



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL DIVISION
HIGH COURT CIVIL APPEAL NO. 624 OF 2015

DEVSHIBHAI & SONS LIMITED.....APPELLANT/RESPONDENT

VERSUS

LULE KALUVE NYAMAI.....1STRESPONDENT/APPLICANT

CATHERINE NTHENYA KAYALO2ND RESPONDENT/APPLICANT

(Suing as legal representatives of the estate of

FRANCIS KILONZO LELU (Deceased)

RULING

1. The application dated 16th January, 2017 seeks the following orders:

- 1. That the Honourable Court be pleased to dismiss the appeal herein for want of prosecution.**
- 2. That the judgment of the subordinate Court delivered on 20th November, 2015 in Milimani CMCC 6265 of 2014 be executed forthwith.**
- 3. That the remaining decretal sum of Ksh.1,830,600/= being one half of the decretal amount be forthwith released to the Applicants.**

2. The application is based on the grounds stated in its body and is supported by the affidavit of Hezekiah N Waiganjo, the Applicant's advocate. The Applicant's complaint is that the Appellant has failed to take any steps to prosecute the appeal herein which was filed on 17th December, 2015.

3. The application is opposed. It is stated in the replying affidavit that the delay in prosecuting the appeal has been caused by the lower court's failure to avail the proceedings and judgment.

4. The application was canvassed by way of written submissions which I have duly considered.

5. Appeals to the High Court are governed by Order 42 of the Civil Procedure Rules. Order 42 rule 35 provides as follows in regard to dismissal of Appeals for want of prosecution:

“35. (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. “

6. In the case at hand, the appeal has not been given directions as required under the provisions of Order 42 Rule 11 & 12. The appeal is yet to be admitted.

7. Although there are letters herein dated 30th May 2016 and 7th December, 2016 from the office of the Deputy Registrar requesting for the lower court proceedings the said proceedings are yet to be availed. There are however no copies of letters from the Appellant company exhibited herein to demonstrate that it requested for the lower court file. The Appellant also has the responsibility of compiling the record of appeal and taking steps to prosecute his appeal. Be as it may, the Appellant is not entirely to blame for the delay. The court must bear part of the blame.

8. With the foregoing, I dismiss the application with costs in cause. The Respondent to take a mention date before the Deputy Registrar within 30 days from date hereof to follow on the progress of the lower court file.

Dated, signed and delivered at Nairobi this 22nd day of June, 2017.

B.THURANIRA JADEN

JUDGE