



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 364 OF 2010

BRUCE TRUCKS & EQUIPMENT (E.A) LTD.....APPELLANT

- V E R S U S -

BOB MORGAN SERVICES LTD.....RESPONDENT

RULING

1. The respondent herein, Bob Morgan Services Ltd, took out the summons dated 29.02.2016 in which it sought for the following orders:

1. THAT the appeal filed herein be dismissed for want of prosecution.

2. In the alternative, that the memorandum of appeal filed herein dated 9th September 2010 be struck off.

3. That costs of this application and the appeal be awarded to the respondent.

2. The summons is supported by the affidavit of L. O. Wauna Oluoch. The summons was served upon Bruce Truck & Equipment (E.A) Ltd, the applicant herein but the same did not elicit any response. When the summons came up for interpartes hearing, the appellant did not turn up in court hence the respondent's advocate was permitted to proceed exparte.

3. I have considered the grounds stated on the face of the summons and the facts deponed in the supporting affidavit. I have also considered the oral submissions of Mr. Oluoch, learned advocate for the respondent/applicant. The background of this dispute appear to be short and straightforward. The appellant herein filed an action by way of a plaint before the Senior Resident Magistrate's Court, Milimani Commercial Court, Nairobi in which it sought for judgment against the respondent in the sum of ksh.1,200,242 plus interest being the outstanding sum due under the agreement for security services provided to the appellant by the respondent at its premises along Kampala Road between the months of June 2005 and March 2006. The appellant filed a defence to deny the respondent's claim. On 31.3.2010, the respondent applied to the trial court vide the motion dated 30.3.2010 for judgment on admission and or summary judgment in the sum of ksh.1,056,481/= being part of the principal sum of ksh.1,200,242/= being claims against the appellant. The aforesaid motion was heard and determined in favour of the respondent on 11th August 2010. Being dissatisfied with the decision, the appellant preferred this appeal.

4. Having given the brief background of this appeal, let me now determine the current motion on its merits. It is the submission of Mr. Oluoch learned advocate for the respondent that the appellant has taken no reasonable steps to have the appeal prosecuted. It is submitted that it is now more than five (5) years since the appeal was filed and there is no evidence that the appellant any more interested in

pursuing this appeal. The learned advocate further argued that the appeal is fatally incompetent in that no leave was obtained by the appellant before filing this appeal.

5. Having carefully considered the material placed before this court and the submissions of respondent's learned counsel, it is apparent that judgment was entered in favour of the respondent by the trial court on admission. Under Order 43 rules 2 and 3 of the Civil Procedure Rules, an appeal against an order made under Order 13 of the Civil Procedure Rules can only be filed with prior leave. In this case there is no evidence that the appellant obtained leave prior to filing this appeal.

In the absence of leave, the appeal is therefore rendered incompetent.

6. The respondent has also urged this court to dismiss the appeal for want of prosecution. It is pointed out by the respondent that it is now more than five (5) years since the appeal was filed and there is no evidence that the appellant has taken steps to have the appeal prosecuted. With respect, I agree with the submissions of the respondent that the delay of more than five (5) years to prosecute the appeal is inordinate. It is worst still because the delay is not explained by the appellant. This court is justified in law to infer that the appellant has lost interest to prosecute its appeal.

7. In the end, I find the summons dated 29.2.2016 to be well founded. It is allowed in terms of prayers 1 and 2 with costs to the respondent.

Dated, Signed and Delivered in open court this 27th day of January, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent