



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO 460 OF 2010

ALBERT MBURU KARINGAAPPELLANT/RESPONDENT

-VERSUS-

PETER MAMBO KARINGA1stRESPONDENT

EDWARD CHEGE KARINGA.....2ndRESPONDENT

RULING

The application before me is a Notice of Motion dated 2nd December 2013. It is brought under Order 13 rule 2, Order 51 rule 1 of the Civil Procedure Rules 2010 and Section 1A, 1B and 3A and 63(e) of the Civil Procedure Act. The applicant seeks the following orders;

- i. That this appeal be dismissed for want of prosecution
- ii. Costs of this application be provided for

The application is grounded on the following grounds;

- i. That it has been 3 years since this appeal was filed
- ii. That the appeal has never been set down for hearing
- iii. That the appellant is dis interested in prosecuting this appeal.

The applicant filed a supporting affidavit and depones that the appeal was filed in 2010 and since that time the matter has never been put down for hearing; that the applicant is not interested in prosecuting the appeal and that the same should be dismissed for want of prosecution.

The application was opposed. The appellant filed a relying affidavit sworn by Albert Mburu Karinya on 31st March 2014 where he depones that the said application has been brought under the wrong provision of the law and that the Orders cited relate to judgment on admission hence the same is fatally defective; that the said application for dismissal for want of prosecution cannot be attainable in law before directions are given under Order 42 rule 13 hence this application is bad in law; that this Court cannot be moved to dismiss an appeal by way of Notice of Motion as the law dictates that this can only be done by way of Summons; that the application is incurably defective, bad in law, oppressive and the same should be struck out with costs; that the matter was filed via a Memorandum of appeal on 2nd November 2010 and thereafter a record of appeal was filed on 7th May, 2012. That on the same date a Notice of change of advocates was filed; that on 11th May 2012 the advocates served the a copy of the Record of appeal on the respondents ; that on 26th November 2012 the advocates on record invited the respondents to meet at the High court Registry with the aim of fixing a mutual hearing date but the same could not be fixed as

the matter had not been admitted for hearing since directions and the lower court file had not been filed; that the advocate on record had visited the High Court Registry on various occasions to follow up on the matter when in Mid and late 2013 when he was informed that judges were engaged in hearing of Election Petitions and Criminal Appeals and that his file plus others were ending for directions.; that on 14th February, 2014 his advocates was served with this application; that he was never informed that the lower court file had been received at the Civil Appeals Registry; that the advocate has been visting the High Court Civil Appeals Registry for advice; that the appeal has not been admitted to pave way for directions; that failure to prosecute the appeal has not been occasioned by him but by the Court's Registry; he argues the court to disallow the application and give him an opportunity to prosecute which he claims has high chances of success and that no prejudice will be suffered by the deponents if the appeal is heard, tried and determined ion merit.

The application came for hearing on 7/4/2014 when parties made oral submissions.

Mr.Kiplagat for the applicant reiterated the contents of his application and submitted that it's been 4 years since the appeal was filed and reiterated that the applicant is not interested in prosecuting the appeal and that his client is not enjoying the fruits of his judgment and urged the court to dismiss the appeal.

Mr.Nzioka reiterated the contents of his replying affidavit and added that the application is brought under the wrong provisions and as such the Court lacks jurisdiction on this he relied on the case of **Joel Yegon & 4 Others V John Rotich & 4 Others Nai. Misc. application 995 of 2003** it was held;

*“While our procedural law does not permit the court to deny relief to a party for not citing the law or provision under which an application is brought where a party quotes the wrong provisions and does not apply to amend, such applications are incompetent and ought to be struck out. I agree with the learned Counsel for the respondent Mr. Arusei that the failure to demonstrate that the application has been properly brought under rule 1 and section 48of the Advocates Act is fatal.”*He also referred to the case of **Joyce LikuJanda v Care International [2009] eKLR.**

He argued that the defects in quoting the wrong provisions of the law can only be cured with an amendment and since this has not been done the Court has no jurisdiction to dismiss the appeal. That under order 42 rule 35 a dismissal can only occur if directions have been given and in the instant case directions have not been given. He referred the Court to their letter inviting the applicant to attend the High court registry to fix the matter for hearing and also a letter dated 18th October, 2013 seeking the matter to be admitted. He submitted that the appellant is serious to prosecute the appeal.

Mr. Kiplagat in reply indicated that the argued that the list given by the appellant was written 8 months and that the letter was written 8 months ago.

I have considered the submissions made. On the application being defective that is cured by the provisions of Article 159 (2) (d) of the Constitution which provides that justice shall be administered without undue regard to technicalities. On whether the suit should be dismissed I find that the appellant respondent has given a satisfactory response, he is not to blame, the matter has not been listed for directions. The provisions of order 45 rules 35 are clear that if after three months of giving direction the matter has not been set down for hearing by the appellant the respondent shall be at liberty to apply by summons for the dismissal of the suit for want of prosecution. I have perused the court file and note that the court has not given directions. The application is therefore premature and its dismissed with costs to the respondent.

Orders accordingly.

Dated, signed and delivered this 17th day of **April** 2014.

R. E. OUGO

JUDGE

In the presence of:-

.....For the APPELLANT/RESPONDENT

.....For the 1st RESPONDENT/ APPLICANT

.....For the 1st RESPONDENT/APPLICANT

.....COURT CLERK