



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MALINDI
CIVIL APPEAL 33 OF 2009

MOHAMED HANIF POPTANIAPPELLANT

VERSUS

GUINNESSE CONSTRUCTION & HOUSING CO. LTD RESPONDENT

RULING

1. I have considered the respective affidavits, the rival submissions made in respect of the Respondent's application dated 13th August, 2011, and expressed to be brought under Order 42 rule 33(2) of the Civil Procedure Rules, Section 3A and 63(e) of the Civil Procedure Act.

2. The Applicant's key contention is that since filing this appeal on 10th July, 2009 the Appellant has not taken any step in prosecuting the same. The Respondent's answer is that the delay is not their fault as letters written to the Lower Court to supply proceedings have not yielded a response. Further that the application is premature as the appeal has not been admitted. Both parties have cited case law in support of their respective arguments.

3. It is apparent that the application was intended under Order 42 rule 35(1) and not rule 33 as invoked on the face of the application Order 42 rule 35(1) states:

“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.”

4. The correct import of the provision is as stated by Justice Okwengu in **Florence Musau v Kenya Anti-corruption Commission of Kenya [2010] eKLR**:

“On the alleged failure by the appellant to prosecute the appeal, Order XLI rule 31(1) of the Civil Procedure Rules (old) provides for dismissal of an appeal for want of prosecution at the instance of the parties only after the giving of directions under Order XLI rule 8B of the Civil Procedure Rules. In this case the appeal has not been admitted to hearing nor have directions under Order XLI rule 8B been given. Therefore the Respondent cannot move the court for dismissal.”

In a similar case **Ishmael Gichunge Muturi v Diana Lasoi [2007] eKLR** Justice Waweru stated:

“the Respondent has not yet exhausted the remedies in Order 41,....he will thus not be permitted at this stage to invoke the inherent power of the court to dismiss the appeal for want of prosecution”

5. The above quotation alludes to the inherent jurisdiction window used by Justice Maraga in **Kariby Timber Industries vs Nemchand Anand & Co. Civil App. No. 11 of 1997** in dismissing a similar appeal. In that case, as in this case, counsel for the appellant blamed the delay in prosecuting the appeal to inability to obtain certified proceedings. The delay was 7 years. The learned judge found that the appellants who were enjoying stay orders were guilty of abusing the court process, and invoking the court's inherent power, dismissed the appeal.

6. Although the period of delay in the instance case is shorter, the appellant cannot be allowed to hold the respondent at ransom while not making any serious efforts to move the appeal forward. The appellant should not use the provisions of Order 42 rule 35(1) as both sword and shield.

7. In the circumstances of this case, I will direct that the appellants take appropriate steps towards the prosecution of this appeal within sixty days of today's date, failing which the Deputy Registrar is directed to list the matter before the judge for dismissal. For this purpose, this matter will be mentioned before the Deputy Registrar on 1st March, 2013.

8. Costs of this application are awarded to the Respondent. The delay in reading this ruling has been occasioned by pressure of work, in and out of court. It is regretted.

Delivered and signed this **21st** day of **December, 2012** in the presence of Mrs. Mwangi for Applicant, Mr. Nyachiro holding brief for COOTOW Advocates

Court clerk – Evans

C. W. Meoli

JUDGE