



REPUBLIC OF KENYA

HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL APPEAL CASE 370 OF 2002

KENYA ROAD TRANSPORTERS LIMITED..... APPELLANT

VERSUS

KANYORO GICHUKI..... RESPONDENT

RULING

The Notice of Motion herein, dated 8/9/04, under Order 41 rule 31 and Section 3A of the Civil Procedure Act, Cap. 21, Laws of Kenya, seeks:

1. Dismissal of the appeal herein for want of prosecution.
2. Release of the K.Shs.185,310/- deposited as security in the joint names of Counsel for both sides, to the Respondent/Applicant's Advocate.
3. Costs of this application to be borne by the appellant.

The grounds in support of the application are, **inter alia**, that:

1. The appellant has not filed a Record of Appeal since it filed the Memorandum of Appeal, and has failed to comply with this court's orders dated 27/4/04 requiring the Appellant to pay K.Shs.1,500/- to the Respondent and have the same set down for hearing within 45 days.
2. It is now over one year since the appellant filed its Memorandum of Appeal yet the appellant neither paid the costs of K.Shs.1,500/- to the Respondent after 45 days nor filed its Record of Appeal or in any way tried to further prosecute this appeal.
3. The Appellant has failed to comply with the orders of this court, dated 27/4/04, requiring the appellant to fix the appeal for hearing within 45 days from the date of the said orders.

In opposition, the Respondent avers, **inter alia**, that: whereas the judgment appealed against was delivered on 12/7/02, the appellant wrote on 22/7/02 requesting for certified copy of the proceedings, together with the judgment and the decree, but the same have not been availed by the Lower court despite several letters, and by 26/4/04, the court wrote stating that the above documents were not ready. That is

sufficient reason for this application not to be allowed, asserts the Respondent.

In his Supplementary Affidavit, the Applicant/Respondent avers that the appellant has not complied with the order of this court, upon which the stay order was given, in that it failed to deposit the decretal sum, in full, and has failed to set down the appeal for hearing as per this court's orders within 45 days; that it is now over 3 years since the appeal was filed and the appeal has not even been admitted to hearing because of failure to comply with the provisions of Order 41 of the Civil Procedure Rules. The delay is an abuse of the court process and prejudicial to the Respondent as it denies him enjoyment of the fruits of his successful litigation.

Having carefully perused the pleadings herein, and considered the submissions by the learned counsel for both sides, made on 17/3/06, I have reached the following findings and conclusions.

The Original Record of Appeal, and thus the appeal, filed in court on 12/5/05, has never been admitted owing to non-compliance with the provisions of Order 41 of the Civil Procedure Rules. Appellant's efforts to rectify the defects bore no fruit as the purported Supplementary Record of Appeal, dated 28/6/05, was prepared and filed without the leave of this court. The same was accordingly struck out by this court on 17/3/06.

Despite the delay in moving the appeal process, this court, vide Visram J, granted the appellant stay of execution on 27/4/04, on condition that the appellant deposits the full decretal amount, and sets down the appeal for hearing within 45 days from 27/4/04. The appellant was also to pay costs – K.Shs.1,500/- to the Respondent. Regrettably, the appellant has not complied with any of the above conditions, four years down the line. The reason advanced by the appellant, especially for failure to set down the appeal for hearing within 45 days of the order, is that the proceedings from the lower court were not ready, and without those, this court's orders could not be complied with.

With due respect, I find that to be a lame and poor excuse for non-compliance with this court's orders. There is no reason, nor record, that the appellant applied for extension of this court's orders upon discovery that the orders could not be complied with, within the prescribed period of 45 days. Neither is there any satisfactory reason why the order on depositing the decretal sum in a joint account in the name of the counsel for both sides could not or was not complied with, to date. Worst of all, it is not reasonably credible that the appellant has failed or failed to pay the poultry costs ordered by this court.

It is difficult to accept the failure to deposit the decretal sum on the basis that there were differences between what was apparently deposited, and what was in the decree. It is the appellants who extracted the decree, with all the figures therein, as appellants.

For all the foregoing reasons, I find and hold that the appellant/Respondent has no satisfactory reason for not moving the appeal process. Nor has the appellant explained why it failed to comply with this court's orders, dated 27/4/04.

Accordingly, the application herein, for dismissal of the appeal for want of prosecution, is granted, with costs to the applicant/Respondent, and against the Appellant.

I further grant prayer No. 2 in the application herein, and order that the appellant do pay costs of this application.

It is so ordered.

DATED and delivered in Nairobi, this 24th Day of July, 2007.

O.K. MUTUNGI

JUDGE