REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA

Civil Appeal 72 of 2000

EDWARD JUMA …….…….. APPELLANT

V E R S U S

PETER NDIRANGU ……. RESPONDENT

R U L I N G

The appeal herein was filed on 3.11.2000 by Edward Juma against the decision of the Chief Magistrate Muga Apondi, (as he then was) made on 19.10.2000 in Kakamega SPMCC No.179 of 2000. The decision appealed against was made on the application of Peter Ndirangu, who is the respondent in this appeal. He was seeking in the application summary judgment in the suit. The trial court allowed the application and entered summary judgment against the appellant on the ground that the latter's denials "did not constitute defence ……."

The application before me was brought by way of Notice of Motion dated 18.8.2006 by the Respondent herein seeking dismissal of the appeal under Order XVI Rule 2 (1) of the Civil Procedure Rules on the grounds, inter alia, that the appellant had taken no steps to prosecute it since 2000. In his affidavit sworn on 18/8/2006 in support of the application, the appellant averred that "the last time the matter was in court for hearing or at all was on 9-2-2001 and since then no steps have been taken to prosecute the appeal."

The appellant filed Grounds of Opposition to the application on 13-3-2007 in which he contended, inter alia, that the application was bad in law and that the court had no jurisdiction to grant the orders sought under the provisions quoted and further that the application was premature as the appeal had not been admitted to hearing and had never come up for hearing.

On 13-3-2007, I heard the submissions of Mr. Wafula, learned counsel for the Respondent, and Mr. Anziya, learned counsel for the appellant. Mr. Wafula reiterated the averments in the affidavit sworn by S.T. Khalwale Advocate in support of the application. On his part Mr. Anziya relied on the grounds of opposition.

The application was premised on Order XVI Rule 2 (1) and (5) of the Civil Procedure Rules. This Rule deals with dismissal of suits for want of prosecution. A "suit" is defined in Section 2 of the Civil Procedure Act as meaning "*all civil proceedings commenced in any manner prescribed.*" It is arguable whether the definition does cover an appeal. It was Mr. Anziya's submission that the application being one seeking to dismiss an appeal (and not a suit) for want of prosecution it should have been brought under Order XLI Rule 31 (1) & (2). The American BLACK'S LAW DICTIONARY 5th Edition, defines

"suit" ***as a generic term, of comprehensive signification, referring to any proceeding by one person or persons against another or others in a court of justice in which the plaintiff pursues, in such court, the remedy which the law affords him for the redress of an injury or the enforcement of a right, whether at law or in equity."*** it further states that the term "suit" (or is it "word") "has generally been replaced by the term "action" which includes both actions at law and in equity." It further states "suit of a civil nature" is a suit for the remedy of a private wrong, called "civil action." It is implicit that the word "suit" does not mean appeal. At any rate, in the context in the instant matter, it is not synonymous with appeal and Order XVI Rule 5 does not apply to suits as well as to appeals. It applies only to suits. The Civil Procedure Rules have specific Rule 31 (1) of Order XLI which deals with dismissal of appeals.

Rule 31 (1) of Order 41 stipulates:- *"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 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."

And Rule 8B (1), (2), (3) and (4) of Order XLI states:-

8B ***(1) 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.***

(2) Any objection to the jurisdiction of the appellate court shall be raised before the judge before he give directions under this rule.

(3) The judge in chambers may give directions concerning appeal generally and in particular directions as to the manner in which the evidence and exhibits presented to the court below shall be put before the appellate court and as to the typing of any record or part thereof and any exhibits of other necessary documents and the payment of the costs of such typing whether in advance or otherwise.

(4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court, and that such of them as are not in the possession of either party have been served on that party, that is to say:-

(a) the memorandum of appeal;

(b) the pleadings;

(c) the notes of the trial magistrate made at the hearing;

(d) the transcripts of any official shorthand or palantypist notes made at the hearing

(e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;

(f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal;

(g) where the appeal is from a decision of a subordinate court given in the exercise of its appellate jurisdiction, the documents corresponding to those specified in paragraphs (a) to (f) inclusive so far as they relate to the appeal to such subordinate court;

provided that –

(h) a translation into English shall be provided of any document not in that language;

(i) ***the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (h) and (f).***

It is implicit from these rules that an appeal cannot proceed to hearing before directions are given under rule 8B (1) of Order 41. It is also plain that it is the responsibility of the Registrar to list the appeal for the giving of directions. Where the Registrar has not listed the appeal for directions and consequently directions are not given, blame for the delay in the hearing of the appeal cannot be attributed to the appellant.

And an appeal will not be listed by the Registrar for directions before it is admitted to hearing. The court has the power under section 79B of the Civil Procedure Act to dismiss an appeal summarily upon its perusal by a judge, if the judge considers that there is no sufficient ground for interfering with the decree or order appealed against. Section 79B of Civil Procedure Act stipulates:-

79B ***Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against he may, part of a decree or order appealed against he may, notwithstanding section 79C, reject the appeal summarily.***

One does not have far to seek to see that before an appeal is admitted to hearing the question of its dismissal for want of prosecution is premature for the simple reason that it has not been certified that there is sufficient ground for it to proceed to hearing. That step is not a matter by either party to the appeal, rather, it is a judicial step. In the instant case, the appeal is yet to be admitted. The present practice before a judge peruses the record of appeal to determine under section 79B (supra) whether to admit the appeal to hearing or not is not embarked on until the lower court record has been typed and released to the High Court. This exercise dissipates time, and neither party to the appeal can be blamed for it. Perhaps when all stations of courts have been computerized, this will speed up the exercise and cut down on delays currently experienced by litigants.

Where the appeal has been admitted, unless directions under Rule 8B (1) of Order 41 have been given, the appeal cannot be said to be ripe to go to hearing. Until all the steps necessary to be taken under the rules have been taken to facilitate the setting down of the appeal for hearing, it cannot be said that an appellant is responsible for the delay unless it can be shown that such steps were his responsibility under the Rules. This cannot be said to be the case here. There is no dispute that the appeal herein has not yet been admitted, and the question of directions does not arise until such admission. Admission is not a matter for the appellant nor is the giving of directions. It is patently clear that the application is premature. Mr. Anziya was quite right in his submission in this regard.

The respondent was seeking the discretion of the court to dismiss the appeal. But he quoted the wrong provisions of the law. He premised his application on Order XLI Rule 5 which applies to suits when there were specific Rules applicable to appeals in Order XLI Rule 31. The court will normally not exercise its discretion where a litigant seeks the exercise of such discretion on the wrong provisions of the law. On this ground alone, the application is incompetent.

In the result, the application is struck out. But even if the correct provisions of the law were still quoted, I would still have dismissed the application for the reasons I have given above.

Dated at Kakamega this 7th day of June, 2007

G. B. M. KARIUKI

J U D G E