



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 407 OF 2018

JOHN KARIUKI MAINA.....1ST APPELLANT

JOHN KIBE KIHUNGI.....2ND APPELLANT

-VERSUS-

THOMAS OOKO WANYANGO.....RESPONDENT

RULING

1. The respondent herein took out the Notice of Motion dated 5th August, 2019 in which he sought for an order for the dismissal of the appeal for want of prosecution, with costs.
2. The Motion is supported by the grounds laid out on its face and the facts stated in the affidavit of *James Ichaura Wachira*.
3. *Christopher Chengecha* learned advocate for the appellants put in a replying affidavit to challenge the averments made in the Motion.
4. When the Motion came up for hearing before this court on 16th October, 2019 only the advocate for the respondent was in court and he opted to rely on the grounds stated on the face of the Motion and the facts deponed in the supporting affidavit.
5. I have considered the aforementioned grounds and the facts deponed in the affidavits supporting and opposing the Motion.
6. *James Ichaura Wachira* advocate for the respondent asserted in his affidavit that since the filing the memorandum of appeal in 2018, the appellants have not taken any steps to have this appeal prosecuted.
7. The deponent further asserted that the appellants were recently served with a notice to file their record of appeal but are yet to comply, thereby portraying their lack of interest in the appeal even more.
8. *Christopher Chengecha* on his part contended that the appeal cannot be dismissed at this stage for the reasons that directions have not been given, neither has the appeal been admitted for hearing.
9. He went on to state that the appellants are yet to receive copies of the requisite documents from the trial court to enable them prepare their record of appeal.
10. **Order 42, Rule 35** of the **Civil Procedure Rules, 2010** provides for the circumstances and manner of dismissing 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.”
11. It is not controverted that the appellants filed their memorandum of appeal on 31st August, 2018.
12. It is manifest from the record that directions have not been given in respect to the appeal, neither has the appeal been admitted under the

provisions of **Section 79B** of the **Civil Procedure Act** which expresses that:

“Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against he may, notwithstanding section 79C, reject the appeal summarily.”

13. It therefore follows that the appeal is not ripe for dismissal pursuant to the proviso of **Order 42, Rule 35(1)** (*supra*).
14. The record shows that there is nothing to indicate that the Registrar has since given notice to the parties in respect to the dismissal of the appeal or that the respondent has approached the Registrar to take action in that regard. Consequently, I am convinced that the provisions of **Order 42, Rule 35(2)** (*supra*) do not come into play in the present instance.
15. The appellants have admitted to having not filed their record of appeal. I have considered their explanation vis-à-vis the court record.
16. It is apparent that the appellants’ advocate by way of the letter dated 1st October, 2018 wrote to the Executive Officer-Milimani Commercial Courts requesting for certified copies of the proceedings, judgment and decree. There is nothing to indicate that a response was offered to the same.
17. I am able to tell from the record that the Deputy Registrar made a similar request vide the correspondence issued on 16th July, 2019 which it would appear did not prompt a response.
18. While I have seen the notice to file a record of appeal given by the Deputy Registrar on 27th June, 2019 there is nothing to confirm when, if ever, the lower court file was delivered to this court.
19. In view of the foregoing, I find that the appellants should not be faulted for the delay caused in the prosecution of their appeal.
20. Consequently, I dismiss the Motion and make the following orders:
 - a) *The Deputy Registrar of this court directed to liaise with the trial court to supply the Appellants with certified copies of the proceedings and Judgment.*
 - b) *The appellants shall thereafter compile, file and serve their record of appeal within 14 days from the date of receipt of the aforementioned documents.*
 - c) *The Deputy Registrar is further directed to avail or cause the file to be availed to this court within 45 days from this date.*
 - d) *The parties to appear before a judge on a date to be fixed by the Deputy Registrar to confirm availability of the lower court file and to take further directions.*
 - e) *Each party shall bear its own costs of the application.*

Dated, Signed and Delivered at Nairobi this 20th day of December, 2019.

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J.K. SERGON

JUDGE

In the presence of:

..... for the 1st Appellant

..... for the 2nd Appellant

..... for the Respondent