



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 108 OF 2008

ESTHER JEMUTAI

KIPSANAI.....APPELLANT

VERSUS

KIMILILI

HAULIERS.....RESPONDENT

(Being an appeal from the Judgment and/or decree in Eldoret Chief Magistrate's Court Civil Case No. 935 of 1998

delivered on 16/9/2008 by G. A. Mmasi (Senior Resident Magistrate)

RULING

The application dated 18th March 2011 is brought under Order 1A and 1B of the Civil Procedure Act as well as S.3, 3A and S.63 (e).

The Order sought is that the cost of this appeal be awarded to the applicant.

The reasons for the prayer is essentially that this appeal was filed on the 15th October 2008. Thereafter, the appellant obtained orders of stay of execution but did not prosecute the appeal. The respondent then moved the Court to have the appeal struck out. On 25th February 2010, the Court granted the appellant a period of three (3) months to formalize the appeal. The appellant did not comply and therefore, the appeal was automatically dismissed.

The applicant now wants the Court to order that the costs of the appeal be paid by the appellant/respondent.

In her supporting affidavit, the applicant contends that she incurred costs as a result of the appeal which

was filed by the respondent in bad faith. Also, the respondent's non-prosecution of the appeal was an abuse of the Court process.

The applicant states that the ruling made by the Court on the 25th February 2010 took effect on the 23rd May 2010 when the appeal was automatically dismissed after the respondent failed to take the necessary steps within three months. However, the order dismissing the appeal omitted the issue of costs. Consequently, the applicant prays for an order that the costs of the appeal be paid to her by the respondent.

The respondent opposes the prayer on the basic ground that the orders made by the Court on 25th February 2010 were administrative in nature and therefore required action by the Deputy Registrar who is yet to discharge the mandate under Order 42 Rule 8B.

The respondent contends that it has fully discharged its obligation and is awaiting the Deputy Registrar's action.

Be that as it may, costs follow the events and in this matter, the respondent was given a specific period of time to undertake the necessary steps to have the appeal heard and determined.

Apparently, the respondent went into slumber as clearly demonstrated by a letter in the court record dated 24th February 2011 and authored by the Deputy Registrar showing that one year down the line the respondent had failed to comply with the conditions set by the Court on 25th February 2010. Consequently, the reason for the respondent's opposition to the present application is untenable.

The application is therefore allowed. Since the appeal has since been dismissed, the applicant is justly and fairly entitled to the costs of the appeal as well as the costs of this application.

Ordered accordingly.

J. R. KARANJA

JUDGE

[Dated and signed this 9th day of June 2011]

[In the presence of Mr. Nderitu for respondent and Mr. Barasa for applicant]