



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CIVIL APPEAL NO. 123 OF 2011

KUKENA SACCO.....APPELLANT/RESPONDENT

VERSUS

CATHERINE WAMUTIRA CUBI.....RESPONDENT/APPLICANT

RULING

1. This is the application dated 20/11/2013 seeking that the appeal be dismissed with costs for want of prosecution. The application is supported by the affidavit of Wachira Mari advocate. In the affidavit it is stated that judgment was delivered in favour of the plaintiff and the appellant filed a memorandum of appeal on 17/01/2012.

2. Since then, the appellant has not taken any action for more than a year. Directions have not been taken and a record of appeal has not been filed. The inaction by the appellant has gravely prejudiced the respondent who has been denied the fruits of judgment.

3. The application is unopposed despite the fact that the affidavit of service sworn on 4/3/2014 by Dickson Musyimi indicates that the respondent's advocate was served with the notice of motion dated 20/11/2013. The respondents did not also file submissions despite being served with the mention notice dated 7/6/2016 for purposes of filing submissions. This has been deponed in the affidavit of service sworn on 27/6/2016.

4. The applicant in their submissions stated that the memorandum of appeal filed on 17/1/2012 is against the judgment delivered on 4/10/11. The respondent states that there is no such judgment and hence the memorandum of appeal is against a non existent judgment and does not lie. The decree was not attached as required by Order 42 Rule 2 of the Civil Procedure Rules.

5. Order 42 rule 35 of the Civil Procedure Rules provides that ;

(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. In the case of **JURGEN PAUL FLACH VS JANE AKOTH FLACH [2014] eKLR** the court cited the case of **KIRINYAGA GENERAL MACHINERY VS HEZEKIEL MUREITHI IRERI HCC NO 98 OF 2008** where Mary Kasango J interpreting Order 42 Rule 35 held that

''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 8B. Directions have never been given in this matter. The directions having not been given the orders sought by the respondent cannot be entertained.''

7. In the case of ***PROTEIN & FRUITS PROCESSORS LIMITED & ANOTHER VS DIAMOND TRUST BANK KENYA LIMITED [2015] eKLR*** the court held that from the provisions of Order 42 Rule 35 an appeal can only be dismissed for want of prosecution in two instances. Firstly where there has been failure to list the appeal for hearing for three months after directions have been made under Order 42 Rule 13 and secondly if after one year of service of the memorandum of appeal the appeal has not been listed for hearing. Under the first scenario the appeal can only be dismissed if it has been admitted and directions have been given.

8. In the case of ***ADNAN KARAMA PETROLEUM LIMITED (T/A A.K FILLING STATION) VS NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY [2007] eKLR*** the court held that under Order 41 Rule 21(2) now Order 42 Rule 35 (2) the best an applicant can do is to write to the registrar to request him to list the appeal before a judge in chambers for dismissal

9. Despite the fact that the application is unopposed, the provisions of Order 42 Rule 13 are clear that the applicant cannot move the court to dismiss the appeal for want of prosecution before directions have been given by the court. The second scenario under the rule is available to the applicant. The procedure he ought to have followed is to write to the registrar to request him to list the appeal before a judge in chambers for dismissal as was held in the case of ***ADNAN KARAMA PETROLEUM LIMITED (T/A A.K FILLING STATION) VS NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY [2007] EKLR*** (supra).

10. The applicant have failed to comply with the provisions of Order 42 Rule 35(2) and the application must therefore fail.

11. It is dismissed with no orders as to costs.

DELIVERED, DATED AND SIGNED AT EMBU THIS 26TH DAY OF JULY, 2016.

F. MUCHEMI

JUDGE

In the absence of both parties.

Notice to issue to the parties through the Deputy Registrar.