



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CIVIL APPEAL NO. 195 OF 2013**

**MULTIPLE HAULIERS (E.A) LTD .....2<sup>ND</sup> APPELLANT**

**JAMES IGOGO WACHIRA.....1<sup>ST</sup> APPELLANT**

**VERSUS**

**NAKAY KUKAN KIPASI.....RESPONDENT/APPLICANT**

**RULING**

The Respondent herein seeks to have the Memorandum of Appeal filed herein by the Appellants struck out for reasons that it is now over one year since the said Memorandum of Appeal was lodged and served upon the Respondent, yet the Appellants have not taken any action or taken any steps to have the appeal admitted. These prayers are in an application by way of Chamber Summons dated 24<sup>th</sup> July 2015 and filed in Court on the same date.

The Respondent's learned counsel, B.M. Mungata & Co Advocates, filed written submissions dated 6<sup>th</sup> April 2016 on the application. Reliance was placed on Order 42 Rule 35 of the Civil Procedure Rules for the argument that ever since the Memorandum of Appeal herein was lodged on 1<sup>st</sup> October 2013, the Appellant has never taken any steps to prosecute it and has denied the Respondent, who is the legal representative of the estate of Kokan Ole Kipasi Landa who passed away as a result of the road accident giving rise to the suit appealed from, the fruits of their judgment. Reliance was placed on the decision in **Abdurrahman Abdi vs Safi Petroleum Products Ltd & 6 Others, (2011) e KLR** for the position that the court has to weigh the prejudice that is likely to be suffered by an innocent party, against the prejudice that will be suffered by the offending party if it is to strike out a document.

The application was opposed by the Appellants in a replying affidavit sworn on 8<sup>th</sup> December 2015 by Pauline Njoki Karanja, the Appellants Advocate, The deponent averred that they were instructed to take up the conduct of the appeal by the Appellants after it had been filed, and that they filed a Notice of Appointment on 12<sup>th</sup> November 2015, a copy of which she annexed. She also attached a letter dated 10<sup>th</sup> November 2015 addressed to the Executive Officer, Machakos Law Courts, asking to be furnished with the certified copies of the proceedings, judgment and decree of the lower court file, for purposes of preparing a record of appeal.

The Appellants state that they were however informed that the lower court file was taken to the typing pool and cannot be traced. According to the Appellants, they are interested in prosecuting the appeal but that the same cannot be admitted without the record of appeal, and they sought the Court's assistance in tracing the lower court file.

These facts were reiterated by the learned counsel for the Appellants, S.M. Chege Advocates, in

submissions filed in Court dated 28<sup>th</sup> April 2016. It was submitted therein that the Appellants stand to suffer irreparable damage as they had complied with the conditions set for stay of execution, whereby half of the decretal sum was released to the Respondent and the balance deposited in Court. Therefore, that the Respondent will not suffer any prejudice if the appeal is allowed to proceed. Reliance was placed on the decision in **Elem Investment Ltd vs John Mokora Otwoma, (2015) e KLR** in this regard.

I have read and carefully considered the pleadings and submissions filed. The issue for determination is whether the appeal herein should be struck out for want of prosecution. The applicable law in this regard is Order 42 Rule 35 of the Civil Procedure Rules which provides as follows:

**“(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.”**

The processes of giving directions and service of memorandum of an appeal are provided for in Order 42 Rules 11, 12, and 13 of the same Rules, wherein it is provided as follows:

**“11. Upon filing of the appeal the appellant shall within thirty days, cause the matter to be listed before a judge for directions under section 79B of the Act.**

**12. After the refusal of a judge to reject the appeal under section 79B of the Act, the registrar shall notify the appellant who shall serve the memorandum of appeal on every respondent within seven days of receipt of the notice from the registrar.**

**13. (1) On notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of appeal the appellant shall cause the appeal to be listed for the giving of directions by a judge in chambers.”**

In the present application, the Appellants claim that no directions have been given in this matter because the Record of Appeal has not been filed, for reasons that the Appellants are yet to be furnished with the certified copies of typed proceedings and judgment of the trial court. The law requires the Appellant to list the appeal for directions within 30 days of filing of the same. There is no requirement for the filing of a record of appeal for such directions to be granted. In this regard the documents that are required when filing of an appeal under Order 42 Rules 1 and 2 of the Civil Procedure Rules are set out as follows:

**(1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.**

**(2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.**

**2. Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under section 79B of the Act until such certified copy is filed.**

The requirements therefore under these rules for directions to be given under section 79B of the Civil Procedure Act is that the Appellants should have filed a memorandum of appeal to which should be attached a certified copy of the decree or order appealed against. The Appellants to this extent have therefore been indolent in listing the appeal herein for directions under section 79B of the Civil Procedure Act.

This finding notwithstanding, it is not disputed that directions have not been given in this appeal, and the appeal cannot therefore be dismissed pursuant to Order 42 Rule 35(1) of the Civil Procedure Rules. The appeal has also not been admitted to hearing, and since Order 42 Rule 12 of the Civil Procedure Rules provide that a memorandum of appeal shall be served after it has been admitted to hearing, this appeal is also therefore not amenable to dismissal under Order 42 Rule 35 (2).

This Court is also persuaded that the Respondent will not suffer prejudice as he did not contest having been paid half of the decretal sum, and since security for the balance has been provided for, the interests of the Appellants in pursuing their appeal ought also to be safeguarded in the circumstances.

I accordingly hereby decline to issue the orders prayed for by the Respondent in his Chamber Summons dated 24<sup>th</sup> July 2015 for the foregoing reasons. The Respondent shall however be awarded the costs of the said Chamber Summons as it resulted from the delay to act on the part of the Appellants.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 23<sup>rd</sup> day of November 2016.

**P. NYAMWEYA**

**JUDGE**