REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

Civil Appeal 61 of 1997

JULIUS MWORIA……..…….…….. APPELLANT

VERSUS

STANLEY K. MWITHIMBU….……..……RESPONDENT

R U L I N G

1. The Application seeks Orders Under Order XLI rule 31 of the Civil Procedure Rules that the Appeal herein be dismissed for want of prosecution. In the grounds in support and the Affidavit of Tom Onyambu, Advocate, sworn on 26.4.2007, it is the Respondent's contention that the Appellant having filed the Appeal in 1997, slept and enjoyed orders of stay of execution for ten (10) years to the prejudice of the Respondent who has continued to suffer costs and great anxiety.

2. The Appellant did not file any reply to the Application but his advocate argued that as a matter of law, the Application could not be granted as framed and filed. The reason given is that no directions under Order XLI Rule 8(b) were given in the matter and therefore no orders under Order XLI Rule 31 could be granted. Further, that since the supporting Affidavit to the Application was sworn by an Advocate and not a party, the same ought to be struck off and without it, the Application would be bare, unsupported, and ought to be struck out.

3. I have seen the record in this matter and I note that after the Appeal was filed in 1997 (on an unclear date), the Appellant appeared before Etyang J. on 1.10.1997 seeking orders of stay of execution of the decree and judgment in BPRT Nos. 11,12, 17, and 18 of 1997 and interim orders were granted and confirmed on 9.12.1997 after hearing inter-parties.

4. On 11.9.2000, the Respondent applied that the Appeal be dismissed for want of prosecution and it would seem that the Application was never determined although it came up for hearing on 19.2.2001, 19.3.2001 and 14.5.2001 without conclusion and on the latter date, the following order was recorded;

"By consent applications in HCCA No. 61 and HCCA 59 of 1997 are hereby consolidated so that can (sic) be heard together. Appeal is hereby admitted. The two Appeals are hereby admitted for hearing.

Tuiyot J.

14.5.2001

By consent mention on 18.6.2001"

5. On 18.6.2001, the Appeal was fixed for hearing on 9.7.2001 but it is unclear what happened on that day but again the same was fixed at the registry for hearing on 1.10.2001 when it was adjourned to 16.9.2002. No record of what happened on that day exists but the matter was placed before me on 14.2.2006 when I ordered for a mention on 14.3.2006 together with HCCA 59/97 but on that day it is again unclear what happened as the matter was certainly not in court but on 19.6.2007 the instant Application was listed for hearing. On that same day a similar Application within HCCA 59/97 was argued and at the time of writing this Ruling, it is in my custody. I have perused HCCA 59/97 and of interest is that the orders of consolidation made on 14.5.2001 in this Appeal are not recorded in that other Appeal. In fact on 9.7.2001, that appeal was separately fixed for hearing on 20.8.2001 without regard to the earlier orders made within this Appeal. More importantly is that on 18.7.2006, parties in HCCA 59/1997 recorded a consent order in the following terms:-

"**Applications dated 11.9.2000 duly filed in Civil Appeals Numbers 59/97 and 61 of 1997 be and are hereby withdrawn with costs to the Appellants/Respondents in the said Application. Each of the Appeals to proceed separately from now henceforth"**.

These orders although affecting proceedings in HCCA 61/97 presently before me is not recorded in the file and is not part of the record in this Appeal.

6. Why am I taking trouble to state all these things? Because Order XLI Rule 8B of the Civil Procedure Rules provides as follows:-

"**(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 gives directions under this rule.

(3) The judge in chambers may give directions concerning the 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 or 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 record, 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 transcript 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;"

7. The above Rules are in mandatory terms and from what I have stated above, the orders of 14.5.2001 as to the hearing of certain applications within the Appeal cannot be said to be "**directions**" in the language of Order XLI Rule 8B generally. I cannot also import the order made in HCCA 59/1997 on 18.7.2006 and presume that the order that the two Appeals do proceed separately can by itself be termed "**directions**" as envisaged by that Rule. The end result therefore is that although otherwise a fit case for an order of dismissal for want of prosecution, without directions being given, properly and within the Rules, I cannot see that this court applying its mind to the proper rule can dismiss the Appeal as is sought by the Respondent.

8. I am aware that where there is delay and the same is neither explained nor excusable, this court should otherwise dismiss the Appeal. In this case, the delay is not properly explained but as argued by counsel for the Appellant, the failure on the part of the Respondent to follow the necessary procedure to have the Appeal dismissed is a reason that would now tie the hands of this court. I should also add the Respondent should have noted that a similar application for dismissal of the Appeal is still pending and should have taken steps to regularize the status of that Application before filing this one.

9. In the event and since the Application is premature and although otherwise merited, the same has to be dismissed. The Appellant is to blame for the eventual situation obtaining and cannot get costs and therefore each party shall bear its own costs.

10. In the meantime, parties should now take directions in this Appeal forthwith. Because the Application within **HCCA 59/97** is intertwined with this one, the orders made herein shall apply to that application within **HCCA 59/97** is intertwined with this one, the orders made herein shall apply to that Application Mutatis Mutandis. A copy of this ruling shall be placed in that file.

11. Orders accordingly.

DATED SIGNED, AND DELIVERED AT MERU THIS 24TH DAY OF JULY 2007.

ISAAC LENAOLA

JUDGE

In the presence

Mr. Onyambu Advocate for the Appellant

N/A Advocate for the Respondent

ISAAC LENAOLA

JUDGE