



REPUBLIC OF KENYA

IN THE HIGH COURT

AT EMBU

Civil Appeal 142 of 2009

JUSTUS GACHOKI WACHIRA.APPELLANT

VERSUS

EMMA MAKENA RESPONDENT

(AN APPEAL FROM THE JUDGMENT DELIVERED ON 30/9/2009 BY HON. B.J NDEDA IN GICHUGU SENIOR RESIDENT MAGISTRATE'S COURT PMCC NO.50 OF 2009).

R U L I N G

This is the application dated 10/8/2012. It's brought under Order 42 rule 13(1) and rule 35(1) and 920 of the Civil Procedure Rules and section 3A Civil Procedure Act. It's for prayers that the Appeal herein be dismissed for want of Prosecution. The main reason is that on 15/11/2011 the court granted the Appellant 45 days to set down the appeal for hearing. And that the Appellant had failed to do so. The application is supported by the Applicant/Appellant's sworn affidavit. This application runs through Appeal No.s 143/09, 144/09 and 145/09.

In the Replying affidavit the Respondent's Counsel has stated in paragraph 6 and 7 the reason for the delay as the lack of a decree even though the proceedings are ready.

All the other issues raised in the application are similar to those raised in the earlier application to which a ruling was delivered on 15/11/2011. I will therefore only deal with the issue of non compliance with the orders given by this court and decide whether the appeal should be dismissed or not.

The cause of action giving rise to the judgment in the lower court was a Road Traffic Accident. A perusal of all the 4 related appeals shows that all the claims were successful and monetary awards were made. It is obvious that fees for those awards had not been paid for and hence the call for further court fees. The further court fees is usually paid by the person in whose favour the award has been made. This brings me to Mr. Ngare's letter to Mr. Ngulli dated 23/9/2010, which indicated that proceedings, Judgment and Decree were typed and certified way back on 21/5.2010.

I am aware that a decree can not be prepared if further court fees have not been paid.

Paragraph 6 (b) (c) of Mr. Ngulli's replying affidavit implies that the decree was not ready. Infact in paragraph 6 (c) he states;

"THAT as such we had to seek instructions from our client to enable us process the decree since the Appellant had to pay further court fees".

Is it therefore true as deponed in paragraph 7 of the supporting affidavit that the decree was certified and ready as early as 21/5/2010 ?

To prepare records one requires the decree. The Applicant/Respondent's have not laid any evidence to show that they had paid the further court fees required. The Appellant/Respondent's Counsel in the letter dated 23/9/2010 gave the impression that the decree was ready and it's the Appellant who was delaying in picking it.

That was not the case and it appears since the Appellant is the one interested in the decree now he has to pay the further court fees. The order of 15/11/2011 gave the Respondent/Appellant 45 days within which to comply with requirements to enable him have the appeal set down for hearing. He has not complied but he has raised a plausible reason for non compliance. He is asking for 2 weeks to prepare the records since he has already initiated the process for obtaining the extracted decree. Since this issue of paying for the decree was not addressed in time by the concerned party I do find that the Appellant is not to blame for the delay. He is granted 14 days to file the record of appeal as prayed.

The application is therefore not allowed. This order applies to HCA No.143 of 2009 – 145 of 2009.

Costs in the cause.

DATED, SIGNED AND DELIVERED AT EMBU THIS 8TH DAY OF MAY 2012

**H.I. ONG'UDI
JUDGE**

In the presence of:

M/s Nyaga for Ngare for Applicant

M/s Ngulli for Respondents (absent)

Njue – C/c