



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

HC CC. NO. 118 OF 2010

SALESIO NJIRU NJERU.....APPLICANT

VERSUS

NJIRU MBOGO.....RESPONDENT

RULING

INTRODUCTION

1. Counsel for the the Respondent through their Notice of Motion dated 25th November 2013 have moved the court to dismiss the appeal for want of prosecution. The appeal was filed on 22nd November 2010. Annexed to the Notice of Motion is a supporting affidavit.
2. The application is opposed by counsel for the applicant through a replying affidavit dated 7th March, 2014. The applicant's counsel have filed written submissions in support of the opposition to the application.

The Respondent's Application and Submissions:

3. In their notice of motion, counsel for the Respondent have stated that it is over three years since they were served with the Memorandum of Appeal. According to them, the Applicant has not taken any steps to set down the appeal for hearing. Additionally, they have stated that the Applicant has lost interest in prosecuting the appeal and that it is in the interests of justice that litigation should come to an end.
4. Furthermore, the Respondent's counsel have elaborated in their supporting affidavit the grounds set out on the face of the motion. They have stated that the appeal was filed and served upon them on 22nd November, 2010. They have also stated that the Applicant obtained a stay order on 27th April, 2011. Finally, they have stated that they wrote several letters to the Applicant's counsel enquiring on the progress made in formalizing the appeal with a view of it being heard and determined. They never got any response to their letters.

Applicant's response to Respondent's Application and Submission:

5. In opposition to the application, the Applicant has relied on his replying affidavit of 7th November, 2014 and submissions of his counsel. According to his replying affidavit, the Applicant had hired Ms Rose Njeru, Advocate to prosecute the appeal. It was until sometimes in 2012 when he visited his advocate to find out the progress of the appeal. His advocate told him that she was not ready to proceed with the appeal (paragraph 3 of his affidavit).
6. Furthermore, he has also stated that he made several attempts to fix a hearing date but the court registry told him that the court diary was full. Finally, the appellant has stated that it was not his

- fault that the appeal was never prosecuted for those three years.
7. The appellant's counsel filed written submissions. Counsel has submitted that the application for dismissal is defective for failing to indicate at the foot that if any party fails to attend court, the court will proceed with the hearing and may make any necessary orders. In this regard, counsel submits that the requirements of Order 5, rule 13 of the 2010 Civil Procedure Rules were complied with.
 8. Counsel further submits that the applicant was not entitled to invoke the provisions of Order 42 Rule 35 (2) of the Civil Procedure Rules. The reason being that only the registrar of the High Court may do so, according to counsel.
 9. Applicant's counsel has submitted that the application is premature because the appeal has not been admitted into hearing as required by section 79B Civil Procedure Act as read with Order 42 rule 13 Civil Procedure Rules.
 10. They also submit that the mistakes of the advocate for the Appellant should not be visited upon the innocent Appellant.

Evaluation of the Affidavit Evidence, Findings and the Law:

11. I have considered the affidavit evidence of both parties. I have also considered their submissions and the applicable law. I find that the appellant filed and served the appeal on 22nd November, 2010. On 11th April, 2012, the Deputy Registrar of this court notified counsel for the appellant that the appeal had been admitted into hearing. Counsel for the appellant was directed to prepare the record of appeal and file the same within 21 days from the date of that letter (ie 11th April, 2012).
12. To date, no record of appeal has been prepared. As the instructing client, it was his duty to ensure that such a record was prepared, filed and served upon the respondent. It was also his duty to ensure that the appeal was set down for directions in readiness for the hearing of the appeal.
13. The submissions of counsel for the Appellant that the instant application is premature on account that the appeal had not been admitted into hearing is without merit and is hereby dismissed. The reason being that the appeal was admitted into hearing on 22nd March 2012. And on 11th April, 2012 the Deputy Registrar of this court notified counsel for the appellant that the appeal had been admitted into hearing.
14. Furthermore, the contention of counsel for the Applicant that his counsel failed him is also without merit. It should always be borne in mind that it is the duty of the Appellant to ensure that the appeal was prosecuted expeditiously. It is his appeal and not of his counsel.
15. It seems that after obtaining an order of stay of execution on 27th April, 2011, the appellant did not take any steps to prosecute the appeal. He bears the blame and not his advocate.
16. I do not believe the Appellant's affidavit evidence that he attempted to set down the appeal for hearing, but was informed by the court registry that the court diary was full. The reason being that he had not prepared the record of appeal, which remains to be the position to date. It is difficult to see how directions, by the court would be given including setting down the appeal for hearing in the absence of a record of appeal.
17. I find that after the obtainment of an order of stay of execution on 27th April, 2011, the Appellant lost interest in the appeal which remained un-prosecuted for over three years. It is in the public interest that litigation must come to an end. It is also important to bear in mind that justice delayed is justice denied.
18. In the light of the foregoing, I hereby allow the Respondent's application with costs.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this.. 26th .. day of **OCTOBER .2015**

In the absence of the parties.

Court clerk Njue

J.M. BWONWONGA

JUDGE

26.10.15