



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCA NO. 40 OF 2019

WILSON NDOLO MUTWIWA ....APPLICANT/APPELLANT

-VERSUS-

NICHOLAS MUSINGA NDETI.....RESPONDENT

RULING

1. Before me is a Notice of Motion dated 24<sup>th</sup> November 2020 filed by the respondent Nicholas Musinga Ndeti through counsel M/s Waiganjo Wachira & company advocates.
2. The application was filed under section 1A, 1B and 3A and 79B of the Civil Procedure Act (Cap. 21), and Order 42 Rule 11 and 13, and Order 45 Rule 35(1) and Order 51 Rule 1 of the Civil Procedure Rules, and seeks orders that the appeal be dismissed for want of prosecution.
3. The application has grounds on the face of the Notice of Motion that the appellant has failed to file and serve record of appeal, and that the appeal has remained pending for long thus occasioning great injustice to the appellant.
4. The application was filed with a supporting affidavit sworn on 24/11/2020 by Waiganjo Wachira the counsel of the applicant which amplifies the grounds of appeal.
5. The application has been opposed through a replying affidavit sworn by Kelvin Ngure the Claims Manager of Directline Assurance Company Ltd on 25/3/2021, in which it was deposed that after instituting the appeal, the appellant wrote to the Executive Officer of the trial court requesting for certified typed copies of the decree, judgment and proceedings, and that there was a delay in receiving the same. It was further deposed that this application should be dismissed as directions in the appeal have not yet been given under section 79 B of the Civil Procedure Act.
6. The application proceeded through filing of written submissions. The applicant's counsel Waiganjo Wachira & company filed submissions on 13/5/2021, which the respondent's counsel M/s Kairu & McCourt filed their written submissions on 12/5/2021.
7. I have perused and considered the submissions of counsel for the parties herein. I note that both sides relied on case authorities.
8. This being an application for dismissal of appeal for want of prosecution, it is governed by the provisions of Order 42 Rule 35 of the Civil Procedure Rules, the relevant part of which states as follows –  
  

**“Unless within three months after 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.**
9. Though the appellant/respondent has contended that this court cannot grant the orders sought because directions have not been given and relied in the case of **Kirinyaga General Machinery –vs- Hezekiel Mureithi Ileri (2007) eKLR**, in my view that is not the mandatory position. In my view, where an appellant files an appeal and just leaves the matter there without taking any further steps for a long period, the court under section 3A of the Civil Procedure Code can dismiss the appeal for want of prosecution even if no directions have been given. On this, I rely on the case of **South Nyanza Sugar Co. Ltd. –vs- Charles Onyango Ondieki (2009) eKLR**.
10. Coming to our present matter, the appellant/respondent has explained the cause of the delay in obtaining the typed trial court record. They requested for the record in writing without delay. I also note that they have now filed the record of appeal. The said record of appeal was filed on 22/2/2021.

11. In the circumstances of this case therefore, and bearing in mind the provisions of Article 159(2) of the Constitution which enjoins courts to strive to render substantive justice rather than determine matters on technicalities, this application will not be unsuccessful. I will thus dismiss the application to give a chance to the appellant/respondent to prosecute their appeal.

12. Consequently, I dismiss the application. The respondent will ensure that the appeal is heard in 2022. Costs will follow the determination of the appeal.

**DELIVERED, SIGNED & DATED THIS 30<sup>TH</sup> DAY OF NOVEMBER, 2021, IN OPEN COURT AT MAKUENI.**

.....

**GEORGE DULU**

**JUDGE**