



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 265 OF 2014

ZENSATIONAL HOLDINGS LTDAPPELLANT/RESPONDENT

V E R S U S

STEPHEN KIMANI GAKENIA.....RESPONDENT/APPLICANT

RULING

1. Stephen Kimani Gakenia, the applicant/respondent herein took out the motion dated 27th June 2016, in which he sought for the

following orders:

- 1. THAT the appeal herein be dismissed for want of prosecution by the appellant.***
- 2. THAT costs of this application and the appeal be awarded to the respondent in the appeal.***

2. The applicant motion was brought under Section 3A of the Civil Procedure Act, Order 42 Rule 35 and Order 51 Rule 1 of the Civil Procedure Rules and all enabling provisions of the law.

3. It is from the motion dated 27th June 2016 that the appellant raised a preliminary objection on the following point of law:

- 1. The instant application offends Order 42 Rule 35(1) of the Civil Procedure rules, as no directions have ever been given in this appeal to warrant the applicant/respondent make an application for dismissal of the appeal for want of prosecution.***
- 2. The instant application be dismissed with costs.***

4. I have considered the facts stated on the face of the preliminary objection application and the rival submissions on record.

5. It is the applicant's submission that it is not in dispute that no directions have been issued in this matter and the notice of motion application seeking to dismiss this appeal for want of prosecution is thus incurably defective, bad in law and an abuse of the court process and in breach of Order 42 Rule 35 of the Civil Procedure Rules. And for this reason it prays that this honourable court be pleased to dismiss the notice of motion application dated 27th June 2016 with costs.

6. The respondents on the other hand submits that the omission to indicate Rule 35(2) in his notice of motion is an oversight and is highly regretted. The applicant further avers that from the ground upon

which the application is brought, supporting affidavit and the submission herein it is clear that the motion was meant to be brought under Rule 35(2) of Order 42. For this reason the respondent is beseeching this court to invoke its inherent power to serve the ends of justice and have the notice of preliminary objection and the appeal dismissed with costs.

7. In **Hermanus Phillups Stayn, -vs- Govanii Guecchi Ruscone Supreme Court Application 2 of 2012**, this court stated:

“..... it is trite law that a court of law has to be moved under the correct provisions of the law”

8. A party who moves the court, has to cite the specific provision(s) of the law that clothes the court with the jurisdiction invoked. It is improper for any party in its pleadings, to make ‘omnibus’ applications with ambiguous prayers, hoping that the court will grant at least some.

9. The basis of a preliminary objection were laid down in the case of **Mukisa Biscuits Manufacturing Co. Ltd –vs- West End Distributors (1969) EA 696**, where it was stated *inter alia*:

“..... a preliminary objection consists of a point of law which has been pleaded., or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.....” It was further stated in this cast that:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

The law concerning dismissal of an appeal for want of prosecution is contained in Order 42 Rule 35 of the Civil Procedure Rules.

11. Under Rule 35, the law contemplates two different scenarios for issuance of an order for dismissal of an appeal for want of prosecution. These are:- First, a situation where three months after issuance of directions under Order 42 rule 13, no steps have been taken by the appellant to fix the appeal for hearing. In such a situation, the respondent has two options: one, to fix the appeal for hearing or to apply by summons for the dismissal of the appeal (Order 42 Rule 35(1)).

This was reiterated in the case of **Kirinyaga General Machinery –vs- Hezekiel Mureithi Ileri HCC No. 98 of 2008**.

“It is clearly seen from that rule (Order 42 rule 35) that before the respondent can move the court either to set the appeal down for hearing or to apply for dismissal for want of prosecution, directions ought to have been given as under Rule 8B.”

12. The second scenario is that contemplated under Order 42 Rule 35(2) which is to the effect that within one year after 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 chamber for dismissal.

13. Noting that no directions were issued in this appeal, and based on the provisions of Order 42 rule 35(1) I have no reason to deviate from the holding in **Kirinyaga General Machinery –vs – Hezekiel Mureithi Ileri (Supra)**

14. The respondent however quoted in support of its omission Section 3A of the Civil Procedure Act 2010 states

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of

the court.

15. For the above reasons, I dismiss the preliminary objection and direct that the notice of motion dated 27th June 2016 be heard on its merits. Partner to obtain interpartes hearing dates at the registry.

Dated, Signed and Delivered in open court this 18th day of August, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

.....for the Respondent