



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Appeal 668 of 2003**

**DR. MICHAEL OLING WANGA.....APPELLANT**

**VERSUS**

**PHARMACEUTICAL MANUFACTURING CO. LTD..... RESPONDENT**

**R U L I N G**

This Notice of Motion, dated 27/1/05, and filed on 31/1/06, seeks two orders:

1. The appeal herein be struck out.
2. Costs of this application.

The application is supported by an Affidavit of Richard Kimani Mwaniki, the Senior Salesman for the Respondent Company, of 26/1/06 and filed on 31/1/06. The application is brought under no-known provision: **“under the inherent power of the court”**, but is on the grounds that: appellant filed the appeal on 9/10/03, and to date, the appellant has not served the Memorandum of Appeal on the Respondent; the appellant has taken no steps to prosecute the appeal; a stay of execution pending appeal was granted by the Subordinate court on 16/4/04 and the delay is unfairly denying the Respondent of his right to enjoy the fruits of its judgment.

In opposition, the Respondent filed a Replying affidavit, deponed by Philip Ocharo, Advocate, on 15/3/06, and grounds of opposition of even date.

During the hearing on 20/3/06, Mr. Ocharo, learned counsel for the Respondent, abandoned the grounds of opposition and relied on the Replying Affidavit in which he avers, **inter alia**, that the application has no place in law because S. 3A of the Civil Procedure Act, Cap. 21, Laws of Kenya, cannot be relied upon; the appellant applied for certified copies of the proceedings in the Subordinate Court on 12/9/03 and has followed that but has not been issued with the same and no Notice from the Registrar that the copies have been ready; that there is no requirement that the Respondent be served with the Memorandum of Appeal when the appellant applied for stay of execution, pending appeal; the Memorandum of appeal, together with application for stay, was served on the Respondent on 16/4/04. The Respondent further avers that the application is premature as there has been no directions, and that the appeal has a good chance of success. Finally, it is the Respondent’s case that this court’s jurisdiction has not been properly invoked; he did not know that the proceedings at the lower court were ready.

Having carefully perused the pleadings and considered the submissions by the two learned counsels, I have reached the following findings and conclusions:

There are clear provisions in the law on how to invoke this court’s jurisdiction. For dismissal of appeals for want of prosecution, which seems to be the case in the application before me today, it is Order 41 Rule 31 of the Civil Procedure Rules; especially sub-rule (1) of the above Rule.

For the applicant to come before this court under an iniquitous, and legally unheard of provision - **inherent power of the court** - is improper invocation of this court’s jurisdiction. There is no lack of specific provisions under which the orders sought here can be brought.

Section 3A of Cap. 21, Laws of Kenya, which are implicitly referred to, are not available where this court's jurisdiction has not been properly invoked, and this notwithstanding the clear provisions under which this application might have been brought.

I therefore hold that this court has no jurisdiction to entertain the application herein and accordingly, the application is dismissed with costs.

There are other grounds raised by the pleadings and submissions by both sides. But without proper invocation of the court's jurisdiction, I dare not venture into those grounds as any findings and orders would be null and void.

DATED and delivered in Nairobi, this 19<sup>th</sup> Day of July, 2006.

**O.K. MUTUNGI**

**JUDGE**