



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
FAMILY DIVISION
CIVIL APPEAL NO. 82 OF 2012

F M K.....APPELLANT

VERSUS

S W M.....RESPONDENT

RULING

1. The Motion dated 4th April 2014 is for dismissal of suit for want of prosecution. It is premised on Orders 17(1), (2) and (3) of unspecified rules, Sections 3 and 4 of the Civil Procedure Act and on all other enabling provisions of the law.
2. The background to the application is set out in the affidavit sworn in support of the application by the applicant, Susan Wangui Mugwe, on 4th April 2014. Her case is that the respondent filed a suit against her at the High Court on 26th October 2012 and that since then the said respondent has not taken any steps to fix the matter for hearing. She would like the suit dismissed for want of prosecution.
3. The application was served on the respondent on 16th May 2014. He responded to it vide a replying affidavit sworn 16th May 2014. He states that he did file an appeal on 26th October 2012 against a decision of the Children's Court in Nairobi Children's Court case number 260 of 2010. He applied for certified copies of proceedings of the Children's court, but the same have not been supplied to date. He further states that the High Court Civil appeals registry has not called for the lower court's file, nor has the appeal ever been fixed for directions. He argues that he cannot possibly apply for the fixing of the appeal for hearing before directions have been given.
4. It was directed on 23rd May 2014 that the said application be disposed of by way of written submissions. Both parties have filed their respective written submissions, both were filed on 10th July 2014. The applicant relies on Order 17 of the Civil Procedure Rules which empowers the court to dismiss a suit for want of prosecution where no step is taken by either party for one year. She argues that that has been the case in the instant cause. The respondent argues that the appeal has not been admitted and directions have not been taken, hence the same is not ripe for dismissal.
5. The record shows that the respondent did file an appeal on 26th October 2012, vide a memorandum of appeal of even date. After that no further action was taken prior to the filing of the instant Motion on 4th April 2014.

6. The pleading filed in this cause is a memorandum of appeal, not a plaint or petition. The cause herein is strictly speaking not a suit, but an appeal. The provisions of the Civil Procedure Rules applying to suits do not apply to it. The applicable provisions are those on appeals.

7. Civil appeals, such as the instant one, are governed by Order 42 of the Civil Procedure Rules. Dismissal of appeals for want of prosecution is provided for in Order 42 rule 35. The said provision states 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.”

8. The effect of the above provision is that dismissal of an appeal for want of prosecution will result from an act by the respondent or by the Deputy Registrar on his own motion. The respondent can only cause an appeal to be dismissed on the ground of non-prosecution where directions have been taken. Quite clearly the Motion before me is for dismissal because it is premised on the wrong provisions of the law for dismissal of appeals. I have no hesitation in dismissing the same.

9. I note however that the appeal on record was filed in October 2012, we are in October 2014. Two years have expired yet nothing is happening in the appeal. The record of appeal has not been prepared and filed as required by the law. The respondent gives the excuse that the proceedings of the lower have not been typed. It is his duty to pursue the typing of the said proceedings. He has been indolent. The applicant has a case, but the law is not on her side.

10. To fast-track the matter, I will make the following orders:-

a. The respondent/appellant is hereby directed to file record of appeal in the next thirty (30) days of the date of this ruling;

b. In default the Deputy Registrar is directed to cause the matter to be placed before a judge in conformity with Order 42, rule 35(2) for dismissal.

11. It is ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 24th DAY OF October, 2014.

W. MUSYOKA

JUDGE