



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CIVIL APPEAL NO.180 OF 2015
MULTIPLE HAULIERS (E.A) LIMITED.....APPELLANT
VERSUS
JOSEPHINE WAYUA NDOLA (suing as the administrators of the estate
of the late RACHEL MEWENDE NDOLA.....RESPONDENT

RULING

1. The Respondent herein has filed a Notice of Motion dated 17th January, 2017 pursuant to the provisions of Section 79B of the Civil Procedure Act, Order 42 Rule 11 and 13 of the Civil Procedure Rules and which seeks the following reliefs namely:-

- (a) That this Honourable court be pleased to dismiss the Appeal herein for want of prosecution.*
- (b) That the judgment of the Subordinate Court issued on 30/10/2015 in Machakos CMCC No. 736 of 2009 Josephine Wayua Ndola =Vs= Multiple Hauliers E. A. limited be executed forthwith.*
- (c) That the partial decretal sum of Kshs.487,020/= deposited in a joint interest earning account No. [particulars withheld] at Family Bank, Limuru branch together with all the accrued interest be forthwith released to the Respondent.*

2. The Application is supported by the Affidavit of Hezekiah M. Waiganjo Advocate for the Respondent/Applicant sworn on even date and further on the following grounds namely:-

- (a) That the Appellant herein has taken no steps whatsoever to prosecute the Appeal herein since 23rd November, 2015 when they filed a Memorandum of Appeal and which period is now more than one (1) year.*
- (b) That the Appellant has failed, neglected and or ignored to prepare the record of appeal to necessitate the taking of directions in this matter.*
- (c) That the Appeal is an abuse of the Court process aimed at denying the Respondent the fruits of her judgement.*
- (d) That the continued pendency of the suit herein has been oppressive and prejudicial to the*

Respondent/Applicant.

(e) That in principle and in the wider interest of justice the Appeal herein should be dismissed for want of prosecution.

(f) That the Appellant is guilty of laches and its Appeal should be dismissed with costs.

(g) That it is only fair and just that the orders sought herein be granted.

3. The Application is opposed by the Appellant whose learned counsel raised the following grounds of objections:-

(a) That the Appellant is yet to be supplied with certified typed proceedings from the lower court despite repeated requests.

(b) That the Appellant has fulfilled all the conditions set by the court and is desirous of prosecuting the Appeal.

(c) That there has been no indolence on the part of the Appellant in prosecuting this Appeal since the delay in obtaining the typed court proceedings is beyond the Appellant's control.

(d) The Applicant's Application should not be allowed as the Appellant has not neglected or ignored to prosecute the Appeal.

(e) That directions in the Appeal herein have not been taken yet and therefore the Respondent's Application is premature.

4. Submissions:

Parties agreed to canvass the Application by way of written submissions. It was submitted for the Respondent/Applicant that the Appellant has never sought to place matter before the Judge for directions which have not been issued for a period of more than one (1) year and hence the Appeal should be dismissed for want of prosecution. Applicant's counsel sought reliance under Order 42 Rules 11 and 13 as well as Order 17 Rule 2 of the Civil Procedure Rules and further cited cases namely – **ATTORNEY GENERAL =VS= CLEMENT MWATSAMA [2014] eKLR**, **ANNAH WANJIKU KAGENYA =VS= CECILIA ACHIENG NYAYIEKA - KERICHO HCCA 14 OF 2012** and **HARON E. OGECHI NYABERI =VS= BRITISH AMERICAN INSURANCE CO. LTD [2012] eKLR** where the High Court in all the three cases granted requests for dismissal of Appeal for want of prosecution.

It was submitted for the Appellant that the Applicant would have resorted to the provisions of Order 42 rule 35 (1) of the Civil procedure Rules to seek for dismissal of Appeal but even then the same was not available in view of the fact that directions have not been given. Counsel sought reliance in the case of **JURGEN PAUL FLACH =VS= JANE AKOTH FLACH [2014] eKLR** where it was held that a party can only apply for dismissal of an Appeal after directions have been given. The case of **ELEM INVESTMENT LTD =VS= JOHN MOKORA OTWOMA [2015] eKLR**. It was further submitted for the Appellant that the Application is premature since directions in the Appeal have not been given. It was further submitted that the delay to file record of Appeal has been due to the lower court in failing to supply the typed proceedings to the Appellant in time and that the Appellant is still desirous of prosecuting the Appeal. The Appellant finally sought for the dismissal of the Application with costs.

5. Determination:

I have considered the Respondent's Applications and the rival affidavits thereto as well as the submissions by both learned counsels. I have also considered the cited authorities. The issue for determination is whether the Application meets the threshold for granting an order for dismissal of an appeal for want of prosecution.

To start with, I need to point out that the law concerning issues to do with dismissal of an Appeal for want of prosecution is found in Order 42 Rule 35 of the Civil Procedure Rules which provides as follows:-

35(1) unless within three (3) 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 to set down the Appeal for hearing or apply by summons for its dismissal for want of prosecution.

(2) If, within one (1) 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. It is clear from the above rule that the giving of directions by the Judge is a prerequisite to any party seeking to thereafter apply for dismissal of Appeal for want of prosecution. Once directions have been given a party could then resort to Order 42 Rule 35(1) of the Civil Procedure Rules on seeking to apply for dismissal of Appeal for want of prosecution. The other option provided under Rule 35(2) is reserved for the Registrar to list the matter before a Judge in chambers for dismissal, and of course after notifying the parties accordingly.

7. Looking at the court record, the only activity therein is an Application for stay of execution of a lower court judgement pending the determination of this appeal. Indeed the said Application was duly canvassed and a ruling rendered on the 3/2/2016. Since then there is no other activity on the file until the present Application was filed by the Respondent seeking for dismissal of the Appeal. None of the parties herein have bothered to cause the matter to be placed before the judge for directions. There is no evidence that either of the parties were prevented by any cause so as not to even seek for a mention of the matter before a Judge for directions. Hence in the absence of directions being given, I find the Applicant's Applications is a non starter and premature.

8. The Applicant if she felt there was delay, could have even nudged the Registrar to resort to Order 42 Rule 35(2) of the Civil Procedure Rules and cause the matter to be placed before a judge in chambers for dismissal of the Appeal for want of prosecution. The Applicant has taken it upon herself by seeking for dismissal of the Appeal like any other suits whereas the giving of directions in Appeal matters is a prerequisite. In the case of **KIRINYAGA GENERAL MACHINERY =VS= HEZEKIEL MUREITHI - NYERI HCCC NO. 98 OF 2008** the court held thus:-

“It is clearly seen from that rule that before the Respondent can move the court to set the Appeal down for hearing or to apply for dismissal for want of prosecution, directions ought to have been given as provided under Rule 8B. Directions have never been given in this matter. The directions having not been given the orders sought by the Respondent cannot be entertained...”

9. As observed from the court record that no directions have been given in this Appeal and based on the clear provisions of Order 42 Rule 35(1) of the Civil Procedure Rules, I come to the finding that the Applicant's Application dated 17th January, 2017 lacks merit. The same is ordered dismissed with no order as to costs.

It is so ordered.

Dated, signed and Delivered at **MACHAKOS** this 20th day of **September** 2017.

D. K. KEMEI

JUDGE

In the presence of:

Munyua for Gichure for Respondent

Mbuvi for Mshila for Applicant

C/A- Kituva