REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 53 OF 2013

JOHN WACHANGA KIAMA ……..……. APPELLANT

VERSUS

DANIEL KIBORO MUCHAI ……..…… RESPONDENT

RULING

1. By a Notice of Motion dated 14th April, 2015, the respondent seeks that the appeal herein be dismissed for non-service of the memorandum of appeal and record of appeal as well as for want of prosecution. The respondent also prays for costs of the application and the appeal.

2. The application is anchored on ***Section1A; 1B; 3A*** of the ***Civil Procedure Act*** and ***Order 42 Rule 35(2)*** of the ***Civil Procedure Rules*** and all other enabling provisions of the law. It is supported by the grounds stated on its face and a deposition by the respondent dated 14th April, 2015. In the grounds supporting the motion and in the supporting affidavit, the applicant (the respondent) avers that since the memorandum of appeal was filed on 18th April, 2013, it has not been served on him nor has the record of appeal; that no action has been taken by the appellant to facilitate the prosecution of the appeal. It is the respondent's case that the appellant has lost interest in the appeal and its pendency is causing him prejudice. He urged the court to allow the application with costs in the interest of justice.

3. Though served with the application, the appellant chose not to file any response thereto. There is also evidence in the affidavit of service sworn on 29th January, 2016 by one *Charles Gakuhi Chege* that the appellant's counsel was notified of the date scheduled for the hearing of the application but on that date, neither the respondent nor his legal counsel attended the court. The application is thus unopposed.

4. I have considered the application. Since the application is not opposed, the respondents claim that by the time of filing the application he had not been served with the memorandum of appeal or the record of appeal has not been controverted and must be deemed to be true. The court record also lends credence to these claims by the respondent since todate no record of appeal has been filed.

5. ***Order 42 Rule 35*** of the ***Civil Procedure Rules*** provides for dismissal of appeals for want of prosecution. It states as follows:-

> ***"(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. A reading of the above provisions show that they envisage two situations in which an appeal can be dismissed for want of prosecution; that is, where an appeal has been admitted for hearing and three months after the taking of directions under ***Order 42 Rule 13***, no date had been fixed for its hearing or where the memorandum of appeal had been served on the respondent but no hearing date for the appeal had been taken for a period of one year.

7. Given that in the instant appeal, the memorandum of appeal has not been served on the respondent and no directions have been taken as the appeal has not even been admitted for hearing, it is obvious that the appeal herein does not fall into any of the two situations contemplated by ***Order 42 Rule 35(1)*** and ***(2).*** The question that then arises is whether this notwithstanding, the appeal can nevertheless be dismissed for want of prosecution as prayed by the respondent.

8. In my opinion, the answer to the above question is in the affirmative. It cannot be in the interest of justice to allow a party to file an appeal and have it pending indefinitely by refusing to take any step towards its prosecution including the most basic step of serving the respondent with the memorandum of appeal. The circumstances surrounding the filing of the instant application paints the picture of an appellant who either lost interest in the appeal the moment he filed it or one who filed the appeal without any intention of ever prosecuting it. I say so because there is evidence in letters dated 6th August 2014; 20th December 2014 and 24th December 2015 which are annexed to the respondent's affidavit that the respondent's counsel had severally requested the appellant's counsel to serve him with the memorandum and record of appeal without success. It is also significant to note that in the letter marked as "DKM2(a"), there is an indication that by 6th August 2014, the appellant had liquidated a substantial part of the decretal amount as he had already paid Kshs. 275,100 and only a sum of Kshs. 60,673 remained outstanding.

9. In view of the foregoing, there is no doubt that the appellant does not have any interest in the instant appeal. This explains the delay of over two years in serving the memorandum and record of appeal and his failure to take any step towards progressing the appeal for hearing. It also explains why the appellant did not find it necessary to file any response to the application or to attend court on the hearing date though duly served. This means that the aforesaid delay has not been explained. It is my finding that the prolonged delay of over two years to take a single step towards the prosecution of the appeal is inordinate and inexcusable. It runs counter to the overriding objective of the ***Civil Procedure Act*** and ***Rules*** which advocates for the just and expeditious resolution of civil disputes which includes appeals.

10. The fact that the appellant had paid a substantial part of the decretal amount by 6th August 2014 also demonstrates that he was retaining the appeal on the court's record when he had no intention of prosecuting it. This amounts to an abuse of the court process which cannot be condoned by this court. Under ***Section 3A*** of the ***Civil Procedure Act,*** , the court is empowered to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process.

11. The ends of justice in this case dictates that the application be allowed to avoid further prejudice on the respondent. The respondent is entitled to fully enjoy the fruits of his judgment and should not be prevented from doing so by an appellant who has no interest in prosecuting his appeal. I therefore find merit in the application dated 14th April, 2015 and it is accordingly allowed with costs to the respondent. The appellant shall also bear the costs of the appeal.

It is so ordered.

C.W GITHUA

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 23rd day of February, 2016.

In the presence of:-

Mr. Njuguna holding brief for Mr. Mbugua for the Respondent/Applicant

Ms. Naomi Chonde – Court Assistant

No appearance for the appellant/Respondent