



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL APPEAL NO. 413 OF 2009

HUDSON DUMUSI NUNGAFU.....APPELLANT

VERSUS

KENYA BUILDERS & CONCRETE LTD.....1ST RESPONDENT

PETER NGOTTA SAMBAYA.....2ND RESPONDENT

R U L I N G

By an application dated 26th February 2014 the respondent's/applicant's in this appeal filed a notice of motion under the provisions of Order 17 Rules 2 (1) & 2 (3) of the Civil Procedure Rules seeking to have the appellant's appeal herein dismissed for want of prosecution with costs.

The application is based on the grounds that it is now over one year and 10 months since the appeal was filed in court and the appellant has not taken any steps to set it down for hearing, which is far in excess of the one year contemplated by Order 17 Rule 2(1); Secondly, that the provisions of Order 17 Rule 2 (3) of the Civil Procedure Rules allow the respondents to inter alia bring such an application as this

The said application is further supported by the affidavit of Kelvin Mogeni advocate sworn on 26th February 2013.

The application was opposed by the appellant/respondent who filed a replying affidavit sworn by Joan Atieno Otieno on 20th June 2014 contending that the respondent's application is misconceived, fatally defective as the applicant seeks to dismiss the appeal which directions have not been given by the court. Her affidavit details the steps which the appellant has taken since the filing of the appeal including the compilation, filing and serving of a record of appeal on 8th April 2011 and their efforts to pursue the submission of the lower court record to the appeal herein to facilitate admission and taking of directions, an indication that the appellant had not slumbered and was eager to have his appeal heard and determined on merit.

The parties' advocates argued the application on 22nd October 2014 with the applicant being represented by Mrs Ndegwa whereas the respondent was represented by Miss Otieno. Counsel for the applicant reiterated what is contained in the application and supporting affidavit whereas counsel for the respondent in opposing the application relied on the affidavit sworn by herself urging the court to dismiss the application with costs.

I have carefully considered the application by the respondents, the reply by the appellant and the rival

submissions by their respective counsels on record. It is not dispute that the appeal herein was filed on 3rd August 2009 and thereafter the High Court Deputy Registrar did on 13th August 2009 call for the lower court record from the magistrate's court at Milimani Courts followed by another reminder on 27th March 2013 and 1st July 2013 but to date no such record has been availed.

It is further not in dispute from the record that the appellant did file a record of appeal on 8th April 2011 and has since then been writing letters seeking to have the matter set down for directions hoping that the lower court record has been availed but these letters have not been responded to by the Deputy Registrar and neither has the lower court record been availed to facilitate admission of the appeal and taking of directions on appeal.

The respondent now blames the appellant for not taking any steps to have the appeal set down for hearing, an accusation this court does not buy or at all as shown by the record herein. But what is shocking to me as I examined the application and heard the arguments by counsel for the respondents Mrs Ndegwa urging the court to dismiss the appeal for want of prosecution, an application which is filed and argued based on Order 17 Rule 2 of the Civil Procedure Rules. With utmost respect to the learned counsel for the applicant, Order 17 of the Civil Procedure Rules concerns prosecution of suits and an appeal is not a suit, in as much as it is continuation of a dispute to a higher level.

Rule 2 thereof provides for dismissal of a suit for want of prosecution where no application has been made or step taken by either party for one year. Under subrule 2 thereof a party may apply for dismissal of the suit where no action has been taken for one year.

It is therefore clear that the applicant's counsel had no slightest idea what provisions of the law are applicable in the case of appeals, their prosecution and or dismissal which I find unfortunate. Having said that, the law concerning dismissal of an appeal for want of prosecution is contained in Order 42 Rule 35 of the Civil Procedure Rules.

Under Rule 35 aforementioned, the law contemplates two different scenarios for issuance of an order for dismissal of an appeal for want of prosecution. These are:-

(i) Where three months after giving of directions under Order 42 Rule 13, no steps have been taken by the appellant to fix the appeal for hearing, the respondent has two options one, to either fix the appeal for hearing or apply by summons for the dismissal of the appeal under Order 42 Rule 35 (1). In **Kirinyaga General Machineries – Vs – Hezekiel Mureithi Ileri HCC 98/2008**, the court while interpreting the old Order 41 Rule 31 stated that

“It is clearly seen from this rule that before the respondent can move the court either to set the appeal down for hearing or to apply for dismissal for want of prosecution, directions ought to have been given as provided under Rule 8B. Directions have never been given in this matter. The directions having not been given the orders sought by the respondent cannot be entertained.”

The second scenario is that contemplated under Order 42 Rule 35 (2). Unlike subrule 1 of rule 35 which requires that directions must have been taken before the appeal can be sought to be dismissed, for want of prosecution. Under subrule (2), if within one year after 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.

Besides the fact that the applicant had no idea what law was applicable in applying for dismissal of an appeal for want of prosecution, it is clear that directions not having been given in this appeal, coupled with my findings that the appellant has not been indolent in any way in having the appeal herein heard and determined, and the fact that it was not the court that sought to have the appeal dismissed under Order 42 rue 35 (2) as the lower court file has not been availed despite incessant reminders to the magistrate's court that heard and determined the case against which an appeal herein was preferred, and based on the decision in **Kirinyaga General Machinery** cited above whose observations I wholly concur with, it has

not been shown by the applicants that they are entitled to the orders sought.

My finding is that this application is premature and misconceived and ought to be dismissed and I accordingly proceed and hereby dismiss the applicant/respondent's application dated 26th February, 2014 with costs to the appellant.

I further direct and order that the executive officer of the Chief Magistrate's Court, Milimani Law Courts do submit to this court the original file and all records containing **CMCC NRB 2072 of 2007** within 14 days from the date of delivery of this ruling, to facilitate the preparation and hearing and determination of this appeal expeditiously.

Orders accordingly.

Dated, signed and delivered at Nairobi this 11th day of December, 2014.

R.E. ABURILI

JUDGE