



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CENTRAL REGISTRY**  
**CIVIL APPEAL NO.668 OF 2003**

**DR. MICHAEL OLING WANGA.....APPELLANT.**

**AND**

**PHARMACEUTICAL MANUFACTURING COMPANY LIMITED....RESPONDENT**

**(Being an appeal from the whole judgment and ruling of Senior Resident Magistrate, N. A Owino(Mrs) in Nairobi CMCC No. 1720 of 2001 delivered on 11<sup>th</sup> September 2003)**

**BETWEEN**

**PHARMACEUTICAL MANUFACTURING COMPANY LIMITED.....PLAINTIFF**

**AND**

**DR. MICHAEL OLING WANGA.....DEFENDANT**

**RULING**

The application before this court is the Notice of Motion dated the 12/4/13 brought under section 1A, 1B and 3A of the Civil Procedure Act. The respondent seeks the following orders:-

- a. That the appeal be dismissed for want of prosecution.
- b. That the applicant do pay the respondent the costs of this application and the appeal.

The grounds upon which this application is based are that;

- a. The appellant has not take any steps to have the appeal listed for directions or taken any steps to prosecute the appeal since the record of appeal was filed on the 17<sup>th</sup> February 2009.
- b. That the appellant/defendant has a stay of execution in RMCC 1720 of 2001 pending the hearing and determination of the appeal which resulted in the decretal sum being deposited in a joint account on 13<sup>th</sup> October 2009 thus unfairly denying the respondent the right to enjoy the fruits of its judgment.

The application is supported by the affidavit of Richard Mwaniki.

In brief Mr. Mwaniki depones as follows in his affidavit: That on the 11/9/03 judgment was entered in RMCC No. 1720/01 in favour of the Respondent against the appellant in the sum of kshs. 53910/- plus

interest and costs. On the 5/3/04 the appellant filed an application in RMCC 1720/01 for stay of execution pending the hearing and determination of the appeal filed on the 9/10/03. The matter was heard and in a ruling delivered on the 16/4/04, a stay of execution pending appeal was granted on condition that the appellant deposits the full decretal sum in an interest earning joint account held in the names of the advocates for both parties. The appellant complied and deposited the money as ordered by the court.

At paragraph 6 to 10 the applicant details the steps that have been taken to have the appeal heard. The applicant states that the failure by the appellant to prosecute the appeal is unfairly denying the respondent the right to enjoy the fruits of its judgment, that the appellant has lost interest and has not taken any further steps to prosecute the appeal and therefore it should be dismissed with costs.

The applicant /respondent opposed the application. He filed grounds of opposition plus a replying affidavit sworn by Mr. Makari Okello an advocate practicing in the firm of Ocharo and Company Advocates.

The grounds of opposition are that; the appellant has an appeal with a high probability of success and should not be condemned unheard, that the application is bad in law under order 42 (2) of the Civil Procedure Rules has no merit and is an abuse of the court process, that the appellant is not the cause of the delay complained of and directions have not been taken in the appeal, that the appellant has taken reasonable steps to prosecute the appeal and the respondent will suffer no prejudice if appeal is heard on merit.

Mr. Okello response is that after the lower court granted the appellant a conditional stay they filed a memorandum of appeal dated the 9/10/03. That thereafter their court clerk Mr. Simon Kathumbi made several visits to the proceedings registry between 5<sup>th</sup> March 2010 and this year but they are yet to get a duly certified decree in RMCCC No. 1720 of 2001. That the lower court's failure to promptly supply them with a duly certified decree and certificate of stated costs hindered their efforts to complete their record of appeal in Criminal Appeal No. 668 of 2003 and as a result it deemed imprudent to them to list the appeal for directions and that the appellant is not to blame in the circumstances. That the appellant has no reason to delay the appeal since his Kshs. 99896/40 is tied up in a joint account in the names of the two firms of advocates and the respondent will suffer no prejudice if the appeal is heard and determined on merit. That the appellant has an appeal with a high chance of success and should not be condemned unheard.

At the hearing of this application counsels reiterated what is deposed in the parties affidavits. Counsel for the applicant submitted further that it is the respondent who has taken active steps in the matter since September 2009 to have the original court file brought to the High Court. On the application being bad in law, Counsel submitted that the decree was issued on the 14/1/04 and it is the responsibility of the appellant to cause the matter to be listed before the court for directions within 30 days yet this has not been done. The applicant relied on the case of Haron E. Ogechi Nyaberi Vs. British American Insurance Company Ltd. It was submitted further that

the respondent is being prejudiced as it bears the burdens of the appeal the costs and a fair trial as memory does fail.

Mr. Okello for the appellant he reiterated what is in their replying affidavit and stated further that the applicant received the application dated 12/4/13, they promptly prepared a record of appeal dated 19/9/13 and filed in court on the 2/10/13. That they have made an effort to prosecute the matter and, that if the application is allowed it would be a draconian step in light of the facts as explained on the steps taken by the appellant. That the case cited can be distinguished from this one as there was a delay for 11 years.

I have considered all that has been submitted by the parties. Judgment in the lower court was delivered on the 11/9/03. From what is attached to the appellants affidavit proceedings of the lower court were ready by the 10/3/10. The appellant argues that the delay has been due to court process in seeking to get the decree confirmed hence they could not file their record of appeal. Indeed it is 10 years since the judgment was delivered. It is apparent that the appellant is now ready to be heard. The appellant argues

that they have an appeal with high chances of success. Having gone through the file I note that from 2003 and 2010 there was a delay that can be attributed to the Court registry. Thereafter the appellant was informed that the records were ready. I do agree with the applicant that litigation must come to an end but to be fair to both sides I will not dismiss the appeal as sought but order that parties take a date before this court for hearing of the appeal after direction. I therefore decline to grant the orders.

Costs shall be in the cause.

Dated, signed and delivered this 7<sup>th</sup> day of November 2013

**R. E. OUGO**

**JUDGE**

**In the presence of:-**

.....For the Applicant

.....For the Respondent

.....Court Clerk