



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL NO. 20 OF 2017

MAKERECHA CHEGE.....APPELLANT

-VERSUS-

JOSEPH NJORA MWANGI.....RESPONDENT

(Being an appeal from whole of the judgment of Hon. Nthuku, Senior Resident Magistrate, Nakuru, delivered on 27th January 2017)

RULING

Judgement in the subordinate court Nakuru CMCC No.56 of 2013 was delivered in favour of the Respondent herein on the 27th January 2017. The appellant filed a Memorandum of Appeal against the said judgment on the 22nd February 2017 within the statutory period.

By a letter dated 28th August 2017, six months after delivery of the judgment, the Appellant sought to be provided with a copy of the certified typed proceedings for purposes of preparing the Record of Appeal.

I have not seen any other follow up requests or at all for the typed proceedings by the Appellant.

By an **application dated 16th August 2018**, the Respondent sought an order of dismissal of the Appeal for want of prosecution but cited inapplicable provisions of the Law, **Order 17 Rule 2(3) of the Civil Procedure Rules (CPR)** in place of **Order 42 rule 35(2)** thereof.

It states

“If within one year after service of the Memorandum of Appeal, the Appeal has not been set down for hearing, the Registrar shall on notice to the parties list the appeal before a Judge in chambers for its dismissal.”

The Respondent has urged that the appeal be dismissed for want of prosecution for the wider interests of justice as the appellant appears to have lost interest in the appeal.

I have considered the supporting affidavit sworn by the Respondent/Applicant as well as the Replying affidavit sworn by the Claims Manager at Direct Line Assurance Company the insurer of the accident motor vehicle.

He blames the Executive officer of the court for failure to furnish it with copies of the proceedings to facilitate filing of the appeal by its only one letter stated above.

It is further averred that since the appeal has not been admitted for hearing nor directions taken under **Order 42 rule 35(2) of the Civil Procedure Rules**, the appeal cannot be dismissed, and in any event, it is further averred that the delay is not unreasonable nor would it prejudice the Respondent.

I note that the Executive officer is yet to provide the typed proceedings to the Respondent neither has the Respondent made a follow up.

It is trite that a case or appeal belongs to the plaintiff, in this case the appellant. It is the duty of the appellant to take steps to progress its appeal. There is no doubt that the appellant is guilty of inordinate delay of 2½ years to date and unless a credible excuse is made out, the natural inference would be that it is inexcusable – **Jaribu Credit Traders Ltd –vs- Mumias Sugar Co. Ltd – HCCC No. 465 of 2009**.

As stated in the case **Amalgamated Saw Mills –vs- Gladys Imbuka, C.A No.96 of 2000**, the appellant must be proactive in pursuing his appeal once filed. A party cannot sit back and do nothing close to over two years on the pretext of waiting for certified copies of proceedings yet no follow up is made. This is an abuse of court process.

Section 3A of the Civil Procedure Act gives the court inherent power to dismiss a case or appeal not only for want of prosecution but also for being an abuse of court process – **Ivita –vs- Kyumbu (1984) e KLR and Bi-madi Engineers Ltd -vs- James Kahoro Mwangi (2011) e KLR** where similar sediments were expressed.

However, in the interest of justice and with a view of balancing the parties rival interest, and not locking the appellant from being heard, being informed by the above observations, being his constitutional right to be heard, I disallow the application dated 16th August 2018, and instead make the following orders:

- 1. That the appellant shall take all necessary steps to file the Record of Appeal within a period of 60 days from the date hereof failing which the appeal shall stand dismissed.*
- 2. The appellant shall pay costs to the Respondent assessed at Kshs.10,000/= being penalty for its delay in filing the appeal.*
- 3. Mention on the 19th September 2019 for further directions and orders.*

Dated, delivered and signed at Nakuru this 27th Day of June 2019.

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J.N. MULWA

JUDGE