



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 287 OF 2017

KENINDIA ASSURANCE COMPANY LIMITED.....APPELLANT

-VERSUS-

CHARLES MUNGAITHI (Suing as administrator of

JAMES MUMO MUNGAITHI-Deceased).....RESPONDENT

RULING

1. The respondent has taken out the Notice of Motion dated 4th April, 2019 supported by the grounds set out on its body and the facts deponed in his affidavit. Therein, the respondent is seeking an order to the effect that the appeal filed on 15th June, 2017 be dismissed for want of prosecution as well as costs of the Motion.
2. The appellant has opposed the Motion by filing the replying affidavit sworn by *Felix Momanyi* and Grounds of Opposition.
3. When the application came up for hearing before this court on 1st July, 2019 the parties recorded a consent to have the same disposed of by written submissions.
4. On the one part, the respondent submits that on the fact that following the granting of an order for a stay of execution by this court on 21st June, 2017, the appellant has not taken any steps to set the appeal down for hearing for two (2) years now, thereby causing him great anxiety and prejudice.
5. The respondent further argued that the power of the Deputy Registrar to dismiss the appeal in no way denies him the right to file an application seeking its dismissal.
6. On the other part, the appellant contends that the appeal is yet to be admitted for hearing or listed for directions by the Deputy Registrar, hence there would be no basis for having the same dismissed.
7. I have considered the grounds stated on the face of the Motion; the facts deponed in the affidavits filed in support and in opposition thereto; the Grounds of Opposition; and the rival written submissions as well as the authorities cited by the appellant.
8. *Order 42, Rule 35* of the *Civil Procedure Rules* provides for the circumstances and manner in which a party can apply for the 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.”

9. It is evident from the record that the appellant's memorandum of appeal was filed on 9th June, 2017. Thereafter, the appellant filed the application dated 20th June, 2017 seeking an order for a stay of execution pending appeal and which application was allowed by this court through its ruling of 10th November, 2017.

10. It is apparent from the record that directions have not been given in this appeal and neither has the same been set down for hearing. It therefore follows that in line with the provisions of **Order 42, Rule 35(1)** (*supra*), the appeal cannot be deemed ripe for dismissal under this sub-rule since directions have not been given.

11. It is also apparent from the record that the appellant is yet to file its record of appeal as explained in the replying affidavit of *Felix Momanyi* who deponed that the appellant had written to the Executive Officer of the subordinate court by way of three (3) letters bearing various dates, requesting for certified copies of the judgment, decree and typed proceedings to enable it prepare its record of appeal but that the same are yet to be supplied.

12. I have seen copies of the aforementioned letters supporting the appellant's position. It would appear they were delivered to the Magistrate's Court at Milimani Commercial Courts on 29th April, 2019 which indicates a delay on the part of the appellant. In the circumstances, it is fair to state that the appellant has made an attempt to follow up on the relevant documents.

13. By a letter dated 24th April, 2019 issued to the trial court the Deputy Registrar requested to be supplied with the court file but no response has been made.

14. In the end, I find the Motion to be premature. The same is ordered struck out with no order as to costs.

Dated, Signed and Delivered at Nairobi this 25th day of October, 2019.

.....

J.K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent