



REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CIVIL APPEAL NO.27 OF 2011

Appeal arising from the Ruling of Hon. A. P. Ndege in Keroka SRMCC No.299 of 2009

SOTIK TEA (K) LTD APPELLANT

V

DUNCAN MOMANYI NYARIBARI RESPONDENT

RULING

The Notice of Motion application dated 20th February 2015 expressed to be brought pursuant to section 1A and B and 3 (A) of the Civil Procedure Act and Order 51 rule 1 of the Civil Procedure Rules 2010 seeks the following orders:

- (1) The dismissal of this appeal for want of prosecution and also for being an abuse of court process.
- (2) Costs.

The grounds are that its now work than three years since the appeal was lodged. Secondly, that in the three years stated, the applicant has not taken any steps to prosecute the appeal. The application is opposed on the grounds that directions have not been taken over the conduct of the appeal herein and hence the respondent's application has been brought prematurely.

Secondly, that the delay in fixing the appeal herein for directions has largely been contributed by the fact that the lower court file had not been forwarded. Thirdly, that copies of proceedings, judgment and decree had not been forwarded to the appellant. Order 42 rule 35 (1) of the Civil Procedure Rules provides:

“ Unless within three months or 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 the year after the service of the Memorandum of Appeal, the appeal shall have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge for dismissal.”

This appeal was admitted for hearing on 12th September, 2013, since then nothing much seems to have taken place towards preparing the suit for appeal.

The appellant has filed grounds of opposition to the application dated 20th November, 2015. On the grounds that the lower court file had been missing and had not been forwarded to this court and secondly,

that the proceedings, judgment and decree appealed against have never been supplied to the appellant.

On 7th day of September, 2013, the Deputy Registrar did notify counsel for the appellant the appeal had been admitted for hearing and he was requested to take directions before the appeal was listed for hearing.

The Deputy Registrar, Kisii did forward the original file and certified copies of proceedings and judgment on 18th June 2013.

The grounds of opposition are dated 11th May 2016 wherein it is argued that the lower court file has never been forwarded to this court which is not the position.

It is also argued that copies of proceedings, judgment and decree have not been supplied despite several requests. There are no letters to show that such requests were made.

There is no letter from the Chief Magistrate or from the Executive Officer to the effect that the court file has been missing.

It is noted that the appellant did not file a replying affidavit. This would have been helpful as it would have accorded him the opportunity of putting in annexures indicating what steps it had undertaken in ensuring that the appeal was prepared for hearing. What is apparent from the record before this court is that after filing the appeal, the appellant went into slumber. There is nothing to show that it undertook any of the relevant steps within the time prescribed by the rules.

This court where and when necessary can invoke its inherent jurisdiction under section 3A and the 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.

I find the appellant in the present case went into slumber and was indolent. This is an old appeal of 2013, three years have since lapsed. Justice delayed is justice denied. The appeal is dismissed for being an abuse of the court process. Costs to the respondent/applicant.

Ruling delivered, dated and signed in open court this 14th day of June 2016 and in the presence of Mr. Mwita for the appellant.

M. MUYA

JUDGE

14/6/2016