



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

Civil Appeal 35 of 2001

GABRIEL MBUGUA WATENE..... APPLICANT

VERSUS

JAMES NJOROGE WAITHIMA.....RESPONDENT

**APPEAL FROM THE RULING OF SENIOR RESIDENT MAGISTRATE S.B.A.
MUKABWA, ESQ. DELIVERED ON 30.08.01 IN SUCCESSION CAUSE NO. 52 OF
1999 GITHUNGURI IN THE ESTATE OF WATENE WAITHIMA (DECEASED)**

BETWEEN

GABRIEL MBUGUA WATENE..... PETITIONER

VERSUS

JAMES NJOROGE WAITHIMA..... OBJECTOR

RULING

By chamber summons dated 03.10.06 and filed on 01.12.06 brought under Order XLI rule 31 of the Civil Procedure Rules, the respondent in the above appeal, JAMES NJOROGE WAITHIMA applied for the following orders, namely:-

1. THAT the appeal herein be dismissed for want of prosecution.
2. THAT costs of this application be granted.

The grounds upon which the application is based are:-

- a) THAT the appeal has never been fixed for hearing since it was filed in 2001.

b) THAT since then the appellant has not taken any steps to prosecute this appeal to the great prejudice of the respondent.

The application is supported by the affidavit of the respondent, James Njoroge Waithima sworn on 03.10.06.

At the hearing of the application on 11.12.06 the respondent/applicant was represented by learned counsel, Mr. J.G. Kimani while there was no appearance for the appellant/respondent.

In his supporting affidavit sworn on 03.10.06, the applicant James Njoroge Waithima has deposed that the appeal was filed way back in 2001; that it was last in court on 05.11.04 when it was admitted for hearing; that since 05.11.04 the appellant has taken no steps to prosecute the appeal; that the appellant's inaction shows he has lost interest in the appeal; that the pendency of the appeal is prejudicial to the respondent/applicant; and that, therefore, the appeal should be dismissed for want of prosecution, with costs.

An affidavit of service by process server Samuel Kiragu Gachuru sworn on 19.10.06 deposes that on 12.10.06 he served the chamber summons dated 03.10.06 now under consideration upon Mr Mariaria Advocate then on record as acting for the appellant and that the said Advocate, while acknowledging he used to act for the appellant, appended the following remarks at the back of James Njoroge Waithima's affidavit:

NOTE

The appellant herein Mr Watene withdrew instructions from us in this matter about 4 years ago and took away his file and documents from us. We therefore do not have any instructions to receive this application on his behalf.'

There is another affidavit by process server Tirus W. Karoki sworn on 21.11.06 to the effect that this process server, while accompanied by an Administration Police Officer, served the chamber summons dated 03.10.06 upon the appellant Gabriel Mbugua Watene at Wakinja Cafe at Kamburu Shopping Centre and that the said appellant refused to sign the process server's copies and was rude to him. There is in the court file a typed but unsigned and undated communication relating to this case ascribed to Gabriel Mbugua Watene who should be the appellant herein complaining that the respondent cum applicant James Njoroge Waithima has been in the habit of going to him with process servers accompanied by Police Officers which he, Gabriel Mbugua Watene found intimidating and that the court should protect him from such harassment. That communication which was received at the High Court on 06.12.06 ends as follows:

'Again, with respect to the court I beg to be away on 11th December 2006.'

Now, 11.12.06 is the date the summons dated 03.10.06 now under consideration came up for hearing before me when the appellant, Gabriel Mbugua Watene never appeared either in person or through counsel.

I am satisfied on evidence tendered before court that the appellant, Gabriel Mbugua Watene was duly served with the summons now under consideration; that he knew it was coming up for hearing on 11.12.06 but chose to stay away. He has not bothered to tender credible evidence to counter the averments of complaints made against him by the respondent/applicant, James Njoroge Waithima. The result is that the complaints of inaction made by the respondent/applicant, James Njoroge Waithima against the appellant/respondent, Gabriel Mbugua Watene remain uncontroverted and I accept them as showing lack of seriousness by the appellant to prosecute his appeal.

Order XLI rule 31 under which the chamber summons now under consideration was brought, *inter*

alia, provides:

'31. (1) Unless within 3 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.'

The respondent has applied for dismissal of the appeal for want of prosecution. It is now some 2 years 4 months since the appeal was admitted for hearing on 05.11.04 and the appellant has not taken tangible steps to prosecute the appeal. He was aware that the chamber summons now under consideration was coming up for hearing on 11.12.06 but he never appeared at the hearing. Those are not the actions of an appellant who is serious about pursuing his appeal. Accordingly, the appeal filed on 28.09.01 is hereby dismissed for want of prosecution, with costs to the respondent.

Orders accordingly.

Delivered at Nairobi this 5th day of April, 2007.

B.P. KUBO

JUDGE