



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 637 OF 2012

EMKAY BUILDERS LTD.....APPELLANT

V E R S U S –

SOSINE ORINDORESPONDENT

RULING

1. The subject matter of this ruling is the motion dated 2nd February 2015 in which Sosine Orindo the Respondent sought for the following orders:

- 1. That this appeal be struck out with costs to the Respondent.***
- 2. Alternatively the appeal be dismissed for want of prosecution.***
- 3. Costs of the application be to the Respondent.***

2. The motion is supported by the affidavit of Nelson Kaburu Felix, learned advocate for the Respondent. Emkay Builders Ltd, the Appellant herein, filed the replying affidavit of its advocate Newton Mwangi to oppose the motion. When the motion came up for hearing learned counsels appearing in this appeal recorded a consent order to have the motion disposed of by written submissions.

3. I have considered the grounds stated on the face of the motion plus the facts deponed in the affidavits filed in support and against the application. I have further taken into account the rival written submissions. It is the submission of the Respondent that on 1.11.2011 parties recorded a consent order before the chief magistrate's court where the Appellant agreed to shoulder 90% liability and the court was requested to assess damages. The trial court awarded kshs.900,000/= as damages in a judgment delivered on 15.1.012.

4. On 26.11.2012 the Appellant filed this appeal to challenge the decision. The Respondent has pointed out that the Appellant filed the record of appeal on 10.06.2015 after it had been served with the motion dated 2.02.2015.

5. The Respondent further pointed out that the record of appeal filed by the Appellant is incomplete in that the same has no proceedings nor a copy of the judgment nor the decree and certificate of costs. The Respondent further argued that he has filed no replying affidavit to explain why the appeal file was inactive between 23rd January 2013 to 10.06.2015. The Respondent further stated that there is no evidence of the steps taken to get the proceedings or the decree yet the period is long. For the above reasons this court was urged to dismiss and or strike out the appeal.

6. In response to the Respondent's argument, the Appellant pointed out that the motion was premature pursuant to the provisions of Order 42 rule 3 of the Civil Procedure Rules. In other words the Appellant has argued that summary procedure cannot be used until the certified copy of the decree is filed. The Appellant further argued that pursuant to the provisions of 42 rule 35 of the Civil Procedure Rules, the orders sought are premature since no directions have been taken. The Appellant admitted that there is a bit of delay in prosecuting the appeal because the lower court record had not been forwarded to the appellate court.

7. Having considered the material placed before this court, I think it is important to discover whether or not there were concerted efforts to cure the defect. On the face of it, there are various provisions cited as the premise the motion is based.

8. However looking at the prayers sought it is clear to me that the Respondent's motion comes under the provision of Order 42 rule 35(1) of the Civil Procedure Rules.

9. The aforesaid provision can only be invoked after the lapse of three months from the date of taking directions. With respect, I agree with the submission of the Appellant that since directions have not been given the motion is premature to that extent.

10. The Respondent has also cited the provision of Order 42 rule 11 of the Civil Procedure Rules. This provision requires the Appellant to cause the matter to be listed before a judge for directions under Section 79B of the Civil Procedure Act within 30 days from the date of filing the appeal. Under this provision the judge perusing the record is barred from rejecting the appeal summarily until a certified copy of the decree is filed.

11. The Appellant was able to explain that it had some difficulty in obtaining the proceedings and the decree from the trial court hence it cannot be blamed for the delay in complying with the provision of Order 42 rule 11. The other provisions cited are processes which can be sorted out at the stage of directions before the Deputy Registrar.

12. In the end, I find the motion to be premature. It is ordered struck out with costs abiding the outcome of his appeal.

Dated, Signed and Delivered in open court this 19th day of August, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent