



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 27 OF 2019

WAGAKO GABRIEL 1ST APPELLANT

DAVID NDUNGU MUGO 2ND APPELLANT

VERSUS

ANGELINE KAMANTHE KILONZO

ESTHER MORAA MOSETI (legal representative of

the estate of Esther Moraa)RESPONDENT

RULING

1. On 3/12/2020 the respondent/applicant filed a notice of motion taken out pursuant to the provisions **Section 1A, 1B & 3A of the Civil Procedure Act, Order 17 Rule 2 (3) & Order 51 Rule 1 of the Civil Procedure Rules 2010** in which the applicant is seeking for the following orders:

a. That this suit be dismissed for want of prosecution

b. That the costs of this application and the entire suit be awarded to the respondent.

2. The application is based on the grounds set out on the face of the motion and on the facts deponed in the supporting affidavit of Angeline Kamanthe Kilonzo. In it she deponed that the subject matter of this application emanates from the judgement delivered on 7/12/2018 by Hon. A. N.Makau, Learned Senior Resident Magistrate at Milimani Chief Magistrate Court in Civil Suit No. 5262 of 2015 where an award of Kshs. 850,000 and Ksh 32,465 being general and special damages respectively plus costs and interests were made. The appellants/respondents being aggrieved by the judgement filed a memorandum of appeal on 25/1/2019.

3. It is the argument of the respondent, that there are no justifiable reasons for the delay to prosecute the appeal and therefore the court is bound to do justice to dismiss this appeal with costs to the respondent/applicant.

4. The application is opposed by the appellants who filed the replying affidavit of Wagako Gabriel, the 1st appellant/ respondent where she contended that she has been keen to prosecute the appeal but they have not been supplied with certified copies of the proceedings and judgement, despite writing to Executive officer asking for the same on 23/1/2019 and 9/8/2019.

5. I have carefully considered the Application and the affidavits of the respective parties. I have also considered the submissions of learned Counsels. The sole issue for determination is **whether the Respondent has met the conditions for granting an order for dismissal of an appeal for want of prosecution?**

6. Order 42 Rule 35 of the Civil Procedure Rules, 2010 envisages two (2) scenarios for the dismissal of an appeal for want of prosecution. The **first** scenario is when an appellant fails to cause the matter to be listed for directions under Section 79B of the Civil Procedure Act as is envisaged in Order 42 Rule 11 of the Civil Procedure Rules. The **second** scenario is that if after service of Memorandum of Appeal the appeal would not have been set down for hearing, the registrar shall on notice to the parties list the appeal before the judge for dismissal.

7. In this matter the appellants filed a memorandum of appeal on 25/1/2019. On examination of the record the appellant is yet to file a record of appeal but in his defence he stated that he has asked the Executive officer for certified copies of the proceedings and judgement but has yet to get a response. It is also pointed out by the appellant that the appeal is yet to be listed for directions.

8. In the case of **Kirinyaga General Machinery v. Hezekiel Mureithi Ileri [2007] eKLR Kasango J**, observed: -

“It is clearly seen from that rule that before the respondent can move the court either to set the appeal down for hearing or to apply for dismissal for want of prosecution, directions ought to have been given as provided under rule 8B. Directions have never been given in this matter. The directions having not being given the orders sought by the respondent cannot be entertained.”

9. It is apparent that the cause of delay to prosecute the appeal was explained by the appellants. There is no dispute that the typed proceedings and judgement have not been supplied despite having been requested by the appellants.

10. There is no dispute that direction have not been taken. In view of that it may be said that the application for dismissal for want of prosecution of the appeal is premature. For the above reasons I find the motion to be premature and without merit. The same is dismissed with costs abiding to the outcome of the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 19TH DAY OF MARCH, 2021.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent