

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Appeal 20 of 2004

SOKORO PLYWOODS LTD.....APPELLANT

VERSUS

ALFRED OMUTOKO NDENGU.....RESPONDENT

RULING

The respondent in this appeal has filed an application under the provisions of **Order XLI rule 31(2)** of the **Civil Procedure Rules** seeking the orders of this court to have the appeal herein dismissed for want of prosecution. He prayed that the appellant be condemned to pay the costs of the application and of the appeal. The grounds in support of the application are that the respondent contends that since the appellant filed the appeal on the 28th of January 2004, it has taken no steps to have the appeal heard. The respondent was of the view that the appellant had been indolent in prosecuting the appeal and had therefore prejudiced him from not enjoying the fruits of the judgment which was delivered in his favour by the subordinate court. He stated that there has been an inordinate delay on the part of the appellant to prosecute the appeal which was inexcusable in the circumstances of this case. The application is supported by the annexed affidavit of Stephen Orina, the advocate for the respondent.

The application is opposed. Njeri Kariuki learned counsel for the appellant has sworn a replying affidavit explaining why she has been unable to have the appeal listed for hearing. She deponed that she had made futile efforts to secure the subordinate court's file so that she could have the proceedings typed and the record of appeal prepared. She deponed that it is only as recent as the 29th of May 2006 that she received correspondence from the court informing her that the file had been found to enable her file the decree and prepare the record of appeal. She deponed that the delay in readying the appeal for hearing was caused by the court and not by the appellant. She therefore deponed that the application ought to be dismissed with costs.

At the hearing of the application, I heard the rival submissions that were made by Mr. Nyamwange learned counsel for the applicant and Mr. Mongeri learned counsel for the respondent. They basically reiterated the contents of the application and the replying affidavit. The applicant referred this court to two decided cases in support of his application. I have carefully considered the arguments that were made before me by the parties to this application. The issue for determination by this court is whether the appellant has been guilty of inordinate delay in prosecuting this appeal to so as to make this court invoke the provisions of **Order XLI rule 31(2)** of the **Civil Procedure Rules** and dismiss the appeal for want of prosecution. What is the purport of this rule? As was held by Visram J. in Sokoro Saw Mills –vs- Alfonse Miano Nakuru HC Civil Appeal No. 24 of 1999 (unreported) at page 3:

“The purpose of this rule is to ensure the expeditious disposal of appeals. Although it does not specifically say so, it imposes an obligation on an appellant to diligently process his appeal.”

In Amalgamated Saw Mills –vs- Gladys Imbuka Nakuru HC Civil Appeal No. 96 of 2000 (unreported) Musinga J. held at page 3 that:

“An appellant must be proactive in pursuing his appeal once filed. A party cannot sit back and do nothing for nearly four (4) years on the pretext of waiting for certified copies of proceedings and

judgment ... although under Order XLI rule 31(2) it is the registrar who is empowered to list an appeal before a judge for dismissal if within one year after the service of the memorandum of appeal the appellant fails to set down the same for hearing, the court is empowered to invoke its inherent jurisdiction to act in any matter where it appears that a party is abusing the court process.”

What is the position in this appeal? The appellant has deponed through counsel that it was prevented from preparing the record of appeal because it was unable to secure the subordinate court's file so that it could have the proceedings typed and record of appeal prepared. The respondent however is of the view that the reasons advanced by the appellant for the delay are untenable. He submits that there has been inordinate delay which has prejudiced him. He complains that he has been unable to enjoy the fruits of his judgment due to the indolence of the appellant.

Having carefully considered the reasons advanced by the appellant for the delay in not filing the record of appeal as soon as the memorandum of appeal was filed, I am convinced that the delay was caused by the fact that the appellant had not secured the typed proceedings from the subordinate court to enable it prepare the record of appeal in time. I however agree with the respondent that the appellant's conduct in this appeal has not been without blemish. The appellant is not entirely blameless. It is apparent that apart from writing letters to court, the appellant has not actively pursued the tracing of the subordinate court's file so that the proceedings could be typed.

Be it as it may, I will decline to grant the application for dismissal for want of prosecution for the time being. The respondent informed this court that the subordinate court's file in respect of which this appeal arose has now been traced. I however order the appellant to file the decree and the record of appeal within fourteen (14) days of today's date. I have taken the liberty to admit this appeal to hearing. If the appellant does not file the decree and the record of appeal within the said period ordered by this court, this appeal will stand dismissed and the respondent shall have the costs of the appeal.

In the circumstances therefore I will disallow the application. I will however make no orders as to costs.

DATED at NAKURU this 20th day of July 2006.

L. KIMARU

JUDGE