



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Appeal 184 of 2004

EAST AFRICA SPECTRE LTD APPELLANT

VERSUS

JAMES NDAKALA AKUBALORESPONDENT

**(Being an Appeal from the Judgment and Decree of the chief Magistrate’s Court at Nairobi
Milimani Commercial Courts in CMCC No.6635 of 2002 before Mr. Elkidy P.M. delivered on the
3rd March 2004).**

RULING

I: BACKGROUND OF APPLICATION

1. An award was made to the respondent original/plaintiff by the magistrates court on tort in favour of the respondent. The appellant/original defendant found that the award given was in excessive on “general damages” and that the issue of “loss of earning capacity” had not been pleaded yet awarded.
2. The respondent/original defendant/appellant filed this appeal in question on 18.3.04, 15 days after the judgment by the lower courts was delivered. They deposited the decretal amount in Equity Bank.
3. The original plaintiff’s/respondent in the application and applicant in the application filed this present application seeking that this appeal be dismissed for lack of prosecution. The Application was first brought under order 16 r 5 Civil Procedure Rules. The applicant prior to hearing, amended this to read Order 41 r 31 Civil Procedure Rules that actually applies in the case of an appeal.
5. The advocate for the applicant deponed an affidavit that he was under pressure from his client to finalise this matter and obtain the decretal amount due to his client. Letters to the chief Justice and law Society had been written of the delay.
6. In this instances an application for dismissal of an appeal for lack of prosecution can only be brought under order 41 r 31 Civil procedure Rules. This order requires that the appeal must first go for directions before the High Court. Three months after the giving of directions and no action has been taken by the appellant, then the other party may move the court to have the appeal dismissed.
7. In this appeal no directions has been taken. The application before me is therefore premature and cannot stand. The same is hereby struck out with costs to the appellant.

Dated his 18th day of May 2006 at Nairobi.

M.A. ANG'AWA

JUDGE

Onyancha Bw'omote & Co. Advocates for the appellant/applicant

Kimani & Michuki Advocates for the respondent