



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 152 OF 2017**

**ALPINE COOLERS LIMITED.....APPELLANT/RESPONDENT**

**-VERSUS-**

**ALFRED AVUKWI MIHESO.....RESPONDENT/APPLICANT**

**RULING**

1. Alfred Avukwi Miheso, the respondent/applicant herein, took out the Notice of Motion dated 10<sup>th</sup> September, 2019 in which he sought for an order for dismissal of the appeal for want of prosecution plus costs of the Motion.
2. The Motion is supported by the grounds laid out on its face and the facts stated in the affidavit of his advocate, *Lemmy Regau Nyawade*.
3. The aforementioned deponent asserted that save for filing its memorandum of appeal way back on 5<sup>th</sup> April, 2017 to challenge the judgment delivered by the trial court on 6<sup>th</sup> March, 2017 in Chief Magistrate's Civil Case No. 7557 of 2014, the appellant has neither filed its record of appeal nor taken any additional steps to prosecute its appeal.
4. It was also the deponent's assertion that in the meantime, the respondent has been hindered from enjoying the fruits of his judgment for close to three (3) years now.
5. *Gad Gathu* advocate for the appellant/respondent put in a replying affidavit to challenge the averments made in the Motion, essentially stating that his office had on several occasions written to the Executive Officer requesting for copies of the typed proceedings and judgment, and further requesting for the retrieval of the lower court file.
6. The deponent explained that when the matter came up for directions on the appeal on 31<sup>st</sup> July, 2018 it was noted that the lower court file had not been forwarded to the High Court, thereby leading to the return of the High Court file to the registry.
7. The deponent maintained on behalf of his client that the appellant/respondent is still interested in prosecuting its appeal and has even complied with the conditions previously set by the court in respect to the order for stay of execution earlier made.
8. When the Motion came up for interparties hearing before this court on 2<sup>nd</sup> December, 2019 the parties' respective counsels presented oral arguments.
9. *Miss Kemunto* advocate for the respondent/applicant relied on the averments made in the Motion and supporting affidavit.
10. On his part, *Mr. Gathu* counsel for the appellant/respondent contended that the Motion has been brought under the wrong provisions of law. The advocate went on to reaffirm that the lower court file has been missing and that there has been no response from the Executive Officer on the status of the file, a fact which the respondent/applicant is well aware of.
11. *Miss Kemunto* rejoined with the submission that this court is at liberty to consider the merits of the Motion under the provisions of Article 159 of the Constitution and Section 3A of the Civil Procedure Act, Cap. 21 Laws of Kenya; adding that the last correspondence by the appellant/respondent to follow up on the lower court file was made on 10<sup>th</sup> May, 2018 and that since then, there have been no additional follow ups.
12. I have considered the grounds laid out on the face of the Motion, the affidavits supporting and opposing the Motion, and the rival oral submissions.
13. On the issue of competency of the Motion, I noted that the Motion has been brought under *inter alia*, the provisions of Order 17, Rule 2(1) and (2) of the Civil Procedure Rules, 2010. The aforesaid Order concerns itself with the dismissal of suits upon issuance of a notice to

show cause by the court; this has not been done in the present instance. It therefore follows that the above provision is inapplicable. Nonetheless, in the interest of substantive justice pursuant to **Article 159(2) (d) of the Constitution, 2010** I will consider the merits of the Motion.

14. **Order 42, Rule 35** of the **Civil Procedure Rules, 2010** provides for the circumstances and manner of dismissing 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.”*

15. It remains uncontested that the appellant filed its memorandum of appeal on 5<sup>th</sup> April, 2017.

16. It is manifest from the record that directions are yet to be given on the appeal. The record also shows that the appeal has not been admitted in line with the provisions of **Section 79B** of the **Civil Procedure Act** which expresses thus:

*“Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against he may, notwithstanding section 79C, reject the appeal summarily.”*

17. It therefore follows that the appeal is not ripe for dismissal under the proviso of **Order 42, Rule 35(1)** (*supra*).

18. Going by the record, I have equally established that there is no indication that the Registrar has given notice to the parties in respect to the dismissal of the appeal or that the respondent/applicant has impelled the Registrar to take any such action. Consequently, the provisions of **Order 42, Rule 35(2)** (*supra*) would similarly not apply to the present instance.

19. There is no question that the appellant/respondent is yet to put in its record of appeal for the reasons set out hereinabove. I have looked at the correspondences made by its advocate to the Executive Officer of the Chief Magistrate’s Court requesting for certified copies of the typed proceedings, judgment and decree. There is no indication that the correspondences elicited a response.

20. I have also looked at the correspondences by the appellant’s/respondent’s advocate concerning availability of the lower court file, the most recent being made on 25<sup>th</sup> September, 2019. While I find that there is nothing to ascertain that the lower court file was ever missing from the registry, the correspondence dated 20<sup>th</sup> June, 2018 from the respondent’s/applicant’s advocate to the advocate acting for the appellant/respondent confirms that the lower court file is yet to be availed.

21. I am also able to tell from the record that the Deputy Registrar made various requests for the lower court file to be availed but it would appear no response was offered.

22. In view of the foregoing, I find that it would be unjust to fault the appellant/respondent for the delay in prosecuting its appeal whereas it is apparent that the availability of the lower court file is well beyond its control.

23. Accordingly, I hereby dismiss the Motion with no orders as to costs.

**Dated, Signed and Delivered at Nairobi this 30<sup>th</sup> day of January, 2020.**

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**L. NJUGUNA**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent