



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 200 OF 2011

JOSEPH NYAMBU.....APPELLANT

VERSUS

DIRECTOR GENERAL NEMA.....1ST RESPONDENT

COPA CABANA LTD.....2ND RESPONDENT

RULING

This Notice of Motion application dated 19th February, 2013 brought pursuant to order 17 rule 2(1) and 3 and order 51 rule 1 of the Civil Procedure Rules seeks the dismissal of this appeal for Want of prosecution.

The grounds are that the appeal is against the ruling and orders of the National Environmental Tribunal delivered on the 9th of September, 2011 being National Environmental Tribunal Appeal No. 71 of 2011.

That since the 4th day of October, 2011 the appellant has made no efforts to advance their case in Court.

That a direct consequence of the appeal and its delay, is the stay granted pending its hearing and determination including other proceedings currently before the National Environmental Tribunal involving the parties.

Further that the applicant is suffering heavy financial losses due to the halting of their project on plot No. 6235/1/MN pending the hearing of the appeal.

That since 4th October, 2011 the appellant has not served the 2nd Respondent/Applicant with a memo of appeal.

In the replying Affidavit of Paul Munyao Counsel for the appellant it is deponed that a Notice of appeal was filed on 4th October, 2011 and was served on the 2nd Respondent on 19th February, 2013.

Further that the Appellant seeks to appeal against the ruling and orders of the National Environmental Tribunal Appeal No. 71 of 2011.

That same parties are litigating in National Environmental Tribunal Appeal No. 73 of 2011.

Further that attempts had been made to obtain a copy of the proceedings from the tribunal but in vain.

This application is brought pursuant to order 17 rule 2 which provides,

“In any suit in which no application has been made or step taken by either party for one year, the Court may give notice in writing to the parties to show cause why the suit should not be dismissed; and if Cause is not shown to its satisfaction, may dismiss the suit”.

As pointed out by Counsel for the Respondent what is before the Court is not a suit but an appeal which is governed by order 42 rules 35(1) which provides,

“Unless within three (3) 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 (1) 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”.

In this present appeal no directions have been given as envisaged above by order 42 rule 35. No notice has been given to the Parties by the Registrar, so clearly the application is premature. It is noted however, that the stay granted to the Respondent has affected other matters pending before the National Environmental Tribunal involving the parties and hence, there is need to expedite this appeal.

The appellant is granted fourteen (14) days to file and serve the memorandum of appeal and subsequently to cause same to be listed before a Judge for directions within thirty (30) days.

Costs in the cause.

Ruling delivered dated and signed this **8th** day of **April, 2014** .

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M. MUYA

JUDGE

8TH APRIL, 2014

In the presence of:-

Learned Counsel for the appellant

Learned Counsel for the Defendants Kinyanjui holding brief Mereka

Court clerk Musundi

M. MUYA

JUDGE

Court: Parties to be furnished with copies of this Ruling.

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M. MUYA

JUDGE

8TH APRIL, 2014