



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO.12 OF 2012

KISHOE BHANDERI t/a CHEAMBE JAGGERY APPLICANT

VERSUS

SAMSON WAMASAKA JUMA RESPONDENT

RULING

1. The respondent in this appeal Samson Namasaka Juma (herein the applicant) has filed a notice of motion dated 3rd March 2017 seeking for orders that:-

(1) THAT this appeal be dismissed for want of prosecution.

(2) THAT the sum of Kshs.244,673/- (Two Hundred Forty Four Thousand Six Hundred and Seventy Three Shillings) and interest plus all accrued interest jointly deposited at Diamond Trust Bank on 11th July 2012 to serve as security in this case be released to the respondent's advocate M/s Ngala & Company Advocates for onward transmission to the respondent.

(3) THAT the costs and interests be in favour of the respondent.

2. The application is based on the grounds that:

(i) That it has been over five years after service of the memorandum of appeal dated on 25th January 2012 and the appellant has not set down the matter for hearing as provided in Order 42, rule 35(2) of the Civil Procedure Rules, 2010.

(ii) That subsequently record of appeal dated 4th November 2014 was served to us on 11th May 2015.

(iii) That to date the appellant has not served us with any application for directions on the appeal.

(iv) That in addition, we have notified the applicant through several letters and through mobile lines of our intention to apply to court for orders of dismissal for non-prosecution of appeal but they have not responded to date.

(v) That the failure by the appellant to prosecute the appeal has been injurious to the respondent and is contrary to the law and procedure. The appellant has been indolent in the appeal proceeding.

(vi) That it will only be just fair that this appeal to be dismissed in order for this matter be settled.

(vii) That the appellant will not suffer any prejudice if this application is allowed.

3. The application is supported by the affidavit of the advocate for the respondent/applicant Kibichi Ngala.

The application is opposed by the appellant in the case Koshore Bhandari t/a Chetambe Jaggery vide the replying affidavit of the appellant's advocate Michael Okwii who depones, *inter alia* that:-

(1) They had applied for the decree at Butali Law Courts hence the appeal ought to be heard on its merit

(2) They have just received a decree from Butali Law Courts dated 20th April 2017.

(3) The dismissal will be premature as no pre-trial directions have been given.

4. The advocates for the appellant submitted that they had applied for a decree at Butali Law Courts but that there was delay by the court supplying it to them. That **order 42(2)** of the Civil Procedure Rules requires that a certified copy of a decree be filed with the appeal which document was not in their possession. That an application for dismissal of the suit can under **Rule 35(1)** only be brought after directions have been given in the matter as provided by **Rule 13** of the Civil Procedure Rules. That no such directions have been given and therefore that the application is premature.

5. The advocates for the respondent/applicant replied that the lower court could not have delayed issuance of a decree for a period of 5 years. Therefore that the appellant was at fault.

6. The court record indicates that the Memorandum of appeal was filed on the 30th January 2012 and the record of appeal filed on 6th November, 2014. On 11th February, 2015, the respondent/applicant filed a application for dismissal of the suit for want of prosecution but he did not prosecute it. The appellant did not take any steps in the matter until when the applicant filed the current application.

7. The lower court's record shows that judgment in the case was delivered on 19th December, 2011. The certified copy of the decree that the appellant produced in court was dated the same day of the judgment, 19th December, 2011. There is nothing on record to indicate that the appellant ever applied to be supplied with the copy of the decree before April 2017. They cannot thereby blame the lower court for delay in issuing them with a copy of the decree when there is no evidence that they ever applied for it. The appellants must have applied for a copy of the decree after the applicant filed the current application to have the suit dismissed for want of prosecution.

8. **Rule 13(1)** of the Civil Procedure Rules requires the appellant in a suit to list the matter before a Judge in chambers for giving of directions after 21 days of service of memorandum of appeal.

9. **Order 42 Rule 35(1)** provides that it is not until after directions have been taken that the respondent can apply for the suit to be dismissed for want of prosecution. The rule provides as follows:-

“Unless within three months after the giving of directions under rule 13 the appeal should 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.”

10. In this case no directions had been taken when the applicant filed the current application. The suit cannot thereby be dismissed for want of prosecution on the basis of the grounds adduced by the applicant. The application is in contravention of **Rule 35(1)** of the Civil Procedure Rules. The application is accordingly dismissed.

11. The appellant is however guilty of inordinate delay in prosecuting the matter. He is not entitled to costs in this application. I therefore order that each party meets its own costs in the application.

Delivered, dated and signed at Kakamega this 28th day of June, 2017.

J. NJAGI

JUDGE

In the presence of:

Isiya..... for applicant

Ngala..... for respondent - absent

Paul..... court Assistant

Applicant ... Present/Absent

Respondent ... Present/Absent