



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL APPEAL NO 477 OF 2013

1. WALTER KABETU

2. JAMES KARIKO BACHA

3. LEONARD KINUTHIA BACHA

4. HARRY BACHA NJUGUNA

5. MATHEW NJOROGE BACHA.....APPELLANTS

VERSUS

HORTENISIAH MILLICENT KIBINU.....RESPONDENT

RULING

(Appeal from the decision of Honourable E. Michieka, Ag. Principal Magistrate delivered on 13th August 2013 in Kikuyu PMCC No. 17 of 2008).

This is an application by the Respondent (by Notice of Motion dated 9th March 2015) under Section 3A of the Civil Procedure Act (the **Act**) and **Order 42, rule 35(2)** of the **Civil Procedure Rules, 2010** (the **Rules**) for dismissal of the Appellant's appeal for want of prosecution. The sub-rule states -

“(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 of the parties list the appeal before a judge in chambers for dismissal.”

Such an application achieves the purpose of placing the appeal before a judge *inter-partes* for dismissal.

The Administrator of the Estate of the Respondent **Sylvia Nancy W. Karanja** swore the supporting affidavit. It is the Respondent's case in this application that the memorandum of appeal was filed on 9th September 2013, and served upon her advocates on 10th September 2013. According to her, the appellant has not taken any action since the filing of the memorandum of appeal.

The Appellants have opposed the application by replying affidavit sworn by **James Kariko Bacha**, one of the Appellants, on 20th May 2015. He has explained his side of the story *inter alia* as follows,–

- i. That since the filing of the appeal, some of his co-appellants have passed away namely Leonard

Kinuthia Bacha and Walter Kabetu.

- ii. That it had been agreed that Walter Kabetu would follow up on the proceedings but his illness took up their time;
- iii. That there was an application filed in the Court of Appeal seeking time to file appeal out of time in respect of Judicial Review proceedings commenced against the Land Registrar Tribunal in JR No. 88 of 2008;
- iv. That the appeal has since been filed vide CA No. 71 of 2014 and awaits fixing of a hearing date;
- v. That bearing the aforesaid in mind it is only fair and just that the proceedings herein await the outcome of the appeal since it would settle the whole matter once and for all;

(ii) That in any case directions are yet to be given in the appeal;

(iii) That it is only fair and just that the orders sought be declined.

Rule 35(1) of Order 42 of the Rules provides for a respondent to either set down the appeal for hearing or apply for its dismissal for want of prosecution if within three months after the giving of directions under rule 13 of the same Order, the Appellant shall not have set the appeal down for hearing. Such directions have not been given in this appeal. Indeed, the appeal has not even been admitted to hearing. So, the Respondent cannot avail herself of the remedy provided by Rule 35(1).

The court however, has inherent jurisdiction to order dismissal of an appeal for want of prosecution even when directions under Rule 13 have not been given. The court's inherent power may be exercised as may be necessary to prevent abuse of the process of the court. An appeal which is lodged without the intention of ever prosecuting it, but with the intention of delaying or obstructing the cause of justice, is an abuse of the process of the court. According to the Appellants, they are already pursuing other avenues of obtaining justice in this dispute. It is concurred that there is no intention of ever prosecuting this appeal until the appeal in the Court of Appeal is heard and determined.

Nevertheless, before a Respondent can invoke the inherent jurisdiction of the court to dismiss an appeal for want of prosecution before directions under Rule 13 are given, he must exhaust the remedies provided under the Rules. In this case, for example by a letter dated 3rd February 2015, the Respondent's Counsel wrote to the Registrar of the court to request that the appeal be placed before a judge in chambers under Rule 35 (2) for dismissal.

Therefore, there is justification in the Respondent's plea that there has been unexplained delay in prosecuting the appeal. The application was filed one year six months after filing the memorandum of appeal which is more than the time prescribed under rule 35(1). The Respondent has even written to the Registrar to have the matter listed before a Judge for dismissal. She should be allowed at this stage to invoke the inherent power of the court to dismiss the appeal for want of prosecution.

The end result is that the application succeeds. The appeal is hereby dismissed for want of prosecution.

The respondent shall have the costs of this application.

Dated and delivered at Nairobi this 16th Day of March, 2016.

A.MBOGHOLI MSAGHA

JUDGE