



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

HCCA NO. 25 OF 2017

LENISI AKORILE.....APPELLANT

VERSUS

ELDORET EXPRESS CO. LTD.....RESPONDENT

(Being an Appeal from the Ruling of the Resident Magistrate Court of Kenya

at Eldama Ravine Hon. R. Yator, SRM dated 14th February, 2017

in Eldama Ravine PMCC NO. 74 OF 2014)

RULING

1. The Judgment from which the appeal has been filed was delivered on 14/2/2017. The Memorandum of Appeal was filed within time on 10/3/2017. Indeed the Record of Appeal has already been filed on 22/1/18.
2. However, on 1/11/2017, the Deputy Registrar of the Court minuted on the file that a Notice to Show Cause why the appeal should not be dismissed for want of prosecution had been served on the parties by Registered Post on 19/10/17.
3. When on 24/7/18 the matter eventually came up before me for hearing of the Notice to Show Cause, Counsel for the appellant pointed to the fact of filing of the Record of Appeal and urged that “*the Notice to Show Cause be withdrawn to allow us to proceed with the appeal which was filed on 22/1/18*”. For the Respondent it was urged that the appeal be dismissed for want of prosecution as the appellant had not demonstrated any efforts to have the appeal heard since the Memorandum of Appeal was filed on 10/3/17. The appellant, however, explained the failure to earlier prosecute the appeal on the delay in obtaining the proceedings of the trial court.
4. With respect to the learned Deputy Registrar, on considering to application, I find that the Notice to Show Cause in this matter issued on 1/11/17 was made in error. Apart from being wrongly expressed to have been brought under order 17 Rule 2 of the Civil Procedure Rules which is applicable to hearing to suits rather than appeals, which defect is curable under Order 51 Rule 10 of the Civil Procedure Act, the Notice to Show Cause was given prematurely.
5. Order 42 Rule 35 of the Civil Procedure Rules on dismissal of appeals for want of prosecution is in the following clear terms:

“Order 42 rule 35.

(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 submissions 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.”

6. The Memorandum of Appeal having been filed on 10/3/17 within the prescribed 30 days under section 79G of the Civil Procedure Act, the appellant had one year upto 9/3/18 after which the Notice to Show Cause may have been given if no step was taken before then. As it is, the appellant filed the Record of Appeal itself on 22/1/18 well within the 1 year grace period under Order 42 Rule 35(2) Civil Procedure Rules. Indeed directions for the hearing of the appeal under Order 42 Rule 13 of the Civil Procedure Rules have not been given. The Notice to Show Cause is accordingly lifted.

7. The matter shall therefore be listed for directions in accordance with Order 42 Rule 13 of the Civil Procedure Rules.

Order accordingly.

DATED AND DELIVERED THIS 30TH DAY OF OCTOBER 2018.

EDWARD M. MURIITHI

JUDGE

Appearances: -

M/S N.K.W Bichanga Advocates for the Appellant.

M/S Kairu M'Court & Co. Advocates Respondent.