



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 21'A' OF 2009

NYALI CONSTRUCTION & ELECTRICAL APPELLANT

V E R S U S

JEREMIAH OGENDO NYASANI RESPONDENT

RULING

1. The Appellant filed a Memorandum of Appeal in this Appeal on 18th February 2009. To date the lower court file has not been brought to this Court and neither have the proceedings of the lower court been provided.
2. The Respondent seeks by a Notice of Motion dated 21st February 2013 that this Appeal be dismissed for want of prosecution. That application is premised on the grounds that it is three years since the Memorandum of Appeal was filed and the Appellant has failed to take steps to set down the appeal for hearing. In the Respondent's view the Appellant has lost interest in this appeal.
3. Appellant by its Replying Affidavit stated that the lower Court misplaced its Court file and it could not be traced immediately after the Respondent obtained warrants of attachment against the Appellant. As a consequence the Appellant stated that it was unable to obtain copies of the certified proceedings of the lower court in order for it to be able to prepare the record of appeal. It further stated that it was not until 16th April 2013 that uncertified proceedings were supplied to it. Those proceedings according to the Appellant are going through proof reading. To this end the Appellant attached to its affidavit a Certificate of Delay issued by the lower Court. That Certificate states as follows-

“This is to certify that Messrs. Marende Birir & Company Advocates for the Defendant herein applied to this Honourable Court for certified copies of proceedings and judgement in the above case on the 5th February, 2009 and the same was delivered to them on the 27th May, 2013 and the period from 5th February, 2009 to 27th May, 2013 was requisite for the preparation and delivery to them of the said copies.

CERTIFIED this 3rd day of June 2013 under my hand and the seal of this Honourable Court.

MAGISTRATE-MOMBASA.”

4. The dismissal of appeal for want of prosecution is governed by Order 42 rule 35(1) & (2) of the Civil Procedure Rules, 2010.
5. Under Rule 35(1) a Respondent has the liberty to set down for hearing an appeal or to seek for its dismissal for want of prosecution where the Appellant fails to set it down for hearing within three months after directions are given by the Court. Here directions have not been given because the lower Court file has not been availed to this Court. Much more this appeal has not been admitted for hearing as per Order 42 Rule 13. The Respondent cannot obtain the orders that he seeks under Rule 35(1).
6. Under Rule 35(2) the Court may dismiss an appeal for want of prosecution where after the Appellant having served the Memorandum of Appeal on the Respondent but fails to set down the appeal for hearing within one year thereof. None of the parties before Court have shown evidence when the Appellant served the Memorandum of Appeal upon the Respondent and whether such service was more than a year. It is therefore clear that this appeal cannot also be dismissed under Rule 35(2).
7. Undoubtedly the Court is possessed with inherent power which power the Court can evoke for dismissal of an appeal where the Court is of the view that there is an abuse of the Court process. The question here is can it be said that the Appellant has abused the process of the Court? From the record of this file it can be seen that this Court wrote to the lower Court a letter dated 25th February 2009 which letter was copied to the parties whereby this Court sought the transmission of the original record, certified copies of the proceedings, judgement and exhibits. To date that letter has not received a positive response. The Appellant on its part has an affidavit in support of its application for stay of execution where he attached a letter dated 29th November, 2010 written to the Executive Officer of the lower Court requesting for the lower Court file to be availed. I cannot see any evidence of abuse of the Court's process on the part of the Appellant.
8. It is because of what is stated in this Ruling that I decline to grant the orders sought by the Respondent. I make the following orders-
 - a. **The Notice of Motion dated 22nd February 2013 is dismissed but the costs thereof shall abide with this appeal.**
 - b. **The Appellant shall file and serve the complete record of appeal within 21 days from today's date.**
 - c. **Failure to so file this appeal shall stand as dismissed with costs to the Respondent.**
 - d. **The Deputy Registrar of this Court is requested to urgently obtain the lower Court file in order to facilitate the admission and the hearing of this Appeal.**

Dated and delivered at Mombasa this 20th day of September, 2013.

MARY KASANGO

JUDGE