



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL APPEAL NO. 8 OF 2011

MOSES AMBOGO WANDERA.....RESPONDENT/APPELLANT

VERSUS

FRANCIS TOM OCHIENG.....1ST APPLICANT

MELSA AUMA OKUMU.....2ND APPLICANT

RULING

1. The application before Court is the Notice of Motion dated 4th December, 2011 in which the applicants pray for the dismissal of the appeal for want of prosecution, vacation of the order of stay issued in lower Court file No. Busia P.M.C.C. No 301 of 2007 and costs of the application.
2. The affidavit dated 9th December, 2011 was sworn by the 1st Applicant, Francis Tom in support of the application. He is one of the respondents in the appeal. In his affidavit, he states that since 15th March, 2011, the Appellant has not taken any steps to fix the appeal for hearing. He further states that the Appellant is enjoying stay orders from the lower Court and he is not suffering any loss.
3. Mr. Ashioya, counsel for the applicants in his address to the Court reiterated the contents of the supporting affidavit. He further added that the Appellant in an attempt to steal a match against the applicants has been enjoying stay orders since 2011.
4. The application is unopposed despite various hearing dates being served upon the Appellant.
5. The law applicable to dismissal of appeals for want of prosecution is contained in Order 42 Rule 35 of the Civil Procedure Rules, 2010 which provides that:

“35. (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 to either set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.

(2) If, within one year after 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. The above provisions envisage that an appeal should first be listed for directions. From the court record, upon admission of the appeal the Appellant was ordered to serve a record of appeal and thereafter seek directions. This was in May 2011. It is also evident from the court record that when the matter came

before the court in May 2012 the Appellant requested for time to engage an advocate. No activity on the part of the Appellant has been noted in the file since then. The conduct of the Appellant is one of disinterest in prosecuting the appeal.

7. The Appellant was under a duty to ensure that he played an active role in prosecution of his appeal and that it was dealt with in an expeditious manner. His reasons for failure to comply with the orders of the court would be best explained by him. Since 2011, the Appellant has not taken any step towards the prosecution of the appeal. He continues to enjoy orders of stay at the expense of the applicants/respondents who would wish to enjoy the fruits of the judgment.

8. As such, this court is left with no option but to make the following orders:

i. The Appellant's appeal is dismissed for want of prosecution.

ii. As reasons for the grant of the order of stay of execution in Busia PMCC No. 301 of 2007 are not known to this court, the applicants are at liberty to move the trial court for vacation of the order.

iii. The costs of this application are awarded to the applicants.

Dated, signed and delivered at Busia this 29th day of Sept., 2016

W. KORIR,

JUDGE OF THE HIGH COURT