REPUBLIC OF KENYA

IN THE HIGH COURT

AT MOMBASA

CIVIL APPEAL 124 OF 2002

GACHIE KARANJA ……...…… APPELLANT

- Versus -

MAHENDRA M. SHAH …… RESPONDENT

Coram: Before Hon. Justice L. Njagi

Mr. Odongo N/A for Appellant

Ms. Y. Ali for Respondent

Court clerk - Ibrahim

R U L I N G

This application is made by a notice of motion dated 20th January, 2006, and brought under Order XLI rule 31 of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act. The applicant seeks an order that the appeal herein be dismissed with costs for want of prosecution, and that the costs of this application be provided for.

The application is supported by the annexed affidavit of the applicant, Mahendra M. Shah. It is premised on the grounds that leave of the Business Premises Rent Tribunal to levy distress is not mandatory; that the appellant's application for leave to file a reference out of time to the notice in dispute was dismissed by the Tribunal; and that despite written notice of intention to apply for dismissal for want of prosecution, the appellant has neither prepared the record of appeal, nor taken any further steps to prosecute the appeal since 9th March, 2004, when the appeal was admitted.

By a replying affidavit sworn on 23rd March, 2006, the appellant, GACHIE KARANJA, avers that the application is brought in bad faith, that it is vexatious and a culmination of hidden injustice tricks. He also states that this averment is based on the fact that all along the Respondent's counsel has engaged his advocates on how to have this matter settled amicably only to discover that the respondent was only scheming to prepare ground for this application. He further deposes that the delay in not prosecuting the appeal was not deliberate as it was partly caused by the deliberate act of the respondent. He finally states that his appeal has high chances of success and prays that he be allowed to prosecute the same and to show that he is serious this time, he prays that a time limit within which to file the record of appeal be given.

At the hearing of the application on 1st October, 2007, Ms. Ali appeared for the respondent but there was no representation for the applicant. The court record shows that the applicant's advocates were served with a hearing notice on 13th August, 2007. That was about one and a half months before the hearing date which was taken on 7th August, 2007. Upon receipt of the hearing notice, the applicant's and advocates endorsed the same as follows –

"Received on 13/08/2007 under protest as the date was taken ex parte without invitation and the said date is not convenient as our Mr. Odongo who has the conduct of this matter will away (sic) attending a conference from the 1/10/2007 to 7th October, 2007.

Kindly invite us for another date."

The endorsement is signed by Kimani Odongo & Associates, Mombasa.

I wish to make some three peripheral observations about this application. Firstly, I don't believe that Mr. Odongo was attending any conference anywhere from 1st to 7th October, 2007. As I write this ruling, this court has another ruling pending in an application in HCCC Misc. Application No. 408 of 2007, KP&L Co. LTD. v. IRENE WANJIRU KAMU, in which Mr. Odongo appeared before the court on 4th October, 2007, when he was allegedly attending a conference. Failure or refusal to attend court deliberately in order to remonstrate against non invation to fix a hearing date is conduct most unbecoming an officer of the court. The least respectable thing that Kimani Odongo & Associates should have done would have been to instruct another advocate, whether inhouse or external to represent them and advance their cause at the hearing. But to feign Mr. Odongo's absence when he is actually present is unprofessional and misconduct which this court will not countenance. Mr. Odongo simply had no excuse, let alone reason, for not attending court.

Secondly, the hearing notice served on Kimani Odongo & Associates showed that the application which was coming for hearing was the one by notice of motion dated 20th January, 2006. But the minute on record reads that the application set down for hearing was the one dated 24th March, 2006. This was erroneous inasmuch as the latter application had been compromised by the consent order filed in court on 10th May, 2006, and adopted by the court on the same date. The hearing notice served on the appellant's advocates was therefore correct as it must have been clear to both sides that the only application remaining to be heard was that one dated 20th January, 2006.

Lastly, Order XLI rule 31 under which this application is brought requires that applications for dismissal for want of prosecution be by summons in chambers. The application before the court is brought by way of a notice of motion. In view of the wording of Order L rule 9, I don't think that this is fatal. This rule is to this effect –

"Where any application authorized by these Rules to be made at chambers is made in court, any additional cost occasioned thereby shall be borne and paid by the party making the same, unless the court shall order otherwise."

These words are as clear as daylight, and I have nothing useful to add thereto.

For the appellant's advocate's deliberate refusal to attend court on the appointed day, Mombasa High Court Civil Appeal No. 124 of 2002 is hereby dismissed with costs to the respondent. The appellant will also meet the costs of this application.

It is so ordered.

Dated and delivered at Mombasa this 19th day of October, 2007.

L. NJAGI

JUDGE