



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 664 OF 2013

BOURNVENTURE NGALA SERONGE..... APPELLANT/RESPONDENT

- V E R S U S -

JUSTUS OMBWRO OMWOYO (Suing as the

administrator of the estate of

SAMUEL ONGIRI OMBWORO (DECEASED)APPLICANT

RULING

1. The respondent/applicant herein, took out the motion dated 30.3.2016 in which he sought for.

1. THAT this honourable court do issue an order dismissing the appeal herein for want of prosecution.

2. THAT an order do issue directing the defendant, his servants, agents or any other person acting on his behalf to forthwith release to the plaintiff all sums deposited as security in compliance with the orders of the subordinate court issued on 17th April 2014 which sums are now held in a bank account known as Njeri Kariuki & Co. Advocates and Wangalwa Oundo & Co. Advocates, Account No. 0013102455002 held at Chase Bank, City Centre Branch.

3. THAT in the alternative the honourable court do issue an order directing that in the interim period the applicant do receive half of the judgment sum to be paid from the sum deposited as security at Chase bank as security while the other remaining half of the judgment sum shall remain in the bank until further orders of the court.

4. THAT costs of this application be provided for.

2. The motion is supported by the affidavit of Justus Ombworo Omwoyo. When served, the appellant filed the replying affidavit of Njeri Kariuki to oppose the motion. When the motion came up for interpartes hearing, learned counsels appearing in this matter recorded a consent order to have the application 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. I have also taken into account the rival written submission. It is the submission of the respondent that over two years have now lapsed since the memorandum of appeal was filed and yet the appellant has taken no steps to list the appeal for hearing hence the appeal should be dismissed for want of prosecution. The respondents further beseeched this court to in the alternative issue an order that he appellant pays half the decretal sum to the respondents if the court is inclined to deny the

motion. The respondents pinpointed that the record of appeal filed by the appellant is incomplete since crucial primary documents have not been included.

4. The appellant on the other hand is of the view that the delay to file the appeal was beyond its control. It was pointed out that there was a delay in typing proceedings before the trial court. The appellant further contended that it would be premature to make an order directing the release of part of the decretal sum yet the appeal seeks to overturn the whole judgment. It is also argued that it would be unwise to make the order since there is no guarantee that the respondents will be in a position to refund the money. The question as to whether or not the appeal should be dismissed for want of prosecution is the main issue this court seeks to answer. In determining the question, the court has to consider the explanation given by the appellant to justify the delay in prosecuting the appeal. The appellant has stated that it took time for the trial court to supply typed proceedings and judgment hence it was difficult to prepare the record of appeal. This argument has not been controverted by the respondents. The respondents have stated that the record of appeal filed is incomplete. With respect, I do not think that is an issue which should be dealt with at this stage. It is an issue that can be taken up at the stage of taking directions.

5. The reason given to justify the delay is plausible. Consequently the motion must fail. This court has been asked to make an order directing the appellant to make partial payment to the respondents. With respect, I agree with the submissions of the appellant that is unwise to make the order while there is no assurance that the respondents will be in a position to refund the money in case the appeal is successful.

6. In the end the motion is found to be without merit. It is dismissed with costs to the appellant.

Dated, Signed and Delivered in open court this 29th day of September, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent