



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO. 24 OF 2018

SAID ADAM KAZUNGU.....APPLICANT

VERSUS

KIBOKONI PROPERTIES LTD.....RESPONDENT

(Being an appeal arising from the Ruling and Orders of the Chief Magistrate

Hon. Dr. Julie Oseko given on 11th April 2018 in Malindi CMCC No. 459 of 2010)

Coram: Hon. Justice R. Nyakundi

Mr. Atiang for the appellant

T. O. K'opere for the respondent

RULING

The Ruling is relation to a notice to show cause (NTSC) date 4th May 2020 issued by the Deputy Registrar why the appeal should not be dismissed for want of prosecution under Order 42 Rule 53 (2) of the Civil Procedure Rules.

When the matter came up for hearing on **21st May 2020**, only counsel for the respondent was on record. The Court ordered that parties should file submissions.

Submissions

In his submissions dated 8th June 2020 Mr. K'opere advocate for the respondent submitted that since the appeal was filed on 27th April 2018 and the stay application dismissed in October 2019, the appellant had taken no steps to file a record of appeal or prosecute the appeal for a period of over 2 years until the Court issued a NTSC dated 4th May 2020.

Counsel submitted that despite filing the memorandum of appeal and the stay application dismissed, the appellant lost interest in prosecution of the appeal and urged the Court to dismiss the appeal to allow the respondent/deedee holder to reap the fruits of its Judgment.

The appellant failed to put in his submissions.

Determination

Order 42 Rule 35 of the Civil Procedure Rule provides for dismissal for want of prosecution and states that:-

“(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.”

This Court in **Rosavie (EPZ) Limited v Stanlex Mbithi James {2015} eKLR** stated that:

“The Law on dismissal of an appeal for want of prosecution is contained in Order 42 Rule 35 of the Civil Procedure Rules. The rule contemplates two scenarios when an appeal can be dismissed. One is where three (3) months after issuance of directions no steps have been taken to prosecute the appeal i.e. Order 42 Rule 35 (1), and the second is where no steps have

taken to prosecute the appeal within one year after the service of the memorandum of appeal i.e. Order 42 (35) (2). Under the first scenario, it is the respondent to move the Court whilst under the second scenario, the action is by the registrar.”

The appeal before this Court was lodged on 27th April 2018 more than two years ago. Thereafter the appellant filed an application seeking to stay the orders of the Lower Court on 26th October 2018 and which was dismissed on 25th September 2019. The appellant has never filed a record of appeal and has never followed up on his appeal.

The Deputy Registrar initiated the dismissal in accordance to the Law. Despite notice been served to his advocate on the notice to show cause, the appellant has failed to respond. It is apparent that the appellant has no interest in pursuing his appeal and has abandoned. In this regard, the appeal stands dismissed.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 18TH DAY OF DECEMBER 2020

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R. NYAKUNDI

JUDGE