



REPUBLIC OF KENYA

High Court at Kisumu

Civil Appeal 123 of 2009

FOAM MATTRESS LIMITEDAPPELLANT

V

RICHARD OMONDI ODUNGARESPONDENT

R U L I N G

The respondent successfully sued the appellant for compensation following injuries he suffered while in employment at the latter's premises. The lower court found the appellant 100% liable and ordered payment of cash.120,000/= in general damages and Kshs.1500/= in special damages plus costs and interest in the judgment delivered on 21/7/09. The appellant was aggrieved by the decision and filed an appeal on 20/8/09. Following an application in the lower court for stay of execution pending the hearing and determination of the appeal, an order was made depositing the decretal sum of Kshs.170,000/= into an account at Bank of Baroda at Kisumu to be operated by joint parties through their advocates.

On 13/12/12 the respondent applied to have the appeal dismissed for want of prosecution. The application was brought under sections 1, 1A, 3 and 3A of the Civil Procedure Act and Order 42 rule 35 of the Civil Procedure Rules. The complaint was that the appeal has been outstanding for over three years and yet the appellant has not taken any action to prosecute it. The respondent felt that the appellant was not interested in the appeal and that this inaction was not only denying him the fruits of his judgment but was also causing the delay of justice. He wanted that the deposited money be released to his counsel.

The appellant responded to the application by filing grounds of opposition in which it was contended that the application

(a) was an abuse of the process of the court;

(b) has not satisfied the pre-requisite for the grant of the orders sought;

(c) was misconceived and frivolous; and

(d) was incompetent and ought to be struck out and or dismissed with costs;

The averment of the respondent, that since the appellant filed this appeal on 20/8/09 it has not taken any action to prosecute it was not controverted. The present application was filed about three years and four months later. Under Order 42 rule 11 the appellant was required to, within thirty days upon the filing of the appeal, cause the matter to be listed before the judge for directions. After the judge's refusal to reject the appeal, the appellant was required under rule 12 to serve the memorandum of appeal. 21 days later, it was required under rule 13 to cause the appeal to be listed before the judge for directions.

This application was made under rule 35. Under sub-rule 1, the appellant was required to set down the appeal for hearing within three months after the giving of directions, failing which the respondent was at liberty to set down the appeal for hearing or apply for its dismissal. Under sub-rule 2, if, within one year after the service of the memorandum of the appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal for dismissal.

There is no evidence that the appellant has taken any of the steps under rules 11, 12 and 13. The respondent was therefore at liberty to seek the dismissal of the appeal for want of prosecution. I allow the application with costs.

Dated, signed and delivered at Kisumu this 13th May 2013.

A. O. MUCHELULE

J U D G E