REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL APPEAL 179 OF 2003

EUNICE NJERI KIMANI……………………….APPELLANT

VERSUS

MUIRURI KARIUKI……………….…………RESPONDENT

RULING

The applicant is the respondent in the above matter. He filed an application dated 31st, May, 2004 seeking dismissal of the appeal for want of prosecution. He also prayed that the appellant be condemned to satisfy the terms of judgment in Nakuru CMCC No. 2282 of 2002. The application was made under Order XLI Rules 1A and 31(1) of the Civil Procedure Rules. In the applicant's affidavit sworn in support of the said application, he deposed that the aforesaid CMCC No. 2282 of 2002 which gave rise to this appeal was decided on 16th October, 2003 and the court entered judgment for Kshs.50,000/- as general damages and special damages of Kshs.2,600/- plus costs and interest. The appellant was aggrieved by the said judgment and he filed the appeal on 14th November, 2003. The trial court granted stay of execution on condition that the decretal sum be deposited in court which was done. On 20th November, 2003 the Deputy Registrar wrote to the appellant requesting her to file a copy of the decree appealed from but the appellant did not file the same upto the time the application was heard. The applicant stated that the appellant had not taken any step towards prosecution of the appeal and the same was frustrating his enjoyment of the fruits of the said judgment.

In reply, the appellant's advocate Mr. Joseph Kavoi swore an affidavit and deposed that on 9th December 2003 he applied for copies of proceedings, judgment and decree and deposited Kshs.300/- for the said documents. On 24th March, 2004 he collected from the court registry a copy of the proceedings, judgment and ruling and paid Kshs.240/- but was not supplied with a decree without which he could not file the record of appeal.

On 1st April, 2004 he wrote a letter to the Executive Officer requesting for the decree but the same had not yet been supplied. The appellant's counsel therefore said that he could not prepare the record of appeal without the decree and said that it was the trial court that had failed to supply him with the decree.

Order XLI Rule 1A states as follows:-

> ***"Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under Section 79B of the Act until such certified copy is filed."***

A decree is therefore vital in the appeal process because even if the memorandum of appeal is filed, the court cannot consider whether the appeal should be admitted to hearing or be rejected summarily until a certified copy of the decree is filed. Whereas in the High Court any party in a suit may prepare a draft decree and submit it for approval of the other before it is signed and sealed by the registrar, in the subordinate court, the decree is supposed to be drawn and signed by the magistrate who pronounced it or by his successor.

The appellant in this matter applied for the proceedings, judgment and decree on 18th November, 2003 and was supplied with the proceedings and judgment only. She reapplied for the decree on 1st April, 2004 but there was no response. Since then, she never sent any other reminder or took any other step towards

procuring the decree. For more than a year she never followed up the matter to know why the decree had not been drawn and furnished to her. She is represented by counsel who knows very well that usually one has to be pro-active to get the court to act in many instances. In ***KARIUKI WAITHAKA VS LOLDIA LTD*** Civil Application No. NAI 67 of 2004, in an application to strike out a notice of appeal, the Court of Appeal stated as follows:-

> ***"Apart from the letter of 2nd December, 1999 there is nothing Mr. Karanja has done to expedite the preparation of proceedings. In these circumstances when 3½ years have elapsed we are satisfied that he has shown less than proper diligence to prosecute his appeal. It is not enough for one to apply for proceedings and then go to sleep with nothing more done. For these reasons, the application succeeds. The notice of appeal filed on 6th December, 1999 is struck out with costs to the applicant and the order of stay granted by the superior court is hereby vacated".***

I am alive to the provisions of Order XLI Rule 31 regarding dismissal of appeals for want of prosecution. That rule is applicable to appeals which have already been admitted to hearing under Section 79B of the Civil Procedure Act and directions have been given. In this matter, the appeal has not yet been admitted to hearing, leave alone directions being given. However, there is nothing to prevent a court from making such orders as may be necessary for the ends of justice or to prevent abuse of the court process.

While I believe this court is perfectly entitled to exercise its discretion in favour of the applicant by dismissing the appeal due to the fact that the appellant's counsel has shown less than proper diligence in pursuing the decree, I am equally concerned that the trial magistrate through the Executive Officer to whom the appellant's advocate addressed his letters requesting for the decree did not act efficiently to draw up the decree, a document which would have taken much shorter time to prepare as compared to the proceedings and judgment. The Executive Officer ought to have ensured that the decree was forwarded to the appellant's advocate together with the proceedings and the judgment.

I will therefore grant the appellant some more time so that he can take all the necessary steps to lead to the prosecution of the appeal within the next four months failing which the appeal will stand dismissed. I will therefore not grant the application. The appellant will however bear the costs of this application.

DATED, SIGNED & DELIVERED at Nakuru this 21st day of June, 2005.

D. MUSINGA

JUDGE

21/6/2005