



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 588 OF 2016

UZURI FOODS LIMITED (ELLIOTS BREAD DIVISION).....APPELLANT/RESPONDENT

-VERSUS-

JOSEPH MUGO MWANGI.....RESPONDENT/APPLICANT

RULING

1. The respondent/applicant (“the applicant”) herein brought the Notice of Motion dated 15th February, 2021 supported by the grounds set out on its face and the facts stated in the affidavit of advocate Mayieka Ronald, and sought an order for dismissal of the appellant’s/respondent’s (“the respondent”) appeal for want of prosecution with costs.
2. The respondent opposed the Motion by a replying affidavit sworn by Macharia Waiganjo advocate.
3. It was agreed by consent of the parties that the Motion be determined by way of affidavit evidence. I have therefore considered the grounds laid out on the face of the instant Motion together with the facts deponed in the supporting affidavit and the replying affidavit.
4. It is clear from the Motion that the sole issue for determination before me is whether the appeal filed by the respondents is ripe for dismissal.
5. While it is apparent that the applicant’s Motion was filed under Order 17, Rule 2(1), (2) and (3) of the Civil Procedure Rules, 2010 (“the Rules”), the correct provision ought to be Order 42, Rule 35 of the Rules which sets out the circumstances and manner of dismissal of an appeal as follows:

“(1) Unless within three months after the giving of directions under rule 13 the appeal shall have been set down for hearing by the appellant, the respondent shall be at liberty either to set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.

(2) 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.”

6. Mayieka Ronald through his supporting affidavit to the Motion states that despite various correspondences by the applicant to the respondent, the latter has neglected and/or failed to set the appeal down for directions and has not taken any steps to prosecute the appeal. The respondent on the other hand has demonstrated the efforts made to obtain proceedings from the lower court in vain. Annexed to the replying affidavit are copies of four letters addressed to Executive Officer asking for the same.
7. From the record, the respondent filed its memorandum of appeal on 14th September, 2016. He also complied with the order made by Njuguna J on to deposit the decretal sum 17th November, 2016 as security for stay of execution.
8. The record shows that the Deputy Registrar-Civil Appeals Division sent correspondences on various dates to the Chief Magistrate’s Court requesting for the lower court file and certified copies of the typed proceedings and judgment/decree. It is apparent that those correspondences did not elicit any response.
9. The record also shows that the applicant’s advocate wrote to the Deputy Registrar vide the letter dated 27th January, 2020 requesting that a notice be issued to the parties for listing of the appeal before a Judge in chambers for dismissal. There appears to have been no response to that letter.

10. Suffice it to say it is apparent that directions are yet to be given in respect to the appeal and consequently, the appeal is yet to be set down for hearing. Moreover, going by the record, the lower court file has not been made available to this court so as to trigger the admission or issuance of directions on the appeal.

11. Consequently, I find the Motion to be premature and the same is hereby struck out, with the following orders being:

- a. The Executive Officer (Chief Magistrate’s Court-Milimani Commercial Courts) shall avail certified copies of the typed proceedings, judgment delivered on 24th August, 2016 and decree in CMCC NO. 85 of 2008 to the appellant/respondent within 20 days from this day.**
- b. The appellant/respondent shall thereafter compile, file and serve its record of appeal within 14 days from the date of receipt of the aforementioned documents.**
- c. The Executive Officer shall avail the lower court file to the High Court-Civil Appeals Division within 30 days from this day.**
- d. The parties shall take a date before the Deputy Registrar to confirm availability of the lower court file and to take further directions.**
- e. Each party shall bear their own costs of the application.**

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF MAY, 2021

A. MBOGHOLI MSAGHA

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent