Case Number:	Civil Appeal 38 of 2002
Date Delivered:	29 Oct 2004
Case Class:	Civil
Court:	High Court at Kericho
Case Action:	-
Judge:	Luka Kiprotich Kimaru
Citation:	African Highlands Produce Co. Ltd v Collins Moseti Ontweka [2004] eKLR
Advocates:	Mr. Magare for the Appellant, Mr. Orayo for the Respondent
Case Summary:	Civil Procedure - application for dismissal of appeal for want of prosecution - Civil Procedure Rules Order XLI rule 31(2) empowering Registrar to list a matter for dismissal where appeal is not set down for hearing one year after service of the memorandum of appeal - whether the provision empowers a party to file an application for dismissal
Court Division:	-
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
CIVIL APPEAL NUMBER 38 OF 2002

AFRICAN HIGHLANDS PRODUCE CO. LTD …. APPELLANT

VERSUS

COLLINS MOSETI ONTWEKA …… RESPONDENT

RULING

The Respondent in this Appeal, Collins Museti Ontweka has made an application under the provisions of order **XLI Rule 31(2) of the Civil Procedure Rule**s and the omnibus **section 3A of the Civil Procedure Act** seeking the orders of this court to dismiss the Appeal filed by the Appellant for want of prosecution. The Application is supported by the annexed affidavit of K. O. Obae and upon the grounds stated on the face of the application. The Application is opposed. The Appellant has filed a lengthy replying affidavit sworn by DKN Magare in opposition to the application. The main thrust of the Respondent's submission, through his Counsel Mr. Orayo, is that since the appeal was admitted to hearing more than one and a half years ago, the Appellant had not made any effort to have the Appeal ready for hearing. The Respondent contended that the Appellant did not pursue with diligence the procurement of the typed proceedings from the court for the purposes of preparing the record of Appeal. The Respondent further argued that under the law, an Appeal can be dismissed if it is not fixed for hearing one year after the admission of the Appeal to hearing. The Respondent took exception with the Appellants action in preparing the record of Appeal and filing the same before the hearing of this application. The Respondent submitted that the Appellant took the action to defeat this Application. The Respondent further submitted that the replying affidavit filed by the Appellant constituted inadmissible evidence and should not be allowed. The Respondent submitted that the Appellant had been indolent in prosecuting this Appeal and therefore prayed that the application be allowed.

Mr. Magare, Learned Counsel for the Appellant strenuously opposed the Application. Counsel submitted that the Appellant had applied all due diligence to procure the proceedings from the court. The Appellant submitted that the proceedings were applied and paid for on the 20th of November, 2002 and were not made ready until the executive officer of this court intervened. Mr. Magare submitted that the Appellant had persistently inquired if the proceedings were ready including sending their clerk at various times to Kericho to check if the said proceedings were ready. The Appellant submitted that upon making inquiry, they were informed that the proceedings would not be ready as priority was being given to the typing of the proceedings of the retired magistrates so as to enable parties to proceed with their cases. Counsel for the Appellant further submitted that the Respondent was partly to blame for the delay in having the Appeal ready for hearing as the Respondent was not willing to have the money deposited in court to be deposited in a joint interest earning account in a Bank and thus forced the Appellant to make an appropriate before the lower court. The Appellant submitted that the application by the Respondent had been made under the wrong provisions of the law. The Appellant further submitted that they had now prepared the record of Appeal, filed the same and also made an appropriate application for directions which application was pending before this court. The Appellant submitted that in the circumstance of this case the Appellant was not to blame for the delay. The Appellant urged this court to dismiss the Application with costs.

I have considered the rival arguments made by the Counsel for the Appellant and the Counsel for the Respondent. I have also read the pleadings filed by the parties to this application in support of

their opposing positions. The Respondent is urging this court to dismiss the appeal filed by the Appellant because, according to him, the Appellant had not taken any positive steps to prosecute its Appeal. The Appellant on the other hand has strenuously opposed the application filed by the Respondent. The Appellant contends that it has done everything within its powers to have the Appeal prepared for hearing but were frustrated by the court which did not avail the typed proceedings in time. The Respondent has made his application under the provisions of order XLI Rule 31(2) of the Civil Procedure Rules which provides that:

"If, within one year after the service of the memorandum of Appeal, the Appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the Appeal before a judge in chambers for dismissal ."

The said rule gives power to the registrar to cause an appeal, which has been admitted to hearing, and had not been fixed for hearing within one year, to be placed before a judge in chambers for the purposes of the said appeal being dismissed. The said rule does not give any party to the suit authority to make an application to have an appeal to be dismissed. This does not however mean that a party to an Appeal which has not been diligently prosecuted cannot invoke the inherent jurisdiction of the court to prevent the abuse of the due process of the court.

In the circumstances of this case it is the finding of this court that the orders of dismissal sought by the Respondent cannot be availed to him under the said rule of the civil procedure rules invoked. It is further the finding of this court that the Appellant cannot be blamed for the delay by the court in availing the typed proceedings to it. The Appellant has explained that the reason given by the court why the said typed proceedings were not availed in time was due to the fact that the court was overloaded by the typing of the partial proceedings of the retired magistrates that were required to enable the said partially heard cases to be concluded. This court takes judicial notice of the fact that indeed the court's secretarial staff were swamped all of a sudden with proceedings which were required to be typed to the extent that the said secretarial staff were overwhelmed. It is possible that the proceedings related to this Appeal fell victim to this state of affairs.

In the circumstances of this case I would not be prepared to allow the Application. I have noted that the Appellant has prepared, filed and served the record of Appeal. The appellant has also made an appropriate application for directions which application is pending before this court. This action by the Appellant clearly shows that the Appellant is interested in the prosecution of this Appeal.

The Application by the Respondent is consequently dismissed with costs to the Appellant.

DATED at KERICHO this 29th day of October 2004.

L. KIMARU

JUDGE