



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIVASHA**

**CORAM: R MWONGO, J**

**CIVIL APPEAL NO. 115 OF 2015**

*(Being an Appeal from the Judgment delivered on 25<sup>th</sup> August, 2015 in Naivasha CMCC No 726 of 2013, (Hon. Shadrack M Mwinzi – SRM))*

**BERNARD BISONGA SUNGURA.....1<sup>ST</sup> APPELLANT/RESPONDENT**

**DAIMA CONNECTIONS LTD.....2<sup>ND</sup> APPELLANT/RESPONDENT**

**-VERSUS-**

**HARRISON OGENDO OPIYO.....RESPONDENT/APPLICANT**

**RULING**

1. This is an application brought under **section 1 A, 1B and 3A** the **Civil Procedure Act** and **Order 42 Rule 35** of the **Civil Procedure Rules**. It seeks that the appeal be listed before the judge for dismissal for want of prosecution and that the appellant's be condemned to pay the respondents the balance of the decretal sum with interest.
2. The application is supported by the affidavit of Kennedy Achieng who has deposed that the judgement in the lower courts was entered on 25<sup>th</sup> August 2015 in favour of the respondent in the amount of Kshs 1,200,000/- less 10% contribution by the plaintiffs as general damages.
3. Following an application in the lower court by the appellants in this application in Naivasha High Court Misc. Civil Application No 55 of 2015, stay of execution was ordered by consent of the parties, on the condition that the appellant's pay the respondents the sum of Kenya shillings 630,725/- and deposit the sum of Kenya shillings 540,000/- court within 30 days from 30<sup>th</sup> October 2015.
4. The memorandum of appeal was then filed on 18<sup>th</sup> December 2015, but since then the appellants have failed to prosecute the appeal.
5. The applicants annexed as FMM 6 a copy of the Registrar's letter dated 17 July 2017 which states:  
***“The above matter refers. We have received the lower court record in respect of the above appeal file. Kindly file your record of appeal for our further action”***
6. Despite the letter being issued, the appellant has failed, neglected and refused to list this matter for purposes of taking directions, file the record of appeal and prosecute this appeal.
7. The appellant's filed a Replying affidavit deposed by Kelvin Ngure the claims manager of Directline Assurance Company Limited, the insurers of the motor vehicle at whose instance the claim is being defended.
8. Mr Ngure admits that the appellant's found their memorandum of appeal dated 27<sup>th</sup> November 2015, that they subsequently wrote a letter to the executive officer of the lower court requesting certified copies of the decree, judgement and type proceedings to enable them to file the record of appeal. They have attached a letter dated 13 November 2015, to the executive officer making the aforesaid request.
9. The appellants argue that the appeal cannot be dismissed for want of prosecution under **Order 42 R35 (2)** as directions have not yet been issued. That in fact the appeal has not been admitted under section **79B** of the **Civil Procedure Act**, and thus no step can be undertaken in the appeal.
10. Further, the appellants argue that the aforesaid provisions can be complied with unless and until the appellants obtain typed and certified

copies of the proceedings judgement and decree of the lower court.

11. I have considered the application and the parties arguments carefully. The procedures for appeals are treated under **Order 42** of the **Civil Procedure Rules. Rule 11** requires the Appellant to cause the matter to be listed before a judge, within thirty days of filing, for directions under **section 79B** of the **Civil Procedure Act**. If a judge refuses to reject the appeal, then under **Rule 12** the Registrar shall notify the appellant who, shall serve the memorandum of appeal within seven days on every respondent. **Rule 13** then kicks in and requires the Appellant within twenty one days of service of the memorandum, to cause the appeal to be listed for directions

12. In this matter, none of the steps under **Order 42 Rules 11 -13** have been taken. The appellants have not submitted any evidence that, after filing the Memorandum of appeal, they have themselves taken any interest in pursuing the proceedings or record of appeal. And this is perhaps because of the condition created by Rule 35 which requires the giving of directions under Rule 13 before dismissal action can be taken. To that extent, the application herein is premature.

13. This situation exists notwithstanding the fact that the registrar issued a letter in July 2017 requiring the appellants to file their record of appeal. I find and hold that the appellants have neglected or failed to so file their record of appeal, and have not even bothered to give an explanation of their reasons for not doing so.

14. As a result, the appeal herein cannot be listed before a Judge for directions under **Section 79B** as there is no Judgment or Ruling of the lower court before the judge to enable him to consider it for summary rejection.

#### **Disposition**

15. In the circumstances the most prudent way forward is to order as follows, as I hereby now do in the interests of justice and expeditious determination, that:

**a. The appellants shall file the record of appeal within ten (10 days from the date of this Ruling to enable the court to act under Section 79B and Order 42 Rules 11-14.**

**b. The appellants shall forthwith cause the file to be listed before the Judge in chambers for admission and directions within fourteen (14) days from the date hereof;**

**c. Failure to comply with this order shall result in the dual automatic admission of the appeal on the basis of existing proceedings and simultaneous immediate dismissal of the appeal;**

**d. A mention shall be held within thirty (30) days from the date hereof to confirm the status of the matter and for further orders.**

16. The application herein was instituted on account of the indolence and unexplained inordinate delays of the appellants, and accordingly they shall carry the costs of the application in any event.

Orders accordingly.

**Dated and Delivered at Naivasha this 22<sup>nd</sup> Day of November, 2018**

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**RICHARD MWONGO**

**JUDGE**

Delivered in the presence of:

1. Mr. Owuor holding brief for Mmuka for the Appellant.
2. Maobe for the Respondent/Applicant.
3. Court Clerk – Quinter Ogutu.