

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL APPEAL 878 OF 2005

ADNAN KARAMA PETROLEUM LIMITED (T/a A. K. FILLING STATION)...APPELLANT

V E R S U S

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....RESPONDENT

R U L I N G

The Respondent in this appeal has applied by notice of motion dated 13th February, 2007 for the main order that the memorandum of appeal be struck out and the appeal dismissed for want of prosecution. The application is stated to be brought under Order 41, rule 31 (2) of the Civil Procedure Rules (the Rules) and also under section 3A of the Civil Procedure Act (the Act). It is supported by the affidavit of the Respondent's advocate sworn on 13th February, 2007. There is a supplementary affidavit sworn by the same advocate on 30th May, 2007 in answer to new matters raised in the replying affidavit.

The Appellant has opposed the application as set out in the replying affidavit sworn by one of its directors on 23rd April, 2007. The grounds of opposition emerging from the replying affidavit are that the application is fatally defective and cannot stand in law; that the Respondent has not disclosed any prejudice to it caused by the alleged delay in prosecuting the appeal; and that the Appellant has not been guilty of any willful delay.

I have considered the submissions of the learned counsels appearing, including the authorities cited. It is clear to me that the Respondent cannot competently apply for an order to strike out the memorandum of appeal. There is no provision under Order 41 of the Rules (which governs appeals) that gives the court jurisdiction to strike out a memorandum of appeal.

It is also clear to me that the Respondent cannot apply for dismissal of the appeal for want of prosecution under Order 41, rule 31(2) of the Rules which states:-

“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.”

The best that a respondent can do is to write to the registrar to request him to list the appeal before a judge in chambers for dismissal under that rule. He cannot competently apply under the rule for dismissal of the appeal; the rule does not give him that right. In this connection I have read the two decisions by my learned brother, Mutungi, J referred to me by the Respondent's learned counsel. They are **LABAN ONONO & ANOTHER –VS- DAN OWITI, Nairobi HC Civil Appeal No. 452 of 2003** (Unreported) and **ANNE W. CHEGE & ANOTHER –VS- PETER KISUNA MUSASYA, Nairobi HC Civil Appeal No. 840 of 2003** (Unreported). The learned judge allowed applications for dismissal of the appeals for want of prosecution brought under Order 41, rule 31 (2), arguing that an indolent appellant cannot hide behind that rule to resist an otherwise meritorious application for dismissal. He also held that it was essentially irrelevant whether the dismissal application is initiated by the respondent or the court (registrar).

I must, with the greatest respect, differ from my learned brother. Nothing good can ever come from ignoring unambiguous rules of procedure; it can only create uncertainty and confusion. Whereas I agree that there should not be slavish adherence to rules of procedure where dictates of justice indicate

otherwise, there is always the inherent power of the court (saved by section 3A of the Act) that a litigant can have recourse to. Where directions under Order 41, rule 8B of the Rules have not been given, thus shutting out a respondent from an application under Order 41, rule 31 (1), such respondent is not entirely helpless. He can seek directions of the court, which would only be too glad to impose time limits within which the Appellant must do certain things to move the appeal forward under pain of it being dismissed for want of prosecution under the court's inherent jurisdiction. A respondent can also apply directly for dismissal of the appeal for want of prosecution, invoking the inherent jurisdiction of the court. With these avenues open to a respondent, why should he be allowed to apply under Order 41, rule 31 (2) when the rule does not give him the right to so apply?

I therefore hold that the Respondent's application, as brought under Order 41, rule 31 (2), is incompetent and liable to be struck out. But as it happens, the Respondent has also invoked section 3A of the Act. As I have pointed out above, an application for dismissal of an appeal for want of prosecution that invokes the inherent power of the court is proper. I will therefore consider the Respondent's application as brought under section 3A aforesaid on its own merits.

The appeal herein was lodged on 8th November, 2005. The memorandum of appeal was served upon the Respondent on the same day. The present application was filed on 21st February, 2007 – that is more than one year and three months after the appeal was lodged. Apart from applying for certified copies of the proceedings on 7th November, 2005 (with reminders on 3rd March and 8th November, 2006) the Appellant has not done anything towards having the appeal heard. More particularly, it has not moved the court to have the appeal admitted to hearing. It has not sought directions under Order 41, rule 8B nor filed a record of appeal.

What is the Appellant's explanation for this inactivity? It is that it has been waiting for the National Environment Tribunal (whose decision is appealed against) to supply it with a certified copy of the proceedings. But there is evidence (exhibited at paragraphs 4 and 5 of the Respondent's supplementary affidavit) that the Appellant was in fact supplied by the Tribunal with a copy of the proceedings. The Appellant is therefore not candid at all.

I find that the Appellant has been guilty of inordinate delay in prosecuting its appeal. There is no reasonable explanation for this delay. Although dismissing an appeal unheard is a drastic step that the court should not take lightly, there will be no sympathy for an indolent and untruthful litigant.

In the result I will allow the Respondent's application by notice of motion dated 13th February, 2007. The appeal herein is hereby dismissed with costs to the Respondent for want of prosecution. There will be an order accordingly.

DATED AT NAIROBI THIS 8TH DAY OF NOVEMBER, 2007

H. P. G. WAWERU

J U D G E

DELIVERED THIS 9TH DAY OF NOVEMBER, 2007