



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL APPEAL NO. 428 OF 2014

UAP INSURANCE COMPANY LIMITED.....APPELLANT

VERSUS

WASHINGTON GATURA KIMANI..... RESPONDENT

R U L I N G

On the 22nd July, 2015, the Respondent Washington Gatura Kimani, filed a Notice of Motion dated the 22nd July, 2015 praying that the Appeal herein be dismissed for want of prosecution.

The application is brought under Sections 1A, 1B, 3A and 79G of the Civil Procedure Act, Order 42 Rule 31 and Order 51 Rule 1 of the Civil Procedure Rules Cap 21 Laws of Kenya. The application is premised on the grounds set out on the body of the same and on the annexed affidavit of Washington Gatura Kihara sworn on the 22nd July, 2015.

The Respondent's case as captured in the Affidavit is that the Appellant filed the Memorandum of Appeal on the 24th September, 2015 together with an application for stay of execution. The court granted a stay of execution and upon grant of the said orders the Appellant has been indolent and has not bothered to prosecute the Appeal nor prepare or file the Record of Appeal despite proceedings having been availed for collection about 3 months as at the time the Application was filed.

The Respondent is apprehensive that the Appellant seeks to delay the matter as it is neither willing to proceed with the Appeal nor is it willing to proceed with the lower court case. The Appeal herein is spurious and the case in the lower court against the Appellant is unassailable.

That the Appellant will suffer no prejudice as in any event the Appeal herein is merely serving as an impediment to hearing and disposal of the case.

The Application is opposed by way of grounds of opposition filed in court on the 22nd January, 2015 which are that; the Appeal is yet to be either admitted or rejected under Section 79B of the Civil Procedure Act, Directions have not been taken as required by provision of Order 42 Rule 11 of the Civil Procedure Rules, Dismissal of the Appeal can only be done pursuant to the provisions of Order 42 Rule 35 of the Civil Procedure Rules which are not applicable here. There is a Record of Appeal prepared and duly filed by the Appellant and therefore she should be allowed to prosecute her appeal as she is desirous of having the same heard and determined on merit. The Appellant has not lost interest in the appeal and there has not been inordinate delay in prosecuting the appeal given the fact that the court is yet to admit or reject the same as is required.

I have considered the depositions and the submissions made by the counsel for the Appellant. The Respondent did not file his submissions despite having given him enough time within which to do so.

The application herein has been brought under Order 42 Rule 31 among other provisions of the law. The said provisions deal with what judgment may direct when a matter has been heard by an Appellate court and it is therefore not relevant to this application. However, under the inherent jurisdiction of the court and under Article 159(2) (d) of the Constitution, I will consider the Application on merits notwithstanding that it has been brought under the wrong provisions of the law.

Looking at the grounds in support of the Application and the Affidavit in support, what I can gather is that the Respondent seeks to have the Appeal dismissed for want of prosecution and I will proceed to consider it along that line under the provisions of Order 42 Rule 35 of the Civil procedure Rules. The sole issue for determination is whether the application meets the conditions for granting an order for dismissal of an appeal for want of prosecution.

Order 35(1) provides for 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 case, the Respondent can either fix the Appeal for hearing or apply by summons for it to be dismissed. In the case of **Kirinyaga General Machinery Vs Hezekiel Mureithi Ileri HCCC No. 98/2008** the judge observed:-

“It is clearly seen from that rule 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 provided under Rule 79B.”

The second scenario is that contemplated under Order 42 Rule 35(2): if 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 chambers for dismissal.

Noting that no directions have been 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)**.

The upshot of the foregoing is that the application is dismissed with no orders as to costs.

SIGNED, DATED and DELIVERED at Nairobi this 24th day of March, 2016

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L NJUGUNA

JUDGE

In the presence of:-

.....for Appellant

.....for the Respondent

.....Court clerk