



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL APPEAL NO 32 OF 2014

ROBERT KIPNGETICH.....1ST APPELLANT

SAMSON NGOMI KIONGO.....2ND APPELLANT

VERSUS

STELLAH MUFOYA (*suing as the next of*

***kin of* LUTUBULA AMOS (DECEASED).....RESPONDENT**

RULING

1. The respondent prays that this appeal be *dismissed*. The respondent contends that the appellant is disinterested in prosecuting the appeal. The respondent has presented a notice of motion dated 29th September 2015. It is predicated upon Order 42 Rules 11, 13 and 35 of the Civil Procedure Rules.
2. There is filed a deposition sworn by Alubala Andambi, counsel of record for the respondent. He avers that the memorandum of appeal was lodged on 12th March 2014; and, that since that date, no concrete steps have been taken to fix the appeal for hearing. He states that the lethargy is prejudicial because his client cannot reap the fruits of the decree.
3. The appellants oppose the application. There is a replying affidavit sworn by Muhoro Muriuki, counsel on record for the appellants. He concedes that the memorandum of appeal was filed on 12th March 2014. He wrote to the lower court on 17th March 2014 requesting for typed proceedings. He later learnt that the lower court file could not be traced. He does *not* give a date.
4. On 6th November 2014, the respondent's counsel wrote to the appellants' counsel enquiring about possibilities of a settlement. On 27th January 2016, the appellants communicated a proposal to the respondent. It was rejected on 10th February 2016. The lower court file was still missing as late as 31st May 2016. This is evident from the appellants' letter marked *MM5*. In a nutshell, the appellants blame the loss of the lower court file for their failure to prepare a record of appeal; or, to take any further steps in the matter.
5. On 6th December 2016, learned counsel for the appellants and the respondent made brief oral submissions. The appellants' learned counsel pleaded with the court to sustain the appeal; and, to pay heed to Article 159 (2) (d) of the Constitution. He stated that he has since reconstructed the lower court file with the kind assistance of the respondent's learned counsel. The application was only allowed on 30th November 2016. The respondent retorts that it is a poor excuse for the laches displayed in this matter.

6. I have considered the rival arguments. I have also paid heed to the records before me, the pleadings, and depositions. It would be an understatement to say that the appellants are keen on prosecuting the appeal. The appeal was lodged on 12th March 2014. That is over *two and a half years* ago.

7. The motion for dismissal was presented to court on 1st October 2015. It is the one that woke up the appellants' from their deep slumber. It explains the following train of events: first, the belated offer to settle the matter on 27th January 2016 which was rejected by the respondent. Secondly, the letter of 31st May 2016 to the Chief Magistrates Court enquiring whether the lower courts file was traced; fourthly, the latest effort to reconstruct the record; and, lastly, the replying affidavit filed months later on 24th June 2016. I have formed the distinct impression that it was a poor effort at window dressing.

8. There is thus *no* contest that there has been *delay* in prosecuting the appeal. The motion to reconstruct the court file was only allowed a few days ago on 30th November 2016, nearly a *year* from the date the application for dismissal was filed. True, I should not blame the appellants for the loss of the file: But their learned counsel could obviously have taken earlier steps to reconstruct the record.

9. The bitter truth is that the appellants; or, their learned counsel went to sleep. It must never be forgotten that in our adversarial system of justice, it remained the primary obligation of the appellants to follow up on their appeal. See *Anne Chege & another v Peter Musasya*, Nairobi, High Court Civil Appeal 840 of 2003 [2006] eKLR, *Daniel Okoko v Dan Owiti*, Nairobi, High Court Civil Appeal 452 of 2003 [2006] eKLR.

10. Order 42 Rule 11 of the Civil Procedure Rules requires the appellant to set down the appeal for directions within *thirty days* from the date of filing. If within three months of the directions no steps are taken to set down the appeal for hearing, Rule 35 (1) authorizes the respondent to apply for dismissal.

11. It has been *more* than *two years* since the service of the memorandum of appeal. Directions have *never* been taken. I thus find that the present motion is properly before the court. However, the test in a matter of this nature is whether *justice* can still be done. See *Ivita v Kyumbu* [1984] KLR 441. There is also an overriding objective to do justice to the parties as decreed by Article 159 of the Constitution; and, by sections 1A, 1B and 3A of the Civil Procedure Rules.

12. I am alive that this is a personal injury claim. The decree is for a sum of Kshs 2,872,400. While I am minded to accommodate the appellants, they must pay a price for their tardiness. Justice is a two way street. I have dealt at length with the lackluster conduct of the appellants. The respondent is prejudiced by the existence of a stagnant appeal. The respondent cannot realize the fruits of the decree in the lower court. I am thus prepared to grant the respondent thrown away costs. That will perhaps assuage the respondent; and, keep the appellants wide awake.

13. The upshot is that the respondent's notice of motion dated 29th September 2015 is *disallowed*. The appellants shall however pay the respondent *thrown away* costs of Kshs 30,000 within the next *thirty* days. The appellants shall also ensure that the record of appeal is filed and served within *thirty days* of today's date; and, that the appeal is placed before a judge in chambers for *admission* or *directions* within *thirty days* of today's date. If the appellant fails to meet *any* of the conditions within the set *time*, the appeal shall automatically stand *dismissed*.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 13th day of December 2016.

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:

Mr. Andambi for the respondent/applicant instructed by Andambi & Company Advocates.

Mr. Muhoro for the appellant instructed by J. M. Kimani & Company Advocates.

Mr. J. Kemboi, Court Clerk.