of prosecution. This application was opposed. Counsel for the appellants challenged the supporting affidavit sworn in support of this application by Mr. Kayai Advocate, on grounds that, the affidavit did not indicate the authority under which Counsel swore the affidavit.

Secondly, it was the appellant's view that the appeal cannot be dismissed before the directions are given, the provisions of **Order 41 Rule 31 of the Civil Procedure Rules** are clear that the appeal can only be dismissed after directions have been given, or, if no steps for its prosecution have been taken within a period of three months. Similarly, under **Order 41 Rule 31(2)**, the Deputy Registrar can place the file before the Judge for dismissal if no steps for the prosecution of the appeal have been taken after one year.

I have taken into consideration all the rival arguments. I have also looked at the record of appeal which clearly shows that the appellant has been less than diligent in prosecuting this appeal. There is no certified copy of the decree or order appealed against that has been filed. The record of the subordinate court has also not been availed and directions as to the hearing and determination of the appeal have not been taken, nor has the appeal been admitted for hearing. In this case under **Order 41 Rule 1(a) of the Civil Procedure Rules**, the court may order that a certified copy of the decree or order be filed and court need not reject the appeal until such a copy is filed.

Secondly and more importantly, under **Order 42 Rule 31** the courts can dismiss an appeal within three months after the directions have been given if no steps have been taken to prosecute the appeal. In this case, directions have not been given and therefore the appeal cannot be dismissed at this stage. Regarding the alternative prayer for the deposit of the decretal sum with joint advocates pending determination of the appeal, I find there is merit in that prayer since the memorandum of appeal was filed all the way in August, 2002 and the appellant has not been enthusiastic in prosecuting the appeal.

I also find that under **Order 41 Rule 9(1)** this court is empowered to order the appellant to give security for the whole or any part of the costs of the appeal. I find this an appropriate remedy for the respondent who has been denied the fruits of the judgment by an indolent appellant. In this regard I order the appellant to deposit the decretal sum as awarded by the subordinate court which should be deposited in

the joint account of both the appellants and respondent's advocates until the determination of the appeal. The said sum is to be deposited within thirty (30) days of this ruling. The appellant should also file a decree or appeal against within seven (7) days. I also direct that the subordinate court records be availed. The respondents shall have the costs of this application.

Ruling read and signed on 28th March, 2007.

MARTHA KOOME

JUDGE