

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. 300 OF 2012

MATHEW OUMA OSEKO.....APPELLANT

V E R S U S

TITUS OTIENO KOCEYO.....RESPONDENT

RULING

This is an application by the Respondent in this appeal by Notice Of Motion dated 24th August 2013) brought under Section 3 and 3A of the Civil Procedure Act, (Cap.21), Order 42 Rule 11(1), Rule 35(2) & Order 51 Rule 1 & 2 of the Civil Procedure Rules (*the Rules*) for an order to dismiss the appeal for want of prosecution. The grounds for the application as they appear on the face thereof are - that since the filing of the appeal on 13th June 2012 the Appellant has never taken any steps to prosecute it; that he has not sought to have the same set down for directions; that he did not cause the matter to be listed within 30 days of filing the appeal; that the appeal was filed to delay the execution of the decree by the Respondent and payment of the subsequent decretal amount awarded to him by court; that he has not prepared and filed a record of appeal despite being informed of availability of typed proceedings on 1st March 2013; and that the appeal is an abuse of the process of the court as it is meant to deny the Respondent the enjoyment of the fruits of the Judgment delivered in his favour.

The application is supported by the affidavit of the Respondent sworn on 24th August, 2013.

The Appellant opposes the application upon the grounds set out in his replying affidavit sworn on 4th September 2013 and filed on 23rd September, 2014. Those grounds are, that the application is misconceived and fatally defective as directions are yet to be given by the court; that after filing of the memorandum of appeal his advocates on record prepared a skeleton record of appeal awaiting certified proceedings from the trial court; that whereas they received a letter informing them that the certified copy of proceedings was ready, they could not access it as the only copy had been picked by the Respondent's Advocates; that despite numerous attempts to get a copy of the proceedings from the executive officer and the Respondent's Advocates none has been forthcoming; that the decretal amount has been deposited in court and in the event the appeal is not successful the same will be released to the Respondent; that eventually his advocates managed to get the proceedings and have filed the record of appeal; and that the appeal has high chances of success and should be heard on merit.

Rule 35(1) of Order 42 of the Rules provides for a respondent to either set down the appeal for hearing or apply for its dismissal for want of prosecution if within three months after the giving of directions under rule 13 of the same Order the Appellant shall not have set the appeal down for hearing. Such directions have not been given in this appeal. Indeed, the appeal has not even been admitted to hearing. So, the Respondent cannot avail himself of the remedy provided by Rule 35(1). But that is not to mean that the court does not have inherent jurisdiction to order dismissal of an appeal for want of prosecution even though directions under Rule 13 have not been given. The court has inherent power which may be exercised as may be necessary to prevent abuse of the process of the court. An appeal which is lodged without the intention of ever prosecuting it but with the intention of delaying or obstructing the cause of justice is an abuse of the process of the court.

However, before a Respondent can invoke the inherent jurisdiction of the court to dismiss an appeal for

want of prosecution before directions under Rule 13 are given, he must exhaust the remedies provided under the Rules. For example there is nothing stopping a Respondent from writing to the registrar of the court to request that the appeal be placed before a judge in chambers under Rule 35 (2) for dismissal. A respondent can also ask the registrar to set down the matter for directions under Rule 13. A judge may then direct the appellant to take appropriate steps towards preparation of the appeal for admission and hearing within a limited period, and prescribe appropriate penalties in default.

Time has passed since the filing of the appeal herein. Whereas there may be some justification in the Respondent's plea that there has been delay in prosecuting the appeal, the application was filed 14 months after filing the memorandum of appeal which is more than the time prescribed under rule 35(1). But the Respondent has not as yet exhausted the remedies provided in Order 42. He will thus not be permitted at this stage to invoke the inherent power of the court to dismiss the appeal for want of prosecution.

The application is therefore dismissed. Each party shall bear their own costs.

Orders accordingly.

Dated, signed and delivered at Nairobi this 20th day of November, 2014.

A. MBOGHOLI MSAGHA

JUDGE