



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 355 OF 2018

THE CONSTITUENCY DEVELOPMENT FUND BOARD.....APPELLANT/RESPONDENT

-VERSUS-

ABUODHA & OMINO ADVOCATES.....RESPONDENT/APPLICANT

RULING

1. The respondent/applicant in this instance took out the Notice of Motion dated 30th June, 2021 and sought for an order to the effect that the appellant's/respondent's appeal be dismissed for want of prosecution and in the alternative, order the respondent to deposit the sum of Kshs.4,000,000/= in court as security for costs pending the hearing and determination of the appeal.
2. The Motion is supported by the grounds presented on its face and the facts stated in the affidavit of advocate Franklin Omino.
3. To resist the Motion, Simon Ndweka swore a replying affidavit on 22nd September, 2021 on behalf of the respondent, to which Franklin Omino rejoined with a further affidavit sworn on 5th October, 2021.
4. When the Motion came up for interparties hearing before the court, 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 contending written submissions and authorities relied upon.
6. To give a brief background of the matter, upon my perusal of the record, I note that the parties had previously appeared before this court under High Court Misc. Application No. 1106 of 2013 pursuant to the Chamber Summons dated 26th October, 2015 brought by the respondent and seeking to have the decision of the taxing master delivered on 17th September, 2015 set aside and/or varied and referred for re-taxation.
7. Upon hearing the parties, this court by way of the ruling delivered on 19th August, 2016 found that the learned taxing master had not considered the issue touching on agreement of fees between the parties and ordered for a fresh taxation to be handled by a different taxing master.
8. While I note that none of the parties availed a copy of the fresh taxation proceedings and/or resulting ruling to this court, it is apparent from the averment by the parties that upon placement of the matter before a different taxing master, the said taxing master vide the ruling delivered on 27th July 2018 determined that there was no agreement on fees and that she would proceed to re-tax the Bill.
9. However, it is apparent that the respondent is dissatisfied with the aforementioned ruling and has preferred the present appeal to challenge the same. It is also apparent that re-taxation is yet to take place.
10. Returning to the instant Motion, the twin issues for determination before me are whether the appeal filed by the respondents is ripe for dismissal and whether the respondent ought to provide security for costs. I will address the issues contemporaneously.
11. On its part, the applicant states and submits that the respondent has not filed its record of appeal or taken any steps towards setting the appeal down for hearing since lodging the appeal over three (3) years ago.
12. The applicant further states and submits that the appeal has been prematurely filed since the respondent did not wait for the taxing master to tax the Advocate-Client Bill of Costs afresh but rushed to court to challenge the ruling of the taxing master to the effect that there was no agreement on fees between the parties.

13. The applicant is of the view that should this court be inclined to dismiss the instant Motion, then it would be fair for an order on provision of security for costs to be made.
14. In reply, the respondent states and submits that it has done several follow ups on the availability of the typed proceedings and the impugned ruling which would explain the delay in pursuing the appeal.
15. The respondent further submits that the appeal is yet to be admitted for hearing and hence the instant Motion is premature.
16. The respondent is of the view that it would be unfair to order it to provide security for costs yet the certificate of taxation dated 7th October, 2015 has since been set aside, adding that it operates on a strict budget and the amount being sought by the respondent cannot easily be raised at this point.
17. The respondent is also of the view that the issue of security for costs can only arise where there exists a monetary decree and in the present instance, no such decree exists.
18. **Order 42, Rule 35** of the **Civil Procedure Rules, 2010** cited in the submissions by the respondent 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.”

19. From the record, it is apparent that the respondent filed its memorandum of appeal on 2nd August, 2018.
20. The record shows that subsequently, the Deputy Registrar-Civil Division requested for the relevant court file and certified copies of the typed proceedings and judgment/decree. It is apparent that those correspondences did not elicit any response.
21. The respondent also annexed to the replying affidavit of Simon Ndweka, a few correspondences addressed to the Deputy Registrar indicating a follow up on the certified copies of the typed proceedings and impugned ruling. This position supports the explanation given by the respondents for not compiling and filing the record of appeal and which explanation I find to be reasonable in the circumstances.
22. Following from the foregoing, 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. It therefore follows that the appeal cannot be deemed to be ripe for dismissal under the provisions of **Order 42, Rule 35(1)** (supra).
23. There is also nothing to indicate that the Deputy Registrar has since listed the appeal before a judge for dismissal pursuant to the provisions of **Order 42, Rule 35(2)** (supra).
24. I have also established from the record that the relevant court file has not been made available to this court which therefore means that it would not have been possible in any event for the appeal to be admitted and/or set down for directions in absence of the file.
25. On the issue of security for costs, I am of the view that the applicant has not brought forth any credible evidence or reasonable arguments to warrant a granting of such order.
26. In the premises, I find the Motion dated 30th June, 2021 to be premature and the same 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.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant/Respondent

..... for the Respondent/Applicant