REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL APPEAL NO. 227 OF 2001

VIRENDRA NARSIDAS PONDA……..……..……APPELLANT

VERSUS

DR. MADDINENI SUBBA RAO…….…….RESPONDENT

RULING

This is a Notice of Motion brought under the provisions of **Section 3A of the Civil Procedure Act and Order L Rule 1 of the Civil Procedure rules** by Respondent/Applicant seeking the orders of this Court to strike out the Appeal filed by the Appellant herein on the grounds that the said Appeal was incompetent. In the alternative the Applicant has prayed that the Appeal be dismissed for being an abuse of the due process of the Court. The Application is supported by the annexed affidavit of the Respondent Dr. Maddeneni Subba Rao and is based on grounds stated on the face of the Application. The grounds are that the Appeal herein was filed without the leave of the lower Court and was therefore incompetent and further that the pendency of the Appeal herein had unnecessarily delayed the hearing and final determination of suit in the lower Court which had remained pending for a very long time. The Application is opposed. The Respondent/Appellant has filed grounds of opposition and a replying affidavit in opposition to the Application.

Mr Karanja, Learned Counsel for the Applicant and Mr Mahida, Learned Counsel for the Respondent argued the respective positions of their clients before me. I have read the pleadings filed in Court in respect of this matter. I have also considered the rival arguments made by the parties to this application. The genesis of this Appeal was the dismissal of a preliminary objection raised by the Appellant regarding the territorial jurisdiction of the subordinate Court to hear and determine the suit filed by the Respondent. The Appellant was of the view that the case ought to have been filed in Nairobi and not in Nakuru. The Appellant was aggrieved by the said dismissal of the preliminary objection and filed this Appeal.

The Appellant obtained stay of proceedings in the lower Court pending the hearing and determination of the Appeal. It appears that after obtaining the said stay of proceedings in the lower Court, the Appellant went to sleep. He did not extract the order of the said lower Court neither did he apply for the proceedings of the lower Court to be typed so that the Appeal can be made ready for admission by this Court and have the same subsequently listed for hearing.

The Applicant herein has another complaint with the Appeal filed by the Appellant herein. The Applicant has submitted that under the provisions of **Order XLII of the Civil Procedure Rules** the Appellant was required to seek leave of the lower Court before he could file this Appeal. It was the Applicant's argument that since the Preliminary Objection dismissed could only result in an order and not a decree, the Appellant was required to seek the leave of the lower Court before he could file the present Appeal. I have considered the argument by the Applicant and also read the provisions of O**rder XLII of the Civil Procedure Rules**. I do not agree that where a preliminary objection is raised touching on the jurisdiction of the Court and the said preliminary objection is dismissed, a party is required to seek the leave of the said Court before filing an Appeal. A decision concerning a preliminary objection which raises issues that may result in the determination of a suit is appealable as of right and an aggrieved party does not need to seek the leave of the Court Appealed from.

The Appellant is however not out of the woods. I have noted that the Respondent in this Appeal filed the suit in the lower Court in 1988. The Appellant took thirteen years, before he realised that the Respondent had filed the suit against him in a Court which did not have jurisdiction. The preliminary objection was heard in the year 2001 and dismissed. The Appellant filed this Appeal, obtained stay of

proceedings in the lower Court and then sat on the said orders. The Appellant did not bother to have this Appeal ready for hearing. The Appellant has, by filing this Appeal, succeeded in denying the Respondent to have his case heard and determined. It is now sixteen years since the said case was filed. The Appellant is not in a hurry to have the dispute pending between himself and the Respondent resolve. In **Nakuru HC CIVIL APPEAL No. 27 of 2001, Robinson Maitai Njeru –versus- Peter Muraya Cheg**e it was held by a Court of concurrent jurisdiction to this one that this Court may dismiss an Appeal which has not been admitted to hearing if it appears that the Appellant by refusing to prepare the Appeal and make it ready for admission and hearing is abusing the due process of the Court. I agree with the reasoning of the above decision.

The Applicant has invoked the inherent jurisdiction of this Court **under Section 3A of the Civil Procedure Act** which gives this Court powers to make such orders as to prevent the abuse the due process of the Court and to meet the ends of justice. This is a case which this Court can exercise its inherent jurisdiction. It appears that the Appellant filed this Appeal to frustrate the hearing and determination of the case in the lower Court. The Appellant's action can rightly be interpreted to be an abuse of the due process of the Court. The Appellant filed this Appeal with no intention of having the said Appeal heard. The Appellant filed the Appeal to frustrate the hearing of the Respondent's case which has been pending now for over sixteen years. This Court will not allow its process to be abused. The Application is allowed. The Appeal herein is ordered dismissed with costs to the Respondent in the Appeal. The Applicant shall have the costs of this Application.

DATED at NAKURU this 1st day of October, 2004.

L. KIMARU

AG. JUDGE