REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 11 OF 199

KARIBY TIMBER INDUSTRIES …….. APPELLANT

Versus

NEMCHAND ANAND & CO. …… RESPONDENT

R U L I N G

Karibu Timber Industries Ltd. (the appellant) being aggrieved by the judgment of the Business Premises Rent Tribunal (the Tribunal) delivered on the 6th March 1997 in BPRT C No. 112 of 1994 appealed to this court on the 7th March 1997. The appeal has not been heard. The reason why the appeal has not been heard, the Appellant says, is because directions in the appeal have not been taken. The reason why directions have not been taken is because the Tribunal has not supplied the Appellant with a certified copy of the decree required by Order 41 Rule 1A to be filed with the memorandum of appeal. The appellant says it does not know why the Tribunal has, for now almost seven years, not supplied a certified copy of the decree inspite of several requests made in that respect.

By Notice of Motion dated the 10th December 2003 expressed to be brought under "Order L Rule 1 and Section 3A of the Civil Procedure Rules" which (should be Order L Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act) the Respondent has sought inter alia an order:-

> **"THAT this Honourable Court do in exercise of its inherent jurisdiction dismiss the appeal herein for want of prosecution and/or make such orders as would secure the expeditious disposal thereof".**

Mr. Mwakisha for the Respondent argued that since directions have not been taken, there is no provision under which the Respondent could move the court to dismiss the appeal for want of prosecution other than invoking the court's inherent powers under Section 3A of the Civil Procedure Act. He further argued that after filing the appeal and obtaining an order of stay of execution of the Tribunal judgment the Appellant went to sleep.

Miss. Moolraji for the Appellant did not only oppose the application she argued that the same should be struck out for being fatally defective.She submitted that applications under Order 41, without specifying under which rule, should be brought by way of chamber summons. This application being by Notice of Motion it is fatally defective and should therefore be struck out. For this proposition she cited the case of **Kenfreight (EA) Ltd. -Vs- Phoneway (EA) Ltd. Mombasa HCCC No. 181 of 1997** as authority. She further argued that since Order 41 makes specific provisions for dismissal of an appeal for want of prosecution it cannot avail the Respondent to call in aid Section 3A. In support of this proposition she cited the case of **J.P. Macharia Vs Wangethi Mwangi & Another Civil Appeal No. 179 of 1997**

(CA) (UR). She concluded by arguing that since the Tribunal has not supplied the Appellant with a certified copy of the decree there is nothing the Appellant can do. She urged me to strike out or dismiss the application.

Order 41 Rule 1A requires that an Appellant should file a memorandum of appeal along with a certified copy of the decree or order appealed against and that failing the same should be filed as soon as possible.

The issue of the competence of the application can easily be disposed of. There is no provision in Order 41 under which a Respondent can apply to have an appeal dismissed for want of prosecution before directions are taken. In an appropriate case of inordinate delay in my view a Respondent is perfectly entitled to invoke the inherent jurisdiction of the court to have an appeal dismissed for want of prosecution. As directions have not been taken in this appeal the Respondent is therefore entitled to invoke the inherent jurisdiction of the court.This application brought under Section 3A of the Civil Procedure Act is properly before the court. That the application should have been brought by way of Chamber Summons instead of Notice of Motion does not arise as it is not brought under Order 41.

In any case my position is that an application required under the rules to be brought by way of Chamber Summons but it is instead brought by Notice of Motion is not fatally defective. Order 50 Rule 11 of the Civil Procedure Rules provides that:-

> **"Where an application which is authorized to be made in court is made in chambers, the judge may either adjourn the application into court or hear it in chambers".**

It is common knowledge that notices of motion are heard in court and Chamber Summons in chambers. After quoting this provision and Order 50 Rule 10 the Court of Appeal in **Johnson J. Kinyanjui & Another Vs Rachael W. Thande & Another Civil Appeal No. 284 of 1997 (C.A.)** stated:-

> **"It can [therefore] be seen that no application is to be defeated by use of wrong procedural mode and a judge has the discretion to hear it either in court or in chambers".**

Following this Court of Appeal decision in **Microsoft Corporation -Vs- Mitsumi Computer Garage Limited [2001] 1 EA 127 at page 132** Ringera J. stated:-

> "**… I am of the firm view that it is in the overall interests of justice that procedural lapses should not be invoked to defeat applications unless the lapse goes to the jurisdiction of the court or substantial prejudice is caused to the adverse party."**

I concur with these views. There is no prejudice caused to the Appellant by this application being made by way of Notice of Motion even if it was supposed to be brought by chamber summons.

In view of the Court of Appeal decision in the **Johnson J. Kinyanjui case** (supra) the authority in the case of **Kenfreight** (**EA) Limited -Vs- Phoneway (EA) Limited Mombasa HCCC No. 187 of 1997** cited by counsel for the appellant is in my view no longer good law. In the same vein the **Ugandan cases of Sahia Namukasa -Vs- Yosefu Bukoya [1966] 433 and George Kigoya Vs Attorney General of Uganda [1966] E.A. 463,** which in any case are not binding on courts in Kenya, are also not good law in Kenya.In the circumstances I overrule the Appellant's counsel's preliminary objection that the application is incompetent.

I will now deal with the application on its merits.

. Counsel for the Appellant wants me to believe that for now seven years they have unsuccessfully tried to obtain a certified copy of the decree from the Tribunal. In my view that is not correct. As is the normal practice Advocates extract decrees or orders from court judgments and take them back to the court for approval and signature. That is a day or two's job. Assuming counsel for the appellant are a very busy

firm I want to give them a period of one month or even two by which time they should have obtained a certified copy of the decree. The record shows that the proceedings and judgment in the Tribunal case were typed and certified way back on the 12th March 1998. If any effort had been made I am sure that a certified copy of the decree could have been obtained long before then or about the same time.

The Respondents in the supporting affidavit stated that they applied for a certified copy of the order from the Tribunal and obtained it in about a month's time. I believe them. The correspondence annexed to the affidavit confirms that averment.

I am satisfied that the Appellant has not made any effort to have this appeal heard. It is no excuse to argue that the Respondent has filed several applications in the matter and that is why the appeal has not been heard. Some of those applications were seeking to discharge the orders of stay the protection of which the Appellant is enjoying. I suppose the reason why the Deputy Registrar has not listed the appeal for directions is because the decree has not been filed.To file an appeal, obtain a stay of execution and do nothing for about seven years to have the appeal disposed of is an abuse of the process of court. Any court of justice must possess inherent powers to prevent misuse of its process in a way which would bring the administration of justice into disrepute among right thinking people. This court has such powers.

For the reasons given and in exercise of the inherent powers of this court I allow the Respondent's application and dismiss this appeal with costs plus the costs of this application to the Respondent.

DATED this 27th day of February 2004.

D.K. Maraga

Ag**. JUDGE**