REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Appeal 840 of 2003

ANNE W. CHEGE & ANOTHER…….....…….APPELLANTS

VERSUS

PETER KISUNA MUSASYA…….....…….RESPONDENTS

R U L I N G

The Notice of Motion herein dated 15th August 2005 and filed on the same date seeks dismissal of the appeal for want of prosecution under Order 41 rule 31(1) of the Civil Procedure Rules and Section 3A of Cap 21, Laws of Kenya.

The grounds for the application are that: the appeal was filed on 24th November 2003 and served on the Respondent on 17th May 2004. Since then, the appeal has not been prosecuted and the appellants, who are enjoying a stay of execution order, have taken no steps at all to prosecute the appeal. The applicant avers that he is greatly prejudiced by the delay because he cannot access or realize the fruits of his successful litigation for a judgment in a case where the cause of action arose over 12 years ago.

In opposition, the appellant/respondents aver that: the application is brought under wrong provisions, namely Order 41 rule 31(2) rather than sub-rule (1) of the said Rule; that the delay is due to failure by the lower court to supply certified copies of the proceedings, despite reminders by the appellants.

Perusing through the pleadings and the submissions by Counsel for both sides, I have reached the following findings and conclusions:

On the 31/1/05 and 29/6/05, the appellants/respondents wrote reminders to the Executive Officer, on the certified copies of the proceedings. But whereas the two reminders talk of request for proceedings, there is no copy of the original request for the said proceedings, and hence, no evidence that the proceedings were ever requested for and the requisite fees paid, as is required. The initial letter is said to have been written on 14/11/03. But as stated, there is no evidence of such an original request, nor was the request copied to the Respondents.

There is no evidence of any follow up of the request for proceedings from the lower court, between 14/11/03, and the early part of 2005, and clearly the appellants do not seem to have done enough.

Whereas the Respondent/Applicant should invoke Order 41 rule 31(1) of the Civil Procedure Rules, rather than sub-rule (2) of the same rule, which is invocable by the Registrar, it is obvious that sub-rule (1) of rule 31 is not available to the applicant, and all because of the laxity of the appellants in not pursuing the appeal vigorously, Sub-rule (1) of Rule 31 provides as under:

“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 at liberty either to set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.”

The steps preceding the applicability of the above provisions is entirely within the control of the appellant, not the Respondent. For it is the duty of the appellant, after launching the appeal by filing the memorandum of Appeal to: obtain certified copy of the proceedings from the lower court; prepare the Record of Appeal before the appeal goes for admission by the Judge in charge of Civil Appeals. Once the appeal has been admitted, the file goes back to the Registrar who, through a notice, summons the parties to the appeal, to appear before the Judge for directions. It is only after the directions that the appeal can be set down for hearing, as per the above Order 41 rule 31(1) of the Civil Procedure Rules.

It is thus evident that it is an abuse of the court process for an indolent appellant to use the absence of directions as a shield against a Respondent who seeks dismissal of the appeal for want of prosecution.

Similarly, sub-rule (2) of the same rule should not be invoked by an indolent appellant to defeat an otherwise meritorious application for dismissal of the appeal for want of prosecution.

Finally, the Respondent/Appellants aver that there is no prejudice to the Respondent since the entire decretal amount has been placed in a joint interest earning account, and it is safe and hence the Respondent/Applicant has nothing to worry about.

With all due respect to the Appellant/Respondent’s Counsel, this submission is both irritating and a total misconception of the rights of a successful litigant, as in this case. It’s of no use to the applicant that the total decretal amount is somewhere safe. If he cant access and make use of that money, then he is denied the right to the enjoyment of the fruits of his successful litigation. No court should encourage such denial of any party’s rights.

All in all therefore, and for the reasons given above, I grant the Notice of Motion herein, and accordingly dismiss the appeal for want of prosecution in terms of the provisions of Order 41 rule 31(2) of the Civil Procedure Rules.

I further order that the appellants/Respondents do pay the costs of both this application and the appeal herein.

DATED and delivered in Nairobi, this 29th Day of March, 2006.

O.K. MUTUNGI

JUDGE