



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

**Civil Appeal 991 of 2004**

**HIND CONSTRUCTION CO. LTD.....APPELLANT**

**VERSUS**

**WILSON ONGESO.....RESPONDENT**

**RULING**

The Appellant was aggrieved by the orders in judgment delivered by the Senior Principal Magistrate's Court at Milimani CMCC No.7986 of 2003 on 19.11.2004, a memorandum of appeal dated 19<sup>th</sup> November, 2004 was filed the same date. Since then no action has been taken to process the appeal for hearing and disposal. The Court has been informed that conditional stay was obtained in the lower court upon deposit of the decretal amount of Kshs 652,000.00 in a joint interest earning account in the names of Counsels for both parties.

The Respondents Counsel has come to this Court under order 41 rules 27 and 31 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking an order that the appeal herein be dismissed for want of prosecution and that costs be provided for. An order seeking release of money deposited in compliance with the stay order in the lower court was dropped.

The grounds in support are that since the memorandum of appeal was filed no steps have been taken to process the appeal for disposal. The applicant sent warnings to them to take action or else the appeal will be struck out for want of prosecution but this too was not heeded. This is evidence that the appellant has lost interest in the appeal and so it should be dismissed for want of prosecution. The application dated 26.1.2007 and filed on 9.2.2007 is not opposed.

The application is brought under Section 3A of the Civil Procedure Act, a section which gives this court inherent powers to do all that is necessary to prevent abuse of the due process of the court and for ends of justice to be met. Rule 27 and 31 of order 41 have been cited. Order 41 rule 27 and 31 state. Rule 27 *"The Court to which the appeal is preferred shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the Respondents although such respondents may not have filed an appeal or cross-appeal"*

Rule 31 (i) *"Unless within three months after the giving of direction 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.*

(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"*

Construction of the two rules show clearly that the two of them do not apply to the situation under consideration. Rule 27 applies to orders to be made by the court at the disposal of the appeal on merit where as rule 31(1) applies to a situation where by an appeal has been processed for hearing and determination and directions have been taken but the appellant has neglected to set the appeal down for

hearing and disposal. Since what is on record is the memorandum of appeal the proper procedure to be invoked should be that laid down under order 41 rule 31(2) as read with rule 8B of the Civil Procedure Rules. Order 41 rule 8B (1) Civil Procedure Rules states:- *“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 directions by a judge in chambers”* This are the rules which should have been invoked.

This court is a live to the saving power in section 3A of the Civil Procedure Act. The question is whether it can be invoked by this court and avail the relief sought to the applicant. Great judicial minds have ruled that rules of procedure are not for cosmetic purposes, they are to be obeyed. Others have ruled that rules of procedure are supposed to be hand Maidens of justice but some times they are bad masters. Herein they are bad matters as they do not provide a remedy for dismissal of an appeal dressed in a memorandum of appeal only through an application. Section 3A Civil Procedure Act was slotted in to cater for such situations. But it has limitations. Its limitation is that it is to be invoked where no provisions of law or rule of procedure exists to cater for that particular situation. Herein, procedure exists under order 41 rule 31(2) and 8B through which the applicant can achieve what he is asking for. For this reason Section3A cannot be called into play to allow the applicant realize what they are seeking.

For this reason the application is refused with no order as to costs since it is not defended. The applicant who has a genuine complaint is advised to move the registrar under order 41 rule 31(2) and 8B for directions. The Directions to be asked for will include the striking out of the memo of appeal.

DATED, READ AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF MAY 2007.

R. NAMBUYE

JUDGE