

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 66 OF 2009

GRACE NJERI KAMANU.....APPELLANT

VERSUS

ROSEMARY GATHONI CHEGE.....RESPONDENT

RULING

1. The respondent's Notice of Motion dated 19th August, 2013 seeks to dismiss this appeal for want of prosecution. The motion is expressed to be brought under Order 17 Rule 2 (3) of the Civil Procedure Rules, 2010 and Sections 1A, 1B and 3A of the Civil Procedure Act.

2. The motion is premised on the grounds on the face of the application and the supporting affidavit and further supporting affidavit of the respondent sworn on 19th August, 2013 and 27th June, 2014 respectively. She averred that the appellant has for more than one year since the filing of this appeal taken no steps to prosecute it. She averred that she instituted a suit against the appellant's insurers and executed a decree whereby this appeal is meant to frustrate her realisation of the decree.

3. The application was opposed vide the replying affidavit of Jared Nchore Orare sworn on 21st May, 2014. He attributed the delay in prosecuting the appeal to loss of the trial court file (Gatundu RMCC No. 345 of 2007) following a fire that razed Gatundu Law Courts.

4. When this application came up for hearing on 5th November, 2014, Miss Chege, Learned Counsel for the respondent submitted that no evidence was furnished to prove that Gatundu Law Courts burnt down; that there is no evidence that the appellant applied to reconstruct the court file and that since a declaratory suit against the appellant's insurer was filed and insurer directed to settle the claim, there was no need for an appeal. Reliance was placed on the case of ***Hesbon Amata & Another v. David Maina Waithaka, Nairobi Civil Appeal No. 213 of 2009(UR)***. Mr. Amadi Learned Counsel for the appellant reiterated the averments in the replying affidavit and admitted that there was a declaratory suit which was settled but argued that the appellant should not be punished twice.

5. I have read and considered the depositions and the rival submissions. The issue that falls for this court's determination is whether the application meets the conditions for granting an order for dismissal of an appeal for want of prosecution. The applicable law is enunciated in Order 42 Rule 35 of the Civil Procedure Rules and not Order 17 Rule 2 (3) as expressed by the respondent. It provides:

***“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.”

Considering the provisions in sub-rule 2, this application is unmerited since it can only be invoked by the registrar. The upshot is that the application is dismissed. Costs shall be in the cause.

Dated, Signed and Delivered in open court this 18th day of December, 2014.

J. K. SERGON

JUDGE

In the presence of:

.....for the
Appellant

.....for the Respondent