



REPUBLIC OF KENYA
IN THE HIGH COURT OF KERICHO

CIVIL APPEAL NO.33 OF 2011

(Appeal arising from the Judgment and Decree of Honourable Were in Keroka SRMCC No.103 of 2010)

SOTIK TEA CO. LTD.....APPELLANT

VRS

KENNEDY NYAKAWA.....RESPONDENT

RULING

The Notice of Motion application dated 20th November, 2015 and which is expressed to be brought pursuant to section 1A and B and section 3A of the Civil Procedure Act and Order 51 of the Civil Procedure Rules seeks the following orders:

That the appeal herein be dismissed for want of prosecution and after being an abuse of court process.

The grounds are:

(1) That it is now three years since the appeal was filed and no steps have since been taken to prosecute the appeal. This application is opposed on the grounds that no directions have been taken over the conduct of the appeal and hence this application is premature. That in spite of requests made, no certified copies of the decree appealed against have been furnished to the appellant and the appeal should proceed to be heard on its merits.

Dismissal of appeals for want of prosecution fall under Order 42 rule 35 (1) of the Civil Procedure Rules which provides thus:-

“Unless within three months after 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.

If, within one year after the service of the Memorandum of Appeal, the appeal shall have not been set down for hearing, the Registrar shall issue a notice to the parties, list the appeal before a Judge for dismissal.”

This appeal was admitted for hearing on 12th September, 2013, since then, there is little to show towards its preparation for hearing.

The appellant filed grounds of opposition dated 11th May, 2016 principally to the effect that certified

copies of the decree appealed against had not been forwarded to the appellant in spite of several requests having been made.

The appellant has opted to file grounds of opposition to this application instead of filing a replying affidavit which had the advantage of encompassing annexures which can go along way in buttressing and explaining the averments of the appellant if any.

There is no correspondence shown in the file between the appellant and the registry over a missing file and/or request for the record of proceedings, judgment or decree appealed against.

There is no certificate from the Executive Officer to the effect that the file in question has been missing.

There is nothing to show that the appellant had been diligent in ensuring that the appeal was prepared for hearing. The appellant from what can be discerned from the file, after filing the appeal did not take any steps in ensuring that the appeal was prepared for hearing.

Whereas Order 42 rule 35 may not be available to the respondent in the present case, the court can invoke its inherent jurisdiction under section 3A and overriding objectives under section 1A and 1B of the Civil Procedure Act and article 159 (2) (b) of the Constitution so as to prevent abuse of court process, justice shall not be delayed.

In this case, the appellant after filing the appeal went to sleep. Justice delayed is justice denied. This is an old appeal of 2013. Three years have since elapsed from the date of lodging the appeal.

The application has merit. The appeal is dismissed for being an abuse of court process. Costs to the applicant. Ruling delivered, dated and signed in open court this 14th day of June, 2016 in the presence of Mwita for the appellants.

M. MUYA

JUDGE

14/6/2016