REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII

Civil Appeal 52 of 2004

G. ISSAIAS & COMPANY (K) LTD JOINT VENTURE …… APPELLANT

VERSUS

AMBROSE MOTURI ……. RESPONDENT

RULING

The appellant/applicant application is Under Order 44 rule 1 CPR and S.3A and 80 CPA and it seeks the court to reviews and/or set aside its Order of 9th July 2004.

After the appeal was filed and lower court record forwarded to court I went through the lower court proceedings and judgment and on 9th July 2004 and being satisfied that there was no reason to warrant court to interfere with the lower judgment dismissed the appeal summarily Under S. 79B of CPA. This is the Order the appellant want reviewed and set aside.

Mr. Okelo for the applicant submitted that the decision of 9th July did not show whether due regard was given to medical evidence in the lower court or the appeal was such that it warranted summarily dismissal. He further said that no prior Notice of dismissal was given to the appellant before the appeal was dismissed. He came to learn about the dismissal almost 8 months later.

Application was opposed by Mr. Anyona who first took issue with the supporting affidavit in that the deponent did not specifically state he was employed by the applicant and had authority to swear the affidavit. He further said that the applicant did not satisfy the conditions under Order 44 Rule 1 CPR as he did not show that there was discovery of new and important facts. There was no error made, he said.

Further it was submitted that the applicant has not annexed to his application the Order or decree he want reviewed. Even the judgment is not annexed. He further said application was brought 8 months after the order was made which is inordinate delay.

I have carefully considered the application and submissions. I do concur that under S.80 CPA and Order 44 Rule 1 CPR the court has discretion to review and set aside Orders or decrees, if there are good reasons given. I however find no good reasons in this application. The appeal was dismissed Under S.79B of CPA. The court clearly stated that it had gone through the proceedings and judgment of the lower court and was satisfied that there were no reason to warrant interference with the judgment. This court was live to the issue of medical evidence because ground 1 & 2 in the memorandum of Appeal touches exactly on that. It was after considering the medical evidence and other evidence the court was satisfied that there was no sufficient grounds to warrant my interfering with the judgment even if the appeal went to full hearing. There were no incentives or contradictions. The award was not excessive in the light of the injuries suffered. In summarily dismissing the appeal under S.79 B CPA Court was not obliged to write and state if it had considered the medical evidence or not. The provisions of that section clearly provides that a judge need to peruse the lower court's record and if he considers there are no sufficient grounds dismiss the appeal. There is no requirement to write a judgment and state why he considers there are no sufficient grounds. The court clearly stated that the judge had perused the lower courts record and was satisfied that there were no sufficient grounds to warrant interference with the judgment.This consideration was made with the grounds in the memorandum of appeal in mind.There is no new ground the applicant has raised in the application apart from his fear that the court might not have considered the medical evidence. This it did. Thus though I am alive to the holding in the case of OWIRO VS WESONGA (1982-88) 1KAR 828 that power of summary dismissal should be sparingly used this was a

clear case to invoke provisions of S.79B CPA.

The court was not bound to give notice to the applicant that it intended to make the dismissal Order. S.79B CPA has no such provisions. True Order 20 rule 1 CPR provides giving of Notice to parties but that is only where a hearing had taken place.Of Course the Deputy Registrar had an obligation to inform the parties of the decision of the court soon after it was made and this seem not to have been done. However that does not make the order invalid in any way.

Counsel for Respondent revised the issue that the applicant did not annex the order or decree he wanted reviewed to the application and as such there is nothing to review. This submission was not contraverted. The only annextures to the application is a bundle of letters between applicants counsel and the Deputy Registrar.S.80 CPA clearly states that it is only a person who feels aggrieved by a Decree or Order who may apply for review of judgment. The summary dismissal of the appeal was a judgment. The applicant should therefore have, applied for a certified decree or order of that judgment and annexure it to the application. S.2 of CPA clearly defines what a decree and an order are. As it were even the judgment was not annexed to the application.

From the above therefore I find application has no merit and the same is dismissed with costs.

Dated at Kisii this 28th day of April 2005

KABURU BAUNI

JUDGE

c.c. Mobisa

Mr. Nyachae for Mr. Anyona for Respondent

N/A. for Appellant.