

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Appeal 231 of 2003

ISHMAEL GICHONGE MUTURIAPPELLANT

V E R S U S

DIANA LASOIRESPONDENT

(From the Original Civil Suit PMCC NO. 4541 of 1999)

R U L I N G

This is an application by the Respondent in this appeal (by notice of motion dated 20th March 2007) brought essentially under Section 3A of the Civil Procedure Act, Cap.21 for an order to dismiss the appeal for want of prosecution. The grounds for the application as they appear on the face thereof are, that since the filing of the appeal on 24th April 2003 the Appellant has never taken any steps to prosecute it; that he has not prepared and filed a record of appeal as required by rules of procedure; that there is in force an order staying the Respondent's suit against the Appellant now pending before the lower court; and that the appeal is an abuse of the process of the court as it was filed to stall and delay hearing and final determination of the Respondent's said suit.

The application is supported by the affidavit of the Respondent's advocate sworn on 20th March, 2007. The Appellant opposes the application upon the grounds set out in the replying affidavit of his advocate sworn and filed on 26th April, 2007. Those grounds are, that the application is meant to "short-circuit" the appeal; that the lower court file has been missing; that the new advocates for the Appellant are willing to take necessary steps to prosecute the appeal subject to the availability of the lower court file; and that the appeal is not an abuse of the process of the court and should be heard on merit.

I have considered the submissions of the learned counsels appearing. Rule 31(1) of Order 41 of the Civil Procedure Rules (the Rules) provides for a respondent to either set down the appeal for hearing or apply for its dismissal for want of prosecution if within three months after the giving of directions under rule 8B of the same Order the Appellant shall not have set the appeal down for hearing. Such directions have not been given in this appeal. Indeed, the appeal has not even been admitted to hearing. So, the Respondent cannot avail himself of the remedy provided by rule 31(1) aforesaid. But that is not to mean that the court does not have inherent jurisdiction to order dismissal of an appeal for want of prosecution even though directions under rule 8B aforesaid have not been given. The court indeed has such inherent power which may be exercised as may be necessary for the ends of justice or to prevent abuse of the process of the court. An appeal which is lodged without the intention of ever prosecuting it but with the intention of delaying or obstructing the cause and course of justice is obviously an abuse of the process of the court.

However, before a respondent can invoke the inherent jurisdiction of the court to dismiss an appeal for want of prosecution before directions under rule 8B are given, he must exhaust the remedies provided in Order 41. Such remedies include rule 31(2). A respondent can, by writing to the registrar of the court, have the matter, on notice to the parties, listed before a judge in chambers for dismissal. A respondent can also ask the registrar to set the matter for directions under rule 8B. A judge may then direct the appellant to take appropriate steps towards preparation of the appeal for admission and hearing within a limited period, and prescribe appropriate penalties in default.

A long time has passed since the filing of the appeal herein. There may be some justification in the

Respondent's plea that there has been inordinate delay in prosecuting the appeal. But the Respondent has not as yet exhausted the remedies provided in Order 41, some of which have been pointed out above. He will thus not be permitted at this stage to invoke the inherent power of the court to dismiss the appeal for want of prosecution.

In the circumstances, I will refuse the application. It is hereby dismissed. But the Appellant does not deserve costs of the application. To award him costs would be to reward his apparent indolence. Parties will bear their own costs of the application. Orders accordingly.

DATED AT NAIROBI THIS 17TH DAY OF MAY 2007

H. P. G. WAWERU

JUDGE