



IN THE HIGH COURT OF KENYA AT MURANG'A

CIVIL APPEAL NO 112 OF 2014

1. SAMUEL KARIUKI MURIMI

2. NAFAS WORLD AUTO (K) LTD.....APPELLANTS

VERSUS

WAMBUI.....RESPONDENT JOYCE MARY

(Appeal from original Decree in Murang'a CMCC No 224 of 2011 – Ochieng, CM)

R U L I N G

1. This ruling concerns the **notice of motion dated 10/06/2016** by which the Respondent seeks dismissal of the appeal herein for want of prosecution, and also an order of release of some KShs 300,000/00 (deposited in a joint account in the names of the parties' advocates as security for stay of execution) to the Respondent in part-satisfaction of the decretal sum. The application is premised upon the main ground that the Appellants have not taken any step towards prosecution of their appeal since filing it on 19/12/2014. The application is supported by an affidavit sworn by the Respondent's advocate, Josephine K. Omwenga.

2. The Appellants have opposed the application by an affidavit sworn by their advocate, Allan Odongo, filed on 19/06/2017. I have read the same. I have also considered the submissions of the learned counsels.

3. The Appellants have contended that the Respondent's application, as brought under **Order 17, Rule 2 (1) & (3)** of the **Civil Procedure Rules, 2010** is incompetent as Order 17 deals with original trials and not appeals. That is indeed so. The Respondent's application ought to have been brought under **Order 42, Rule 35** which caters for dismissal of appeals for want of prosecution.

4. However, the application is also brought under sections **1A, 1B** and **3A of the Civil Procedure Act, Cap 21**. Section 3A particularly saves the court's inherent power –

...to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

In so far as the application is brought under that section, it is properly before the court.

5. The Appellants have admitted the delay in prosecuting their appeal. But they contend that the appeal is yet to be admitted in accordance with **section 79B** of the Act, and that without such admission no step can be undertaken by the Appellants towards prosecution of their appeal. That section reads –

“79B. Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for

interfering with the decree, part of a decree or order appealed against he may notwithstanding section 79C, reject the appeal summarily.”

Section 79C provides for the mode of hearing appeals.

6. The Appellants appear to have ignored their duty under **Order 42, Rule 11** of the Rules which provides –

“11. Upon filing of the appeal the appellant shall within thirty days cause the matter to be listed before a judge for directions under section 79B of the Act.”

It is not sufficient for an appellant to file an appeal and simply sit back and wait for the court to act under section 79B aforesaid. He ought to have the matter listed before a judge for that purpose. The Appellants have not demonstrated that they did their duty under Rule 11 aforesaid.

7. The Appellants have also contended that the original lower court record has not been availed to this court to enable the court to act under section 79B. As a matter of fact the original lower court was forwarded here by the lower court by a letter dated 01/09/2016 and was received in this court on 05/09/2016. That record is before this court!

8. The Appellants further contended at paragraphs 7, 8 and 9 of the replying affidavit that immediately after filing the appeal their advocates instructed their clerks to obtain typed copies of proceedings and judgment of the lower court to enable them compile and file record of appeal; that the said documents have not yet been obtained; and that therefore they have not been able to compile and file the record of appeal.

9. The supporting affidavit does not contain the annexure of a single copy of a letter written to court requesting for such copies of proceedings and judgment. Further, there is not an affidavit by any of the clerks of the Appellants’ advocates setting out the efforts they may have made towards obtaining copies of proceedings and judgment of the trial court.

10. It is apparent that the Appellants were content to file the appeal, obtain a stay of execution of the money decree and then go to sleep. No single step taken towards prosecution of the appeal has been demonstrated. There is no justification anymore for keeping the Respondent from the fruits of her litigation.

11. In the circumstances the Respondent’s application at hand is hereby allowed. The Appellants’ appeal is hereby dismissed for want of prosecution with costs to the Respondent. I will also allow prayer 2 of the notice of motion dated 10/06/2016. The Respondent/Applicant shall also have the costs of the application. Those will be the orders of the court.

DATED AND SIGNED AT MURANG’A THIS 5TH DAY OF OCTOBER 2017

H P G WAWERU

JUDGE

DELIVERED AT MURANG’A THIS 13TH DAY OF OCTOBER 2017