



REPUBLIC OF KENYA

THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 73 OF 2016

PAUL MUCHOMBA & OTHERS.....APPLICANT

-VERSUS-

JAMES NGARUIYA KANYORI & ANOTHER.....RESPONDENT

RULING

1. The applicant (who is the respondent in this appeal) has filed the present notice of motion dated 21st September 2017 seeking orders for the dismissal of the appeal for want of prosecution. In the alternative, the applicant prays for an order that the court directs the registrar to list the appeal before a judge in chambers for dismissal. The application is brought on the grounds that the appellants have not taken any steps towards the conclusion of the appeal over a year.
2. The application is supported by the sworn affidavit of **James Ngaruiya Kanyori** the 1st respondent. He avers that the appellant filed the memorandum of appeal on 1st July 2016 and has not taken any steps towards its prosecution including setting down the appeal for directions. He further avers that the delay continues to prejudice the applicants by denying them the fruits of the judgment in the lower court and, that in the circumstances, it was fair to dismiss the appeal.
3. In opposition to the application, the 1st appellant **Paul Muchomba** swore a replying affidavit on 14th November 2017. He avers that the application was premature, misconceived, incompetent and bad in law. He avers that there were pending issues on costs in the lower court and that the proceedings were yet to be typed. Further, he states that the appeal was yet to be admitted and that the appellants had paid the decretal sum into an interest earning joint account as a condition for stay.
4. The application has been urged by way of written submissions. In brief submissions, the applicant, submits that the appeal ought to be dismissed under **Order 42 Rule 35 (2)** of the **Civil Procedure Rules** because no action has been taken by the appellant. They cite the case of **Protein and Fruit Processors Ltd & Another Vs. Diamond Trust Bank Ltd (2015) eKLR** where the court (**Onyanja J**) proceeded to dismiss a dormant appeal by invoking **Section 3A** of the **Civil Procedure Act**.
5. The respondent has submitted that the applicant has failed to disclose to the court that there were on-going negotiations between the appellants' and respondents' respective counsel on the issue of costs in the lower court and conditions for stay of execution. That the proceedings for stay were pending before the trial court with a mention date for 29th November 2017 and that the typing of the proceedings in the trial file Nakuru CMCC. No.1764 of 2005 was on-going.

6. I have considered the rival affidavits and submissions. The applicant has brought the application under **Order 42 Rule 35 (2)** of the **Civil Procedure Rules**. The rule provides:-

(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"

7. The rule implies that the registrar can act on his own motion or be moved by the respondent to have the appeal placed before a judge for dismissal if a year elapses without the appeal being set down for hearing. In this case the memorandum of appeal was filed on 1st July 2016 slightly over a year ago. The applicant is therefore well within the time frame provided by the rule to bring up the present application. He ought, under this rule to have moved the registrar. I will however consider the application against the well-established principles namely the period of delay; whether the delay is inordinate, intentional and inexcusable; and whether the dismissal would prejudice the appellant. **See Ivita Vs. Kyumbu (1984) KLR 441 and Protein & Fruits Processors Limited Vs. Diamond Trust Bank Kenya Ltd (2015) eKLR.**

8. In the present case, it is not disputed that a year has elapsed since the memorandum of appeal was filed and served. It is also not disputed that a record of appeal has not been prepared and filed for admission. What is obtaining is that the only step taken so far by the appellant was the filing of the memorandum of appeal. On the face of it there has been inertia on the part of the appellant/respondent. The respondent has on the other hand explained in the replying affidavit and in written submissions that the parties have been and continue to be engaged in the subordinate court in applications in respect of costs and stay of execution. They have indicated that they shall be returning to court on 29th November 2017.

9. This, to my mind sufficiently explains the delay. It is one that can be excused. None of the parties has elaborated on the proceedings before the lower court. While such proceedings are not a bar to completing the appeal process, it is evident to me from the submissions of the parties that the applicant though entitled by procedural law to make the present application, has not come to this court with clean hands. Rather the application is clearly an attempt to steal a match against the respondents.

10. In the circumstances of this case, I am inclined to dismiss the application and order that the appellant files record of appeal within 45 days failing which the appeal shall stand dismissed.

Costs shall follow the appeal.

Ruling delivered, dated and signed in open court *This 30th day of January, 2018*

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R. LAGAT KORIR

JUDGE

In the presence of:

C/A Emojong

Mr. Oragia holding brief for Waiganjo for applicant

M/s Gikonyo holding brief for Wambura for respondent