



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
HIGH COURT CIVIL APPEAL NO. 55 OF 2013

OMAR SHARRIF HASIM.....1ST APPELLANT/RESPONDENT

LUCY NJERI2ND APPELLANT/RESPONDENT

VERSUS

BONIFACE ASHINDU ISUNDU.....1ST RESPONDENT/APPLICANT

BILHA ATOLWA ISUNDU.....2ND RESPONDENT/APPLICANT

MARY ATAMBA ANDEI.....3RD RESPONDENT/APPLICANT

(Suing as Legal representatives of the estate

of **MOSES KAITORO** (Deceased)

RULING

1. The application dated 14th November, 2016 seeks orders that the Appeal herein be dismissed for want of prosecution.
2. It is stated in the affidavit in support that the judgment of the lower court was delivered on 12th December, 2012. That the Respondents were granted an order of stay of execution pending appeal. That since the filing of the Appeal on 6th February, 2013, the Respondents have not taken any steps to prosecute the same. According to the Applicants, the Appeal herein is a delaying tactic meant to deny them the enjoyment of the fruits of the judgment.
3. The application is opposed. The Respondents filed a replying affidavit. The delay is blamed on the failure by the lower court to supply the Respondent with the certified copy of the decree. That consequently the Respondents have been unable to prepare a complete Record for Appeal. That the Respondents have now prepared and filed the Record of Appeal with the available documents for purposes of fast tracking the Appeal and intend to later seek leave to file a Supplementary Record of Appeal to include a certified copy of the decree.
4. The Applicants in response to the replying affidavit filed a supplementary affidavit and stated that no document has been exhibited by the Respondents to demonstrate the follow ups made. It is further stated that this being an appeal to the High Court, there is no law which provides that a Record of Appeal be

filed before prosecuting the Appeal in the High Court.

5. I have considered the application and the reply to the same.

6. 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. “

7. On whether the Appeal has high chances of success, under Order 42 Rule 6 (2) of the Civil Procedure Rules, the Applicants are seeking orders of stay of execution pending appeal from the Subordinate Court to the High Court. The Applicants are not required to prove that they have an arguable appeal, unlike if it was an application in respect of an appeal to the Court of Appeal seeking stay of execution of the decree of the High Court pending appeal to the Court of Appeal. (See for example **Nakuru HCCC 211/98-Martha Njeri Wanyoike & 3 others –vs- Peter Machewa Mwangi & 5 Others; Bake ‘N’ Bite (Nrb) Limited –vs- Daniel Mutisya Mwalonzi [2015] eKLR**).

8. Although the Respondents blame the delay on the lower court’s failure to supply them with a copy of a certified decree, the letter dated 17th April, 2014 requesting for the certified copy of the decree has no court stamp. On the other hand it is not possible to give any directions and proceed to hear the appeal without a complete Record of Appeal. Directions have to be given under Section 79b of the Civil Procedure Act and thereafter under Order 12 & 13 Civil Procedure Rules. The complete Record of Appeal therefore has to be compiled.

9. It is also noted that the lower court file has not been availed to this court.

10. With the foregoing, I dismiss the application with costs in cause. Mention on 23rd November, 2017 before the Deputy Registrar for the lower court file to be availed.

Date, signed and delivered at Nairobi this 24th day of Oct., 2017

B. THURANIRA JADEN

JUDGE