



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 406 OF 2017

KAMANYI RICHARD.....1ST APPELLANT/RESPONDENT

GITHAIGA CHARLES.....2ND APPELLANT/RESPONDENT

-VERSUS-

NATHANIEL WANYOIKE WAINAINA.....RESPONDENT/APPLICANT

RULING

1. Nathaniel Wanyoike Wainaina, the respondent/applicant (“the applicant”), took out the Notice of Motion dated 21st June, 2021 and sought for an order to the effect that the 1st and 2nd appellants’/respondents’ (“the respondents”) appeal be dismissed for want of prosecution with costs, and a further order for release of the decretal sum of Kshs.470,154/= together with interest accrued, held in the account number 011xxxxxxxxxx in the joint names of the parties’ advocates.

2. The Motion is supported by the grounds presented on its face and the facts stated in the affidavit of the applicant.

3. To resist the Motion, advocate Daniel Mugun swore a replying affidavit on 21st September, 2021 on behalf of the respondents.

4. When the Motion came up for interparties hearing before the court on 22nd September, 2021 the parties were directed to file and exchange written submissions.

5. I have considered the grounds laid out on the face of the Motion, the facts deponed in the affidavits supporting and resisting the Motion, and the rival written submissions and authorities relied upon.

6. The sole issue for determination before me is whether the appeal filed by the respondents is ripe for dismissal.

7. On his part, the applicant states and submits that since filing their memorandum of appeal on 1st August, 2017 the respondents have not taken any active steps towards prosecuting their appeal which is a clear demonstration of a lack of interest in pursuing the appeal.

8. The applicant further states and submits that meanwhile, he continues to suffer prejudice by virtue of his inability to enjoy the fruits of his judgment and hence it is only fair that the appeal be dismissed on that basis and that he be granted access to the decretal amount held in the joint bank account.

9. In reply, advocate Daniel Mugun states that since filing the memorandum of appeal, the firm acting for the respondents has been following up on the typed proceedings from the lower court, to no avail.

10. The advocate also states that the respondents are still ready and willing to prosecute their appeal and therefore request for more time within which to comply. These sentiments are echoed in the written submissions by the respondents.

11. **Order 42, Rule 35** of the **Civil Procedure Rules, 2010** cited by the applicant provides for 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.”

12. From the record, it is apparent that the respondents filed their memorandum of appeal on 4th August, 2017.
13. The record shows that subsequently, the Deputy Registrar-Civil Division sent correspondences to the Chief Magistrate’s Court requesting for the lower court file and certified copies of the typed proceedings and judgment/decree.
14. Advocate Daniel Mugun similarly annexed various correspondences to his reply and addressed to the Executive Officer of the Chief Magistrate’s Court making similar requests.
15. The record shows that the lower court file together with the relevant documents have since been availed to the High Court.
16. Furthermore, the record shows that the Deputy Registrar issued a correspondence on 25th January, 2021 which was received by the respondents’ advocate on 27th January, 2021 notifying them of the availability of the lower court file and further directing them to file the record of appeal. It is apparent that the respondents are yet to comply.
17. Nevertheless, it is also 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. It therefore follows that the appeal cannot be deemed to be ripe for dismissal under the provisions of Order 42, Rule 35(1) (supra).
18. There is equally nothing to indicate that the Deputy Registrar has listed the appeal before a judge for dismissal pursuant to the provisions of Order 42, Rule 35(2) (supra).
19. In the premises, the Motion is found to be premature and is struck out with costs abiding the outcome of this appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 17TH DAY OF DECEMBER, 2021.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the 1st and 2nd Appellants/Respondents

..... for the Respondent/Applicant