

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Appeal 127 of 2000

TAYARI FARMERS COMPANY LTD.....APPELLANT

VERSUS

PAUL MBUGUA NJAU.....RESPONDENT

RULING

The respondent, Paul Mbugua Njau, has made an application under the provisions of **Order XLI rule 31(a) of the Civil Procedure Rules** seeking the order of this court to have the appeal filed by the appellant Tayari Farmers Company Limited, dismissed for want of prosecution. The grounds in support of the application is that the appellant had failed to prosecute the appeal four years and three months after the appeal was admitted to hearing. The application is supported by the annexed affidavit of the respondent. The application is opposed. An official of the appellant Benson Kiragu Miritu has sworn a replying affidavit opposing the application. In the said replying affidavit he has stated that the delay in preparing the record of appeal was occasioned by the Molo Law Courts which had failed to avail the proceedings and the judgment to him in spite of making a request for the same.

At the hearing of the application, Miss Njoroge submitted that the High court had on the 5th of February 2001 written to the Senior Resident Magistrate Molo informing him that the appeal had been admitted to hearing and that the proceedings ought to be typed and be availed to the High Court to enable the appeal could be heard. Miss Njoroge however laments that since then the appellant had not made any effort to procure the said proceedings or to prepare a record of appeal despite of several reminders being sent to its counsel by the respondent. She submitted that the appellants had made no effort to fix this appeal for hearing. She therefore urged this court to dismiss the appeal for want of prosecution.

Mr Karanja, learned counsel for the appellant admitted that no record of appeal had been prepared by the appellants. He however pleaded with this court not to dismiss the appeal for want of prosecution. He urged this court to strive to have the appeal heard and determined on merits. He further urged this court to consider applying substantial justice in this matter by allowing the appellant to prosecute his appeal. He submitted that the appellant was willing to comply with any conditions that may be imposed by the court. He further submitted that Miss Njoroge was not properly on record as acting for the respondent because she had not sought leave of the court to be allowed to so appear for the said respondent. He urged this court to dismiss the application with costs.

I have carefully considered the rival arguments made before me by the learned counsel for the appellant and the learned counsel for the respondent. I have also read the pleadings filed by the parties to this application. This appeal was filed on the 5th of December 2000. There is no evidence that the appellant applied for the proceedings of the lower court to be typed. The appeal herein was admitted to hearing on the 2nd of February 2001. The Deputy Registrar of this court requested the proceedings to be typed by the Senior Resident Magistrate Molo and the same to be availed to this court for the purpose of the hearing and determination of this appeal. The said proceedings were typed and the subordinate's court file together with the proceedings sent to the High Court. However since the filing of the said appeal, the appellant has made no effort to prepare the record of appeal or to take directions to enable the appeal to be heard by this court. It is therefore untrue for the appellant to allege that it was hampered from filing

the appeal because of lack of typed copies of the proceedings.

The appellant has been indolent. It has shown no interest at all in prosecuting this appeal. The respondent sent the appellant more than six reminders since the year 2003 to expedite the preparation of the record of appeal so that this appeal could be heard. The appellant however took no action. It is now more than five years since the appeal was filed and the appellant has taken no single step to have this appeal ready for hearing. In the circumstances of this case, the application by the respondent that the appeal be dismissed for want of prosecution has merit. Although Miss Njoroge learned counsel for the respondent did not seek the leave of the lower court to be allowed to come on record on behalf of the respondent as provided for under **Order III rule 9A** of the **Civil Procedure Rules**, this court would in any event, on its own motion dismiss the appeal herein for want of prosecution. The appellant has not given any reasonable explanation why it failed to take any steps to prosecute the appeal. It is apparent that the appellant is no longer interested in this appeal. The submissions made by its counsel, in my opinion, was meant to shore up a case which the appellant is actually no longer interested in. I therefore dismiss the appeal herein for want of prosecution.

Since Miss Njoroge is not properly on record, I will make no orders as to costs in this application.

DATED at NAKURU this 8th day of March 2006.

L. KIMARU

JUDGE