

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURT

CIVIL APPEAL NO. 669 OF 2009

BALOZI HOUSING CO-OP SOCIETY LTD.....APPELLANT

VERSUS

JOSEPH KIARIE.....RESPONDENT

(Appeal from the original ruling of Hon. Kiema, Resident Magistrate delivered in, CMCC No. 1225 of 2008 at Milimani Commercial Courts. On 19th November, 2009)

RULING

1. By a Motion on Notice dated 29/1/2014, the Respondent has applied to have the appeal struck out or in the alternative dismissed for want of prosecution. The application was brought under Order 2 Rule 15(1) (b) and (d) and Order 42 Rule 11, 13 and 35 (2) of the Civil Procedure Rules. The grounds upon which the application was premises were set out in the body of the motion and Supporting Affidavit of James Rimui sworn on 29/1/2014.
2. It was contended that the Appellant had agreed to settle the decretal sum before filing the appeal; that pursuant thereto, the Appellant issued two cheques for Kshs.200,000/- and Kshs.202,427/- respectively towards settlement of the decretal sum. The copies of the cheques were exhibited as "JR3". That whilst the first cheque was encashed, the Appellant obtained a stay of execution before the second was paid. A sum of Kshs.264,836/85 was ordered deposited as security. That the Record of Appeal was filed on 25/8/11 but to date no step has been taken to prosecute the appeal.
3. I have considered the Affidavit on record and submission of Counsel. There was no reply to contradict or controvert the averments in the Supporting Affidavit although the application was served. An advocate held brief for counsel for the Appellant to apply for adjournment but when the same was declined, he disappeared. The application remained unopposed. Looking at what is deponed to in the detailed Affidavit of James Rimui, one cannot get a feeling that the application is indefensible. The Memorandum of Appeal raises only two grounds. The Appellant had partly paid the decretal sum. After it got the stay order it went to slumber.
4. In my view, I find the application to be meritorious. I allow the application in terms of prayer Nos. 2 and 3 of the Motion. I also award the costs of the Motion and appeal to the Respondent/Applicant.

It is so ordered.

DATED and DELIVERED at Nairobi this 12th day of June, 2015.

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A. MABEYA

JUDGE