

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL APPEAL NO. 7 OF 2004

NATIONAL BANK (K) LIMITED APPELLANT

-VERSUS-

PATRICK WAYUNDI MUNA..... RESPONDENT

RULING

This is a Chamber Summons purported to have been brought under Section 3 and 3A of the Civil Procedure Act (Cap.21) and Order 41 Rule 31 of the Civil Procedure Rules. It seeks for two orders, firstly that the appeal herein be dismissed for want of prosecution and secondly, that costs be provided for. The application is dated 15th February 2005. There are grounds on the face of the application and it is supported by an affidavit sworn on 15th February 2005 by Evans Ogendo Miyienda Advocate.

At the hearing of the application Mr. Miyienda submitted that the appeal arose from Eldoret CMCC.1262 of 2002. That case was struck out on the 3rd June 2004 by the learned magistrate, therefore there was nothing to justify having the appeal on the court record. The appeal was filed on 15th January 2004. The delay in prosecuting the appeal is inordinate. He submitted that the replying affidavit does not explain the reasons for the delay in prosecution of the appeal. In any event there is no need of having the appeal on record as the suit has already been struck out.

Mr. Mutei opposed the application and relied on the replying affidavit. He submitted that the application was brought under Order 41 rule 31. The provisions of that rule are not available to the applicant as directions in the appeal should have been given by the court first. He admitted that judgement was entered against the appellant National Bank of Kenya Limited on 8th January 2004 and they appealed. He explained that the delay in prosecuting the appeal was due to the fact that they had to get a certificate of taxation of costs before compiling the record of appeal. They sought for directions from the court and the Deputy Registrar wrote to them that the judge had directed that they have to comply with the procedures of appeal. It is at the stage of taking directions that the issue raised in the application can be raised, therefore the application is premature.

I have considered the submissions of both counsel. I have also perused the documents in this file. It is true that on the 3rd June 2004 the entire proceedings of the suit in the lower court were ruled as incompetent and struck out by the Principal Magistrate. The reason given was that Mr. Miyienda who was acting for the plaintiff did not have a practicing certificate when he so acted and filed documents in court. By that time, the memorandum of appeal had already been filed on 15th February 2004 by Tom Mutei Advocate. The Deputy Registrar sent a copy of the ruling of 3rd June 2004 to Tom Mutei Advocate. As a consequence, the advocate wrote a letter to the Deputy Registrar dated 8th June 2004 requesting that the file be placed before the judge for further directions. The judge directed that the normal procedure of appeals should be followed in the matter. The Deputy Registrar then communicated to Tom Mutei & Company Advocates by letter dated 8th July 2004, that normal procedures should be followed.

This application was brought under Order 41 rule 31 of the Civil Procedure Rules which reads as follows:

-

“ 31 (1) Unless within three months after the giving of directions under rule 8(b) an appeal shall have been set down for hearing by the appellant, the respondent shall be at liberty to either to set down the appeal for hearing or apply for dismissal for want of prosecution.

(2) If, within one year after the service of the memorandum of appeal the appeal shall not have been set down for hearing the Registrar shall list the appeal before a judge in Chambers for dismissal.”

From the above provisions of the law, it is clear that rule 31 (1) applies only when directions have been given. That is when the respondent is at liberty to either set down the appeal for hearing or apply for its dismissal for want of prosecution. Sub-rule (2) refers to powers exercisable by the Registrar. In this matter before me, it is evident that no directions have been given. The respondent has applied for dismissal of the appeal before directions were given. Therefore, in my view, this application is premature. It does not matter even if the entire proceedings were stuck out, as was done in this case. The only avenue available to the respondent at this stage is to advise the Registrar to take the necessary action in terms of Order 41 rule 31(2) of the Civil Procedure Rules, if he was served with the memorandum of appeal and one year has lapsed. Section 3 and 3A of the Civil Procedure Act (Cap.21) are not of assistance, as there are specific provisions of law dealing with the orders sought. For the above reasons, I dismiss this application and order that costs will follow the results of the appeal.

Dated and Delivered at Eldoret this 10th Day of May 2005

George Dulu
Ag. Judge

In the Presence of: N/A for parties.