



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

HCA NO. 15 OF 2014

MUNGANIA TEA FACTORY.....APPLICANT/APPELLANT

V E R S U S

JONHSON MURIITHI.....RESPONDENT

R U L I N G

1. This is an application dated 24/08/2017 seeking for orders that this appeal be marked as dismissed pursuant to the ruling of the court delivered on 13/07/2016.
2. The application is supported by three main grounds. Firstly, that the appellant has never complied with the orders made in the court's ruling delivered on 13/07/2016. Secondly, that the appellant paid Kshs.69,574/= being the principal sum claimed in the primary suit. Finally, that litigation must come to an end.
3. The application was opposed by the respondent on a single ground of opposition filed on 31/10/2017 that the appeal herein was withdrawn by consent with no orders as to costs.
4. On 31/01/2018 the counsel for the respondent filed a replying affidavit sworn by herself on 30/01/2018. She deposes that the application is brought in bad faith and is tainted with fraud and malicious intent. The parties negotiated the settlement of the appeal through correspondence following a stay that was granted on 12/06/2014 in favour of the appellant. It was agreed that subject to a sum of Kshs.69,574/= being deposited in the joint names of Rugaita & Co. Advocates and Ms. Malonza & Co. Advocates the parties would settle the appeal. The necessary documents for opening the bank account were sent to the respondent's advocate for execution. Despite reminders being issued, the respondent's advocate did not respond and subsequently filed an application for dismissal of the appeal.
5. At a later date the parties agreed to have appeal withdrawn with no orders as to costs and signed a consent dated 30/06/2016 which was filed in court. By error the appellant's counsel signed the consent on both her part and on the part of the respondent. The document was sent for execution to the respondent's counsel without the error being noticed. This was after the amount of Kshs.69,574/= was paid to the respondent. Since the matter had been settled, the appellant's counsel did not pursue the matter and assumed that all was well until this application was filed.
6. The background fact to this application are that the court delivered a ruling on 13/07/2016 and made the following orders.
 - (a) That the application for dismissal of the appeal for want of prosecution was disallowed.
 - (b) That stay orders granted on 12/06/2014 be vacated.
 - (c) That the respondent causes directions to be taken and the appeal listed for hearing within 30 days failure to which the appeal was to stand dismissed.
7. From the record of the court, the appellant never complied with the orders for taking directions and listing the appeal for hearing within 30 days. To date the orders of the court have not been complied with.
8. The parties never informed the court that they were negotiating to settle the appeal out of court. This came out in the replying affidavit of the appellant's counsel who was on the firing side. It is surprising that the respondent's counsel never mentioned that there was an attempt to settle the appeal.
9. The ruling of the court was delivered on 13/07/2016 and the 30 days given to the appellant to take directions and list the appeal for hearing expired on the 12/08/2016. The appeal stood dismissed at the expiry of the 30 days. The appellant's counsel states that the cheque for payment was forwarded to the respondent's counsel on the 22/08/2016. At the time the payment was made the appeal was already

dismissed.

10. The consent dated 30/06/2016 was never executed by the parties and was never filed in court. In essence there was no order marking the appeal as “withdrawn with no order as to costs”.

11. It is not in dispute that the orders of the court of 13/07/2016 were never complied with. It is also not contested that the appeal stood dismissed 30 days after the orders were issued.

12. For the foregoing reasons, I find the application dated 24/08/2017 meritorious and allow the same as prayed.

DELIVERED, DATED AND SIGNED AT EMBU THIS 22ND DAY OF MAY, 2018.

F. MUCHEMI

J U D G E

In the presence of:-

Respondent present