

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 7 OF 1998

(from Original Civil Suit No. 552 of 1993 of SPM Machakos)

JONATHAN MUTISYA MUMOAPPELLANT

VERSUS

DANIEL M. MUTWARESPONDENT

R U L I N G

The applicant is the respondent to this appeal. The respondent was given judgement against the appellant in Machakos SPMCC no. 552/93 on 15.1.98. The appellant who is the respondent to this application became aggrieved of that judgement and he filed this appeal. The memo of appeal filed in person is dated 6.2.1998 and filed on a date not visible but in February 1998. A perusal of the record shows that the appeal was admitted to hearing on 5.8.98. The initial memo of appeal was filed in person. There is on record an amended memo of appeal filed on 28.11.2000 but it is not signed by the counsel who drew the same. A perusal of the record shows that on 12.8.98 the Deputy Registrar notified the parties that the appeal had been admitted. The appellant was supposed to have prepared the record and then served it on to the respondent and put in an application for directions or take directions before the Deputy Registrar and then set down the appeal for hearing and final disposal it is on record that the respondent took no such action. The applicant has come to this court seeking dismissal of the appeal for want of prosecution among other orders. The major ground is that no action has been taken by the respondent appellant to process the appeal for hearing since the same was admitted, that the applicant who was the successful party in the lower court has been greatly prejudiced and denied. The fruits of his judgement for over 5 years now, that the respondent has lost interest in prosecuting the appeal and the same should be dismissed.

There are no papers filed in opposition to the application as counsel who was then appearing for the respondent appellant withdraw from the matter.

In his oral submissions in court the appellant respondent stated that he appealed because the judgement was delivered in his absence, that his defence was not considered as he was not listened to, he used to take dates but then the applicants were not attending court, that it is the applicants who have been delaying the matter by taking far off dates and he requests the court to allow the appeal to proceed, he is willing to take a hearing date once given by the court. in reply counsel for the applicant respondent stated that it is not true that it is them who have been taking far off dates, that he is the one who should have been taking dates to serve them, that he has not responded to the matters raised in the application and affidavit.

This court has taken an overall picture of all the facts relating to this application and finds that:-

1. It is the appellant respondent who was aggrieved by the lower court judgement and he is the one who should have moved the court to speedily dispose off the appeal.
- 2 There is no dispute that the appeal was admitted way back in 1998 and upto date it has not been set down for hearing. It is the appellant respondent who was required to prepare the

record and set the appeal down for hearing. There is no dispute that no record has been prepared herein and the appellant respondent has not given any explanation as to why he has not prepared the record and yet the lower court proceedings have been typed.

3. In the absence of a prepared record of appeal there is no way the appeal herein can be listed for hearing or could have been listed for hearing.

4. In the premises this court has no option but to dismiss the appeal for want of prosecution prayer 1 of the application dated 14.12.2001 and filed on 21.12.2001 be and is hereby allowed as prayed. The appeal is dismissed with costs to the respondent.

There will be no finding on prayer 2 and 3 which were alternative to prayer 1.

The applicant will also have costs of the application.

Dated, read and delivered at Machakos thisday of, 2003.

R. NAMBUYE

JUDGE