



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

HCCA NO. 60 OF 2003

JOHN MARK KIRIMI.....APPELLANT/RESPONDENT

VERSUS

PETER GITONGA NKAABU.....RESPONDENT/APPLICANT

R U L I N G

The respondent has through an application dated 19th January, 2011 brought under Order 42 rule 35(1) of Civil Procedure Rules sought the following Orders:-

“ (a) That the appeal herein be dismissed for want of prosecution.

(b) That costs of this application and the appeal be provided for”.

The application is based on the following grounds:-

“ (i) It is more than 3 years since the last time this matter was fixed for hearing.
(ii) the appellant has lost interest in this matter”.

The application is supported by applicant’s affidavit dated 9th January, 2011. The respondent filed Replying Affidavit dated 27th June, 2011 in opposing the application.

The appeal was filed on 4th July, 2003 against the order of Senior Resident Magistrate in civil suit NO.187 of 1998 delivered on 20th June, 2003. The appellant was 1st defendant in a claim for eviction from NKUENE/TAITA/1079 and NKUENE/TAITA/1078. On 25th June, 2003 court entered judgment in favour of the respondent. The lower court record show that the appellant never put in evidence controverting what the respondent had told the court.

The appeal was set down for directions on 15th August, 2007 and suit set down for hearings on 27/11/2007. That appeal was not heard and no other date was set down for hearing. The respondent in affidavit dated 27th June, 2011 claimed to have taken necessary steps to prosecute appeal and all what is pending is a hearing date.

The respondent claimed to be more anxious to be heard and cannot be blamed for not prosecuting the appeal and prayed the appeal to be dismissed.

The counsel for the applicant relied on Order 42 Rule 35 of CPR and on grounds set in the chamber

summons and affidavit in support and stated it is over 3 years since directions were given without the suit being set down for hearing.

The counsel for the respondent opposed the application and stated appeal was ready for hearing since 2007. He claimed no dates were available at the registry. The counsel I must point out did not exhibit of evidence to show that there was an attempt to get date and none was available at the registry. The counsel has made a general allegation which he has not attempted to support in his arguing and I must state that no seriousness has been demonstrated in setting this appeal down for hearing.

I have been referred to Order 42 Rule 35 (1), CPR which provides:-

“ Unless within three months after the giving of the direction 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 apply by summons for its dismissal for want of prosecution”.

The respondent did not set down the appeal for hearing. The applicant/ respondent applied for dismissal of suit for want of prosecution. The applicant/ respondent in exercising his discretion under Order 42 Rule 35(1) Civil Procedure Rules, two things must be considered by the court. The relevant Rules giving the applicant/ respondent two options. The first is to set Appeal down for hearing and second option is to apply for dismissal of the appeal.

The respondent would hardly press on with trial of the action but would be perfectly right to take the action that would best serve his interest. In applications for dismissal of Appeal, and in a case where the delay is not prolonged a court should be slow to dismiss an appeal under Order 42 Rule 35(1) of Civil Procedure Rules.

In this appeal it is over three years since directions were given without the suit being set down for hearing. The delay in setting down the appeal for over 3 years is inordinate and unexplained by appellant. The appellant's counsel allegation dates were not available since 2007 till application was filed for a period of over 4 years is not serious and clearly points out that the appellant has no interest in prosecuting the appeal and the appeal is merely filed to deny the applicant from enjoying the fruits of the judgment as the appellant is still sitting comfortably on the land awarded to the applicant who has since judgment was entered in his favour on 25th June, 2003 been unable to take execution proceedings due to this pending appeal.

The delay in setting the appeal down for hearing defeats the purpose of Section 1A(1) of the Civil Procedure Act and Article 159(1) (b) of the Constitution. Section 1A of Civil Procedure Act provides:-

“ 1A (1) the overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act”.

Article 159(1) (b) of the Constitution provides:-

“ (b) justice shall not be delayed”

Considering the above mentioned sections of Civil Procedure Act, Civil Procedure Rules and provision of Article 159(1) (b) of the Constitution and circumstances obtaining in our courts, the delay of over 3 years is inordinate and inexcusable for one to fail to set suit down for hearing. I am not inclined to grant the appellant any indulgence.

I therefore allow the application, and proceed to dismiss the appeal with costs of the application and of the appeal to the applicant/respondent.

Right of Appeal.

DATED AND DELIVERED AT MERU THIS 17th day of November, 2011

J. A. MAKAU
JUDGE

DELIVERED IN OPEN COURT IN PRESENCE OF

1. Mr. Kiogora hb for
2. Mr. Kimathi for the respondent

J. A. MAKAU
JUDGE