



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO.29 OF 2017**

**KENNEDY ODHIAMBO OCHIENG.....APPELLANT**

**-VERSUS-**

**ESTHER WANJIRU KIMANI& ROBERT UNO MUNGAI**

**(Suing as the administrator of the Estate of**

**SAMUEL NJOROGE MUNGAI DECEASED).....RESPONDENT**

***(An appeal from the judgment/Decree of Hon. L. Gicheha, SPM delivered on 17<sup>TH</sup> February 2017 in Nakuru CMCC No.1036 of 2011)***

**RULING**

1. This is a ruling on application dated 29<sup>th</sup> March 2019. It seeks to dismiss this appeal for want of prosecution. Grounds on the face of the application are as set out hereunder:-

- i. That the judgment in CMCC No.1036 of 2011 was delivered on 17<sup>th</sup> February 2017 in favour of the plaintiff.
- ii. That the appellant filed the instant appeal dated 21<sup>st</sup> March 2017 on even date; that the appellant has failed to take any steps to prosecute the appeal; that the appellant has lost interest in the appeal whose pendency prejudices the respondents
- iii. That failure to prosecute this appeal is contrary to the overriding objective that require suits to be expeditiously disposed.

2. The application is supported by affidavit sworn by **George Kirumba Mbiyu** on 29<sup>th</sup> March 2019. He restated grounds of appeal.

3. In response, the respondent filed replying affidavit sworn by **Kelvin Ngure** on 3<sup>rd</sup> May 2019. He attached a letter dated 11<sup>th</sup> January 2018 written by appellants Advocate to the executive officer requesting for typed proceedings to enable them prepare and file record of appeal. He averred that the delay is not inordinate or unreasonable and can be compensated by way of costs.

4. He averred that directions in this matter have not been taken and it can only be dismissed under Order 42 Rule 35 (2) of the **Civil Procedure Rules** and the appellant can only move the court for dismissal after directions have been taken under **Section 79** of the **Civil Procedure Act**.

5. He averred that the appellant will be greatly prejudiced if application is allowed as they will have been prevented from ventilating their grievances

6. Parties herein proceeded by way of written submissions

7. In submissions the appellant restated ground of appeal and cited the case of **Safina Limited Vs Jammadass (K) Ltd (2006 )** where the high court cited with approval the case of **Mukisa Biscuit Co.Ltd Vs West End Distributors (1969 ) E.A 696** and stated as follows:-

**“...it is the duty of the plaintiff to bring this suit to early trial, and he cannot absolve himself of his primary duty by saying the defendant consented to the position.”**

8. In **Dickson Miriti Kamonde Vs commercial Bank [200]eKLR** the court held as follow:-

**“For purposes of this application he did nothing between 7/5/2003 and date this application was filed 7/2/2005 a period of 11/2 years. No evidence that the court file was unavailable has been given. The delay cannot be excused and indolent party must reckon with consequences of inaction.”**

9. The applicant/respondent submitted that it is slightly over one year since memorandum of appeal; that following filing of the appeal, a request was done by the deputy registrar on 29<sup>th</sup> July 2016 for lower court record; that no action has been taken by the appellant; and by reading of Order 42, it is the appellant’s duty to have the appeal listed for directions.

10. Respondent submitted that the overriding objective as set out under **Sections 3A and 3B** of the **Civil Procedure Act** is to ensure disputes, which include appeals, are determined in a manner that facilitate just, expeditious, proportionate and affordable resolution.

11. Applicant/Respondent submitted that considering that the application is not opposed, the applicant has demonstrated lack of interest in the appeal and that the same lack of interested was demonstrated in the lower court where the hearing proceeded exparte, as the appellant did not attend court on the hearing date.

12. Appellant/Respondent restated averments in the replying affidavit and among other other authorities cited include the case of **Judge Paul Flasch Vs Jane Akoth Flach, Nakuru Civil Appeal No.119 of 2012** where the court held that dismissal for want of prosecution cannot be granted where directions have not been given under **Section 79B** of the **Civil Procedure Act**.

### **ANALYSIS AND DETERMINATION**

13. I have perused the court file and confirm that the appeal herein was filed 16<sup>th</sup> March 2017. On 15<sup>th</sup> November 2017, the deputy registrar sent a letter to chief magistrate, Nakuru asking for the lower court original record, certified proceedings, pleadings and exhibits and certified extracted Decree.

14. **Order 42 Rule 35** of the **Civil Procedure Rules** provide 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. From the foregoing therefore, the deputy registrar should have issued notice for dismissal of appeal upon expiry of one year after service of memorandum of appeal which has not been done. The option available for the advocate for the respondent is to seek dismissal after 3 months from the date directions for hearing are given.

16. The appeal herein has not been admitted. Directions have not been given. There is no dispute that there is delay but before directions are given orders for dismissal should beat the instance of the registrar. In the absence of any other provision, the respondent should have prompted the registrar to place the file before a judge for dismissal.

### **17. FINAL ORDERS**

1. Application dated 29<sup>th</sup> March 2019 is hereby dismissed

2. Appellant to move the court in respect of the appeal within 30 days failure to which the deputy registrar do list the appeal for dismissal for want of prosecution

3. Costs in the cause.

**Ruling dated, signed and delivered at Nakuru this 26<sup>th</sup> day of Sep. 2019.**

.....

**RACHEL NGETICH**

**JUDGE**

**IN THE PRESENCE OF:-**

Jeniffer Court Assistant

Kanyi holding brief for Kariuki Counsel for Appellant

No appearance for Counsel for Respondent