

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL 200 OF 2002

AMALGAMATED SAWMILLS LTD.....APPELLANT

VERSUS

JACKSON NJONJO KIANIARESPONDENT

RULING

This is an application made under **Order XLI Rule 31(2)** of the **Civil Procedure Rules** by the respondent in this appeal seeking to have the appeal dismissed for want of prosecution. The application is supported by the annexed affidavit of Nyamwange Calen Bichang'a and is based on the ground that the appellant had failed to take steps to fix the appeal for hearing. The respondent stated that there had been inordinate delay by the appellant in having the appeal made ready for hearing. The respondent further stated that the appeal had been overtaken by events in that the decretal amount ordered paid by the trial Magistrate court had been paid. The application is opposed. Rosalind Kagure Muthiga, learned Counsel for the appellant has sworn a replying affidavit. She depones that the appeal ought not to be dismissed for want of prosecution but be marked as settled as the parties herein had compromised to settle the claim. She further deponed that the application filed was misconceived and should be struck out as directions had not been taken and further the provisions of Order XLI Rule 31(2) of the Civil Procedure Rules did not apply in this case.

At the hearing of the application, Mr Nyamwange, learned Counsel for the respondent reiterated the contents of the application and the affidavit in support. He relied on two decisions **Amalgamated Saw Mills -Vs- Gladys Imbuka Nakuru HC Civil Appeal No. 96 Of 2000 (unreported)** and **Sokoro Saw Mills - Vs- Alfunge Miano Nakuru HC Civil Appeal No.24 of 1999 (unreported)**. Mr Musundi, learned Counsel for the appellant also relied on the replying affidavit filed by the appellant's Counsel. He submitted that the suit between the appellant and the respondent had been compromised. He urged the court to order the appeal to proceed to hearing if it is established that the suit had not been compromised. He submitted that the decretal sum had been paid in full and final settlement of the suit.

I have read the pleadings filed by the parties to this application in support of their respective positions. I have also considered the rival arguments made by the Counsel for the respondent and the Counsel for the appellant. The issue for determination by this court is whether the respondent has established a case to have the appeal herein dismissed for want of prosecution. Certain facts are not disputed in this case. It is not disputed that the appellant was dissatisfied with the decision of the trial Magistrate who found the appellant to be 50% liable for the accident which occurred and thereafter awarded the respondent the sum of Kshs.100,000/- as general damages. It appealed to this court. Before the said appeal could be listed for hearing, the parties to this appeal negotiated out of court and reached an amicable settlement.

According to a letter written by the Counsel for the appellant to the Counsel for the respondent dated the 24th February 2005, the respondent was paid the decretal sum in full and final settlement of the claim. What was however not stated in the said letter is the fate of this appeal. Whilst it may be assumed that by stating that the payment was in full and final settlement of the claim, the appellant may have included this appeal, the appellant was however not categorical on this aspect of the settlement. It would have been desirable before the said payment was made for the appellant and the respondent to execute a consent agreeing on all aspects of the case. Unfortunately, it would appear that the appellant ignored this crucial part of the negotiated settlement. As it were, the respondent has now taken advantage of this lapse and sought to have the appeal herein dismissed for want of prosecution.

Having carefully considered the facts of this case, it is clear that the appellant, having paid the decretal sum, did not intend to prosecute this appeal. The parties to this appeal did not agree on how this appeal was to be disposed off. Whereas this court sympathises with the appellant, the issue before this court is whether this court should allow this appeal to remain pending in court whereas the appellant has made no efforts whatsoever to list the same for hearing.

This appeal was filed in the year 2002. The appellant has made no effort whatsoever to list this appeal for hearing. The appellant has not extracted the decree nor prepared the record of appeal. For all intents and purposes, the appellant seem to have abandoned this appeal once it compromised the suit in the lower court. The appellant did not cover all the angles of this case by also compromising the issue of this pending appeal with the respondent. In the premises therefore, I do find that the application filed by the respondent has merit. The appeal filed herein is hereby dismissed for want of prosecution. In view of the peculiar circumstances of this case, I will make no orders as to costs.

During the subsequent hearing of a similar application between the appellant and another respondent involved in the same accident in **Nakuru HC Civil Appeal No. 199 of 2002 Amalgamated Saw Mills Ltd –Vs- Johnson Njenga Kamiti**, Mr Nyamwange and Mr Musundi agreed that the orders made in this application shall also apply in the application in the said application. I therefore make similar orders therein. The appeal filed by the appellant therein is ordered dismissed for want of prosecution. However there shall be no orders as to costs.

DATED at NAKURU this 28th day of October 2005.

L. KIMARU

JUDGE