



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 200 OF 2010

RIARA ENTERPRISES LIMITED.....APPELLANT

-VERSUS-

KENYA DUTY FREE COMPLEX.....RESPONDENT

RULING

1) Kenya Duty Free Complex, the respondent herein, took out the amended motion dated 29.8.2016 in which it sought for this appeal to be dismissed for want of prosecution under order 42 rule 35 of the Civil procedure Rules and under Sections 3, 3A and 100 of the Civil Procedure Act. Riara Enterprises Ltd, the appellant herein filed the replying affidavit of Anne Ameyo to oppose the motion. When the motion came up for interpartes hearing, learned counsels recorded a consent order to have the motion disposed of by written submissions.

2) I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the motion. It is the submission of the respondent that more than three years have lapsed since the appeal was filed and the appellant has taken no action to prosecute the appeal. The respondent pointed out that it is clear that the appellant has lost interest in pursuing this appeal and hence, its pendency is prejudicial to the respondent. It is said that the delay in fixing the appeal for hearing is inordinate and inexcusable.

3) In response, the appellant urged this court to dismiss the motion on the basis that the same was prematurely filed in that directions have not been taken therefore the right to apply for the appeal to be dismissed has not arisen.

4) It is argued that the respondent could have approached the Deputy Registrar to cause the file to be placed before a judge to issue a notice to show cause why the appeal should not be dismissed for want of prosecution.

5) In its written submissions, the appellant stated that it is still interested in pursuing the appeal and has even gone ahead to prepare a record of appeal which is not complete since the certified copy of the decree and certificate of costs have not been supplied to the appellant despite writing several letters.

6) It is apparent that the respondent has invoked the relevant provisions in which a party who seeks for the dismissal of an appeal for want of prosecution can rely. The respondent has equally cited the inherent power of the court under Sections 3 and 3A of the Civil Procedure Act.

7) In my humble view, it is inappropriate for a party to rely on the inherent power of the court where there is an express provision which a party can base its application. In the instant motion, the relevant provision is Order 42 rule 35 of the Civil Procedure Rules.

8) Under the aforesaid provision there are two ways in which a party can seek to have an appeal dismissed for want of prosecution. **First**, an applicant can approach the court under Order 42 rule 35(1) of the Civil Procedure Rules to have the appeal dismissed if one year has lapsed after directions have been given and the applicant has not taken any step to have the appeal set down for hearing.

9) **Secondly**, is where the Registrar under Order 42 rule 35(2) Civil Procedure Rules issues a notice to show cause why the appeal should be dismissed for want of prosecution if one year has lapsed since the memorandum of appeal was served and the appeal has not been set down for hearing.

10) The appellant has challenged the respondent’s motion on the basis that the same is premature in that it was filed before directions have been taken. With respect, I agree with the appellant’s argument that the motion is premature. Consequently, the motion is ordered struck out with costs abiding the outcome of this appeal.

Dated, Signed and Delivered at Nairobi this 22nd day of November, 2019.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent