REPUBLIC OF KENYA

IN THE HIGH COURT

AT NYERI

CIVIL APPEAL CASE 21 OF 1998

JOSEPH NJOROGE WAMUGUNDA..……..APPELLANT

Versus

FRANCIS MWANGI WAMUGUNDA……...…..RESPONDENT

RULING

The Respondent in this appeal has made an application by way of a Notice of Motion dated 8th June 2007. By that application which is brought under ***Order XLI Rule 31*** of the Civil Procedure Rules the Respondent seeks the dismissal of this appeal for want of prosecution. ***Order XLI Rule 31(1)*** provides as follows:

"***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 a liberty either to set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution."***

The record of appeal shows that the appeal was in respect of a ruling delivered by the lower Court on the 14th April 1998 in SRM CC 65 of 1973. A casual glance of the proceedings in the lower court of the 27th March 1998 shows that the learned magistrate noted that this matter by then had been pending before Court for 25 years. That is the case which is the subject of the present appeal. That as it may be the present appeal was admitted on 28th September 1999. Thereafter the Respondent on 21st March 2001 attended the Court registry and fixed the matter for directions for the 27th April 2001. The proceedings do not show what happened on that day. The Respondent again at the registry on 6th February 2002 fixed this matter for directions on 3rd May 2002. On 3rd May 2002 when the matter came before the Deputy Registrar of the High Court, the Appellant applied for an adjournment on the basis that the directions were before a judge. The Respondent did not get tired but yet again on the 12th September 2002 fixed the matter for directions on 25th October 2002. On that day directions were given for the hearing of this appeal. The Respondent then fixed the appeal for hearing on 29th July 2003. On that day the Appellant

informed the Court that the record of appeal had not been prepared and filed. The matter was then adjourned generally. As it shall be seen from the above record the Appellant took no action to ensure that the appeal is heard. The next action on the proceedings is the fixing for hearing of the present application.

What does the Appellant say in response to the application? In opposition to the application the Appellant stated that the application is incurably defective for failing to abide by the requirements of ***Order L R 15 (2).*** That rule provides as follows:

"***Every motion and summons shall bear at the foot the words –***

"If any party served does not appear at the time and place above-mentioned such order will be made and proceedings taken as the court may think just and expedient."

The Appellant relied on the holding of the case of **ROSE ATIENO V CITY COUNCIL OF NAIROBI HCCC NO. 1848 OF 2000.** That ruling related to an objection raised to an application that had failed to abide by the provisions of that rule. The judge had the following to say:

"***the rules of procedure are legislated to be followed. The application if filed by a firm of advocates who are presumed to know the procedural law. It does not lie in their mouth to state that it is a defect in form and this court can ignore it."***

In the premises, I am of an opinion that as no step is taken to rectify the defect which is on record, the application is defective and should be struck out with costs. Orders accordingly."

I find that I am not persuaded by the finding of that ruling. Failure to comply with the requirements of ***Order L Rule 15 (2)*** is not fatal to an application. What that rule requires is that every motion or summons do have a warning or a caution to the respondent that if he fail to attend court the court would proceed to give orders as necessary. To fail to quote the words of that rule does not make an application incompetent. Such failure is more of an irregularity which does not go to the root of the application. Failure to quote those words would probably only lead to the setting aside of any orders that would be given in the absence of conformity to that rule. The mischief that this rule addressed was to ensure that the Respondents who would be served with an application would be made aware that if they fail to oppose the application by attending the hearing they would suffer the consequences of orders being granted in accordance with such an application. It therefore follows that failure to abide by the provisions of that rule does not make an application incompetent particularly as in our case where the Respondent attended the hearing. It ought to be noted that the Appellant did not respond to the allegation of delay in prosecuting this appeal. The only submission raised by the Appellant's counsel was that the appeal had merits. My response to that submission is if indeed the appeal had merit the Appellant should have moved with haste to prosecute the appeal. The end of the matter is that I find the Respondents' Notice of Motion dated 8th June 2007 to be merited and accordingly the appeal is hereby dismissed for want of prosecution with costs being awarded to the Respondents in the appeal.

MARY KASANGO

JUDGE

Dated and delivered at Nyeri this 11th day of October 2007.

By M. S. A. MAKHANDIA

JUDGE