

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Appeal 137 of 2002

JAMES OLUOCH APPELLANT

- Versus -

HAMID DINE ABDI RESPONDENT

Coram: Before Hon. Mr. Justice J. Njagi

Mr. Anyanzwa for Respondent/Applicant

Mr. Wameyo & Okumu for Appellant/Respondent

Court Clerk – Kinyua

R U L I N G

The application before the court is brought by way of an amended chamber summons dated 23rd September, 2004, and taken out under section 3A of the Civil Procedure Act, and Order XLI rules 1A, 8B and 31 of the Civil Procedure Rules. The applicant seeks orders that the appeal filed herein be dismissed for want of prosecution; that the appeal be struck out as no certified copy of the decree has been filed; and that costs of this application be provided for.

The application is supported by the annexed affidavit of the respondent/applicant sworn on 21st July, 2004 and further affidavit sworn on 24th September, 2004, and filed with the amended chamber summons on 27th September, 2004. It is based on the grounds that at the time of filing the application, almost two years had elapsed since the memorandum of appeal had been served on the respondent, and yet no certified copy of the decree had been filed since the filing of that memorandum. Consequently, the applicant has in the circumstances been denied the fruits of the judgment entered in his favour.

At the hearing of this application (before me,) Mr. Anyanzwa appeared for the applicant, but there was no attendance by or on behalf of the respondent. An affidavit of service sworn by Kennedy Kasamani and filed in court on 8th June, 2006, shows that the respondents were served on 5th May, 2006. As the respondents neither responded nor attended court, the application is, prima facie, unopposed. Unopposed as it is, however, it is subject to the following observations.

The application was first brought to court by way of a Notice of Motion dated 22nd July, 2004, and filed in court on 2nd August, 2004. On 19th August, 2004, it was fixed for hearing on 16th September, 2004. On the hearing date, justice Mwera recorded the following consent order –

“By consent, the Respondent/Applicant do file an amended Notice of Motion within 14 days from now. Appellant has 14 days to respond and then parties to fix hearing dates in the registry.”

The amended chamber summons was dated 23rd September and duly filed in court on 27th September, 2004, which was within the 14 days ordered by the court. However, according to Mr. Kasamani’s affidavit of service referred to herein above, the amended application was not served on the appellants

until 5th May, 2006. That was a delay of more than 1 year and 7 months, and no explanation has been offered for it. This delay has in turn contributed to the four years delay which Mr. Anyanzwa is now complaining about.

Having noted that the applicant himself is equally guilty of laches, I don't think that it would be appropriate to dismiss the appeal at this stage as prayed in prayer 1. However, as no certified copy of the decree has been filed, the appeal is hereby struck out in terms of prayer 2. The appellant will meet the costs of this application.

Dated and delivered at Mombasa this 7th day of July, 2006.

L. NJAGI

JUDGE