

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 549 OF 2010

STEPHEN NICHOLAS MAKWATA APPELLANT

VERSUS

PETER WACHIRA NDIRANGU RESPONDENT

RULING

The appellant herein was aggrieved by the Judgment of the lower court delivered on 12th November, 2010. As a result, a memorandum of appeal was filed on 8th December, 2010. Since then, no record of appeal has been filed and there is now before me an application by way of Notice of Motion dated 11th August, 2016 seeking orders that the memorandum of appeal dated 8th December, 2010 be struck out and the appeal be dismissed with costs.

The reasons for that step are that since the memorandum of appeal was filed no steps have been taken to prosecute the appeal. Further, the typed proceedings and judgment appealed against were made available to the appellant way back in the year 2013; and also the appellant has ignored the invitation by this court to comply with Order 42 Rule 13 of the Civil Procedure Rules which was communicated by a letter dated 24th September, 2013. It is further stated by the applicant that the appellant is enjoying a stay of execution order and has completely lost interest in the appeal.

The application is opposed, and there is a replying affidavit sworn by the advocate for the respondent in that regard. The affidavit sets out the efforts made to move the appeal forward and there are copies of letters written by the appellant's advocates both to the lower court and Registrar of this court requesting for proceedings and judgment.

I observe that this point that there is another issue that has not been addressed by both learned counsel in this application. On 16th June, 2016 Njuguna J, dismissed this appeal under Order 42 Rule 35 (2) of the Civil Procedure Rules. That dismissal order is still in place. Assuming that the said order had been set aside (but I see no evidence to that effect) I have decided to address the present application on merit.

As early as September, 2013 the appellant's advocate had been invited by the court to take directions under Order 42 Rule 13 of the Civil Procedure Rules. The last letter written by the appellant's advocate relating to the lower court file and the proceedings therein was dated 24th January, 2014.

There is no evidence that from that particular time any steps had been taken to ensure that the proceedings were secured. It is over two years now and the appellant has not made any effort to find out whether or not the proceedings are ready, yet going by the record before me the proceedings are in the original court file. The delay in compiling the record of appeal with a view to prosecuting the same is inordinate and inexcusable. One would be tempted to agree that the appellant is taking advantage of the stay order issued in his favour.

Taking into consideration all the attendant circumstances I see no merit in the application. In the circumstances the application by way of Notice of Motion dated 11th August, 2016 is allowed. The appeal is hereby dismissed with costs to the respondent.

Dated, signed and delivered at Nairobi this 28th Day of November, 2016.

A. MBOGHOLI MSAGHA

JUDGE