

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

Civil Appeal 452 of 2003

LABAN ONONO

DANIEL O. AKOKO.....APPELLANTS

VERSUS

DAN OWITI..... RESPONDENT

R U L I N G

The Notice of Motion herein dated 10/4/06 under Order 41 Rule 31(2) of the Civil Procedure Rules seeks dismissal of the appeal for want of prosecution on the grounds that the appellants have failed to take any step towards the prosecution of the appeal; and there is inordinate delay in setting down the appeal for hearing.

The application is supported by an Affidavit by Otieno Oluoch, of even date, which avers that the appeal was filed on 22/7/03 and since then, nothing has been done to prosecute the appeal; that by a consent order, the appellants had settled the decretal sum in full, the appeal serves no purpose.

In opposition, the Appellants aver that the application is incompetent as provisions of the provisions of Order 41 Rule 31(2) of Civil Procedure Rules, is invocable by the Registrar, not the Respondent; further that the application is premature since there has been no directions by the court.

I have considered the pleadings and submissions by counsel for both sides and I have reached the following findings and conclusions.

The decretal sum, the subject matter of the appeal herein, having been paid in full, the appeal, even if it were heard, serves no purpose, and would be waste of valuable judicial time.

This court has consistently held that an indolent appellant cannot hide under the provisions of Order 41 Rule 31(2) by arguing that those provisions are only invocable by the Registrar, rather than the Respondent, who should move the court under sub-rule (1) of the same Rule.

To hold otherwise is to miss the entire purpose of Rule 31 of Order 41, which is dismissal of appeals for want of prosecution. IN my humble view, it is essentially irrelevant whether that dismissal is initiated by the Respondent or by this Court. In either case, the issue is the same – want of prosecution of the appeal by the appellant.

In **ANNE W. CHEGE & ANOTHER VS. PETER MUSASYA, HCCA 840 of 2003** this court held that an indolent appellant cannot use sub rule (1) of Rule 31 in defence against an application for dismissal of the appeal on the basis that the Respondent should invoke sub-rule (1), not (2), when that sub-rule (1) is unavailable to the Respondent and all because of the fault by the appellant in whose control the process prior to directions by the court, referred to in sub-rule (1) lie entirely on the appellant, not the Respondent.

For all the above reasons, this court rules as under:

1. Grants the application herein and accordingly,
 - (a) dismisses the appeal herein, with cost to the Respondent/applicant and against the appellant.
 - (b) Appellant/Respondent to pay the costs of this application.

It is so ordered.

DATED and delivered in Nairobi, this 17th Day of July 2006.

O.K. MUTUNGI

JUDGE