



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 378 OF 2011

S.K. NGANGA LIMITED.....APPELLANT

VERSUS

ELIZABETH WAITHIRA KARIUKI.....RESPONDENT

RULING

1. The application before me is a Notice of Motion dated 19th April, 2013 seeking to dismiss this appeal for want of prosecution. The application is premised on the grounds that since the filing of this appeal, the Appellant has taken no steps to prosecute it. It was contended that more than one year has lapsed since the filing of this appeal and that the Appellant has not taken any steps to list this appeal for directions or serve the Respondent since the filing of the memorandum of appeal.

2. There are two Replying Affidavits filed in response to this application. The first is the Appellant's Replying Affidavit filed on 27th July, 2015 in which he contends that he was informed by his former advocates that they were waiting for communication from court on its own motion on the date for directions and that he is interested in prosecuting his appeal. The second affidavit is that of Kairu Kimani who by a notice of change of advocates dated 27th July, 2015 took over the matter from the Appellant's former advocates. Mr. Kimani too contended that what is pending before court is directions on court's own motion and that the record of appeal is in order.

3. When this application came up for hearing on 30th July, 2015, Mr. Njoroge learned counsel for the Respondent expressed that if the record of appeal had been filed, costs could be paid and the application be compromised. He however contended that the M/s Kairu Kimani & Company Advocates are not properly on record since they sought no leave to come on record for the Appellant and that Mr. Kimani has no right of audience.

4. It is not in dispute that the two Replying Affidavits were filed by the firm of Kairu Kimani & Company Advocates. The Appellant was hitherto represented by L.K. Kirori & Company. It is the latter firm that filed the record of Appeal. I think since there was a Notice of Change of Advocate properly filed on 29/7/15, I am not in agreement with the submission that the firm of Kairu Kamau & Co. Were not properly on record. I reject that contention.

5. The law on dismissal of an appeal for want of prosecution is found in Order 42 Rule 35 of the Civil Procedure Rules. The said order provides as follows:-

"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 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. (Emphasis mine)

6. Directions have not been taken in this matter, the applicable provision is therefore Rule 35 (2). The effect of the said rule is that it is upon the registrar to list the appeal before a judge in chambers for dismissal. Considering that the provision is couched in mandatory terms, a party filing an application such as this one shall be considered usurping the duties of the deputy registrar. It is only the registrar who is mandated to nudge the court to dismiss the appeal.

7. In the circumstances, I find that this application was premature and cannot succeed. Since however, there had been a lapse of more than 3 years, I will award the costs of the application to the Applicant assessed at Kshs.15,000/- payable within 30 days. In default execution therefor to issue.

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A. MABEYA

JUDGE

Dated, Signed and Delivered at Nairobi this 21st day of September, 2015.

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JUDGE