



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 82 OF 2013

RIFT VALLEY RAILWAYS KENYA LTD.....APPELLANT

VERSUS

1. JEREMIAH KYALO MWANTHI.....1ST RESPONDENT

2. ISIAH O. NYANGWESO.....2ND RESPONDENT

3. CHRISTOPHER MWANDIKI.....3RD RESPONDENT

4. THE ATTORNEY GENERAL.....4TH RESPONDENT

RULING

1. The respondents filed a preliminary objection dated 10th March, 2017 to the application dated the 5th December, 2016 on the following grounds:

- a) The issues raised are res judicata.
- b) The application is an abuse of the process of the court since the same application had been dismissed by the honourable court.
- c) The application violates the principles of the rule of law and due process.
- d) The applicants are mischievous as they have paid more litigation fees than the decretal amount.
- e) The application be dismissed with costs.

2. Submissions to this preliminary objection were orally tendered. Learned counsel for the respondent Mr. Ondieki submitted as follows that the motion dated 5th December, 2016 is largely similar to the other two applications that were dismissed by this court. That this appeal was dismissed pursuant to a lawful court order. That it has been 8 years since the matter was filed and that as a result of the many applications that have been filed by the appellants, the respondents have been in a dilemma.

3. It was contended that there has been no effort made by the Appellant to prosecute the appeal since the year 2013 and though the deponent in the supporting affidavit has blamed the court registry for the delay, the court order was express and unambiguous.

4. Mr. Odhiambo learned counsel for the appellant on the other hand contended that the said motion was

filed following the ruling of the court on 1st December, 2016. That the failure to lodge the appeal within the required period was not of the appellant's making. He stated that they wrote to the registry for the file to be traced. That Justice Onyancha had given directions on 15th October, 2015 that the appeal be listed for hearing within 30 days. An invitation was sent on 16th October, 2015 but they were informed that the file was missing. That on 3rd August, 2016 they learnt that the file had been taken to the lower court. That the court in its own order of 1st December, 2016 noted that an order for reinstatement had not been sought. He stated that the record of appeal has not been filed because the appeal had been dismissed and the appellant could not so file without the leave of court.

5. In rebuttal Mr. Ondieki submitted that the order of 1st December, 2016 was very clear. That the appellant was aware as early as 14th January, 2016 that the file was available but the appellant did not take action until the respondents commenced execution proceedings.

6. The court has given due consideration to the preliminary objection and the submissions made by the parties herein. I have also taken the liberty to peruse the court record and it is clear to me that the prayer for stay of execution pending the hearing and determination of the appeal is Res Judicata. However, prayer 3 has never been canvassed by the court after the Appeal was dismissed.

In the result, the court hereby orders that the application dated 5th December, 2016 should proceed for hearing but only with respect to prayer 3 of the same.

No orders is made on costs of the application.

Dated, Signed and Delivered at Nairobi this 28th Day of June, 2017.

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L. NJUGUNA

JUDGE

In the Presence of

..... For the Appellant

..... For the 1st Respondent

.....For the 2nd Respondent

..... For the 3rd Respondent

.....For the 4th Respondent