



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
CIVIL APPEAL 11 OF 2013

MOHAMED ADAN

ABDULLAHI MOHAMED

NOOR ALI OSMAN APPELLANTS/RESPONDENT

VERSUS

HUSSEIN MAALIM ALIO (Suing as the Legal Representative of the

Estate of DAHABO MAALIM

(DECEASED)..... RESPONDENT/APPLICANTS

RULING

Before me is an application brought by way of notice of motion dated 25th July 2014. The applicant is the respondent Osman Mohamud Alio. The application was brought under Order 42 rule 35 of the Civil Procedure Rules 2010 and Section 3A of the Civil Procedure Act Cap 21 of the Laws of Kenya. The prayers are as follows;

1. That this appeal be dismissed for want of prosecution.
2. That the costs of this application be awarded to the respondent.

The application has grounds on the face of the notice of motion. The grounds are that the appeal has already been admitted to hearing four months ago. Secondly that the appellant is reluctant to prosecute the appeal. Thirdly that the failure to prosecute the appeal is a delay of justice to the respondent.

The application was filed with an affidavit sworn by the applicant on 25th July 2014. It was deponed interalia that the appeal was admitted to hearing on 28th March 2014. That it was over 4 months since, and the appellant has not taken steps to prosecute the appeal. That the prolonged delay in hearing the appeal is a delay of justice to the applicant.

A replying affidavit sworn by Fredrick Mwhia advocate on 13th October 2014 was filed. It was deponed therein interalia that the application was bad in law frivolous and vexatious and an abuse of the process of the court. That it was not true that the appeal had been admitted on 28th March 2014 as no notice was served upon the appellants as required by law. That the application was brought in bad faith and in contravention of Order 42 Rule 35(1) of the Civil Procedure Rules as directions had not been taken by the parties.

The applicants' counsel Magare Musundi & Co filed written submissions. The respondent's counsel Ms. Kairu & Mccourt also filed written submissions. Counsel relied on written submissions filed.

I have considered the application. It is an application for dismissal of an appeal for want of prosecution. The respondents counsel has stated that the appeal was not admitted to hearing and as such the application is premature. I have perused the court record. It is clear to me from the record that the appeal has not been admitted to hearing. In my view therefore the application was filed prematurely.

Order 42 rule 35 (1) of the Civil Procedure Rules 2010 is relevant on this. It provides 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.

Since directions, under rule 13 have not been given by the court, it follows therefore that this application for dismissal of the appeal for want of prosecution is premature. It cannot be sustained. Consequently, I strike out the application, with no order as to costs.

Dated and delivered at Garissa this 8th day of December 2014.

GEORGE DULU

JUDGE