



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL APPEAL NO. 447 OF 2015
HIGHLANDS MINERAL WATER CO. LTD.....APPELLANT/RESPONDENT
VERSUS
SUSAN NYAMBURA KARIUKI & TWO OTHERS.....RESPONDENT/APPLICANT
RULING

1. The respondent has filed a notice of motion dated 18th January, 2017 under Order 17 rule 2 (1) & (3) and Order 51 rule 1 of the Civil Procedure and section 3A of the Civil Procedure Act. She seeks the following orders:

a. That the appellant's memorandum of appeal dated 16th September, 2015 and/or the appeal herein be dismissed for want of prosecution with costs to the respondent.

b. That the sum of KShs. 2,802,774/= plus accrued interest thereon deposited in a joint interest earning account of both law firms herein at Chase Bank Ltd, Hurlingham branch as a condition for stay of execution pending hearing be released to respondent's advocates herein.

2. The motion is based on the grounds on the body of the application and the supporting affidavit of Fidelis Maithya Mutisya who is the advocate in conduct of the matter on behalf of the respondent. He advanced the reason that the appellant has since the filing of the memorandum of appeal on 16th September, 2015 taken no steps absolutely to set down this appeal for hearing whilst all along enjoying orders for stay of execution to the detriment of the appellant. He stated that the prosecution of this appeal is long overdue more than 1 year having lapsed since its filing and the appellant continues to suffer by being unduly delayed and denied the enjoyment of the fruits of their judgment. He contended that litigation must come to an end and a suit cannot pend indefinitely without any progression whatsoever. That the respondent stands to suffer no prejudice herein should the instant application be denied.

3. Judith Matata the advocate in conduct of this appeal on behalf of the appellant swore a replying affidavit on 2nd February, 2017 in response to this motion. She explained that the appellant applied for typed proceedings and prepared a record of appeal dated 18th April, 2016 and filed it on 20th April, 2016. That the appellant filed a supplementary record of appeal on 20th January, 2017 she avers that the appellant has made attempts to list this appeal for directions recently by a letter to the Deputy Registrar dated 23rd January, 2017. She contended that the appellant has always been eager to prosecute the appeal and have it heard and determined on merit. That the appellant's appeal has high chances of success and that the appellant is not out to deny the respondent what may be rightfully theirs.

4. In its submissions, the appellant submitted that this appeal is not ripe for dismissal since it has not been listed down for directions. The appellant cited Order 42 rule 35 of the Civil Procedure Rules and the cases of **Jurgen Paul Flach v. Jane Akoth Flach (2014) e KLR**, **Kirinyaga General Machinery v. Hezekiel Mureithi Ileri HCCC No. 98 of 2008** and **Mwangi S. Kimenyi v. Attorney General & Another (2014) e KLR** to support that argument.

5. The respondent on the other hand argued that an indolent appellant cannot use the absence of directions as a shield against a respondent who seeks dismissal of the appeal for want of prosecution. The respondent cited **Ann W. Chege & another v. Peter Kisuna Musasya (2006) eKLR** and **Laban Onono & another v. Dan Owiti (2006) eKLR** to support that argument.

6. I have carefully considered the application and submissions. The issue for determination is whether or not this appeal should be dismissed for want of prosecution. The substantive law in this regard is Order 42 Rule 35 of the Civil Procedure Rules which provides as follows:

“(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 to apply by summons 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.” (Emphasis mine)

7. This provision enunciates two scenarios of dismissing an appeal for want of prosecution. Under order 42 rule 35 (1) directions must have been taken. The second is where one year after serving a memorandum of appeal the appeal shall not have been set down for hearing. In this case, no directions have been taken. But am also alive to the fact that this court has inherent jurisdiction under section 3A of the Civil Procedure Code to dismiss a suit for want of prosecution where the appellant has failed to take action within the prescribed period. However, I note that the Appeal herein was filed on the 17th September, 2015, thereafter, a record of Appeal was filed on the 20th April, 2016 and a supplementary record was filed on the 20th January, 2017. In the interest of justice, and considering that the Appellant has made some reasonable efforts to ready the Appeal for hearing, the following orders are made

(a) The application dated the 18th January, 2012 is dismissed with no orders as to costs.

(b) The Appeal to be prosecuted within 120 days failing which it shall stand dismissed.

Dated, signed and delivered at Nairobi this 29th day of June, 2017

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L. NJUGUNA

JUDGE

In the presence of:

..... **for the Appellant/Respondent**

.....**for the Respondent/Applicant**