REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
Civil Appeal 16 of 2000
(APPEAL FROM THE ORDERS IN THE RENT RESTRICTION,KAKAMEGA CASE No.36 of 2000)

ARTHUR INZOFU ……. APPELLANT

V E R S U S

ASHA GULLED …….. RESPONDENT

RULING

The Applicant/Respondent, ASHA GULLED, sought in her application dated 24.8.2004 orders that the appeal herein filed on 8-2-2000 by ATHUR INZOFU, the Appellant, be dismissed with costs for want of prosecution. The application was premised on order XLI Rule 31(1) of the Civil Procedure Rules. Rule 31 provides:-

> *31. (1) Unless within three months after the giving of directions under rule 8B the appeal shall have been set down for hearing by the appellant, the respondent shall be at liberty either to set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.*
>
> *(2) If, within one year after the service of the memorandum for appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal.*

The affidavit sworn by the Respondent in support of the application averred that after directions were given on 10.2.2003 pursuant to order XLI Rule 8A of the Civil Procedure Rules, the Appellant went to sleep. He averred that on 25.2.2004, the hearing of the appeal was stood over generally and as at the time of the filing of the application for dismissal of the appeal on 26.8.2004, over 6 months had elapsed.

When the application came up for hearing before me Mr. Samba, learned counsel for the Respondent, urged me to grant the application and pointed out that the Appellant had failed to show good cause why the appeal had not been prosecuted. He pointed out that on 25.2.2004 when the appeal was scheduled to be heard, the record of appeal was found to be wanting and although the Appellant undertook to file a proper record he had failed to do so and instead had gone into a slumber as a result of which the Respondent compiled the record. He attacked the competence of the Replying affidavit and urged the court to strike out paragraphs 3 to 21 of the Replying affidavit.

Mr. Fwaya, learned counsel for the Appellant opposed the appeal and submitted that the appeal had been set down for hearing on three occasions after directions. On one occasion, the record was found wanting while on the others the Respondent was not ready to proceed, an allegation which Mr. Samba countered on the basis that the hearing of the Appeal collapsed because the Appellant had failed to compile a proper record of appeal.

I have perused the application and both the supporting and replying affidavits. I have also given due

consideration to the submissions of both counsel. The appeal was filed on 8.2.2000. Directions for the appeal were given on 10- 2-2003 but these directions were subject to the appellant filing in court and serving on the Respondent a copy of the Record of Appeal. After 10-2-2003, the record was not filed and the appeal came up in court severally in connection with the issue of the record when the matter was repeatedly stood over.

On 25-2-2004, the appeal finally came up for hearing when Mr. Samba indicated he was not ready to proceed because the record of appeal served on him was incomplete. Mr. Fwaya had no objection to the appeal being taken out to facilitate preparation of the record and as a result the hearing was taken out by consent. Nothing happened after this. It was the responsibility of the appellant to ensure that a proper Record of Appeal was prepared, filed in court and served on the Respondent. Time went by and nothing seemed to happen in this regard. On 26-8-2004, the Respondent ostensibly tired of waiting for a proper record and fixing of the appeal for hearing filed the application for dismissal of the appeal.

It came up for hearing on 12-4-2005. To my mind, the Appellant has not given any sufficient explanation for the delay of almost six months between 25-2- 2004 and 26-8-2004. Directions had been given and record of appeal served, albeit incomplete as all the exhibits were not compiled in it. The directions given on 10-2- 03 were subject to the record of appeal being filed and served. To my mind, a record of appeal must mean a proper and complete record of appeal and where as here an incomplete record is filed, it cannot be said to be in compliance with the order. In effect therefore, since the record was as at 25-2-2004 incomplete, the directions given on 10-2-03 having been subject to “filing and serving of a proper record” cannot be said to have been complied with. In short, the appeal was not ready for hearing before the filing and serving of a proper record of appeal.

It is my finding that the application to strike out filed on 26.8.2004 was therefore premature. But it is the Respondent who has been goading the appellant to prosecute the appeal. The latter has taken advantage of technicalities to procrastinate the hearing and must bear the blame for the attendant delay in the hearing of the appeal.

In the result, I dismiss the application dated 24.8.2004. I however decline to grant the Appellant costs. I hereby order that the record of appeal be filed and served not later that 30th September, 2005 failing which the Appeal shall stand struck out without any need for a formal application in this regard.

Dated at Kakamega this 22nd day of September, 2005.

G. B. M. KARIUKI

J U D G E