



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL APPEAL NO 142 OF 2009

(An Appeal from the Judgment of B.J. NDEDA - SRM sitting at GICHUGU in Civil Suit No. 50 of 2008).

JUSTUS GACHOKI WACHIRA.....APPELLANT/RESPONDENT

VERSUS

EMMA MAKENA RESPONDENT/APPLICANT

RULING

This is the Chamber Summons dated 16/3/2011 brought under Order 42 rule 13 (1) and rule 35(1) & (2) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act for orders that:

- 1) This appeal be dismissed with costs for want of prosecution.
- 2) Costs of this application and the entire appeal to the Respondent/Applicant.

The Application is supported by the annexed affidavit of Emmah Makena and is based on the ground that the Memorandum of Appeal was filed on 19/11/2009 and served on the Respondent on 14th December 2009. Since then the Appeal has not been prosecuted. She says there has been inordinate delay in setting down the appeal for hearing.

The Application is opposed. Mr. Ngulli learned Counsel for the Appellant/Respondent has filed grounds of opposition saying the Application is premature and irregular as it contravenes the Provisions of Order 42 Rule 35(1) Civil Procedure Rules and Order 42 Rule 35(2) Civil Procedure Rules.

He further says Order 42 rule 13(1) Civil Procedure Rules can only be invoked once an appeal has been admitted for hearing and directions under section 79 B of the Civil Procedure Act.

Both Counsels by consent filed written submissions propounding their positions on the matter. Mr. Ngulli submits it's the court which has delayed in taking the necessary steps to enable him list these matters for hearing. He relies on section 79B Civil Procedure Act and Order 42(13) Civil Procedure Rules. He says that no notice has been issued to them by the Registrar for directions.

Ms Ngari says the delay has been caused by the Appellant/Respondent who has not set it down for hearing.

The issue here is for this court to determine if the Respondent/Applicant has established a case to have the Appeal herein dismissed for want of Prosecution. The Memorandum of Appeal was filed before this court on 19/11/2009. On the same date the Appellant safely obtained Orders of stay which he still

enjoys to date. What was filed is a Memo of Appeal with no decree.

Order 42 rule 11 Civil Procedure Rules provides that:

“Upon filing of the Appeal the Appellant shall within thirty days, cause the matter to be listed before a Judge for directions under section 79B of the Act”.

To date Order 42 Rule 11 Civil Procedure Rules has not been complied with. The directions under Section 79B of the Act would entail the admission or summary rejection of the Appeal.

In brief this Appeal has never been admitted two years after filing of the same.

In a letter dated 23/9/2010 M/s Ngari did write to M/s Ngulli informing them that proceedings, judgment and decree had been typed. The Appellants did nothing.

To date there is no decree, there are no records and one wonders how the Judge is supposed to give directions. The Appellant deliberately refused to comply with Order 42 rule 11 Civil Procedure Rules. The Appellant had to cause the matter to be listed to enable the Judge give directions under section 79B of the Act. He cannot therefore turn around to blame the court for his own mistakes/carelessness.

The Applicant moved this court under Order 42 rule 13(1) and rule 35(1) & (2) Civil Procedure Rules and section 3A Civil Procedure Act for the dismissal. Directions under Order 42 rule 13(1) Civil Procedure Rules cannot be given before admission under section 79B Civil Procedure Act. And therefore Order 42 rule 35(1) & (2) cannot be invoked where section 79B Civil Procedure Act and Order 42 rule 13(1) have not been complied with.

Does it then mean the court becomes toothless when it comes to litigants like the Appellant who wish to take their sweet time in prosecuting their matter? The answer is NO!

Section 1A(1) of the civil Procedure Act explains the overriding objective of the Act as being to facilitate the just, expeditious, proportionate and affordable resolution of Civil Disputes governed by the Act. Section 1A(3) of the Civil Procedure Act calls upon every party and counsel of such a party to assist the court to further this objective.

The Appellant cannot pretend that he is waiting for the Registrar’s Notice to enable him serve the Memo of Appeal on the Respondent when counsel for the Respondent says he was served with the Memo of Appeal on 14/12/2009.

This is a case where I am convinced that the Respondent is out to derail the objective set out in Section 1A Civil Procedure Act and this court will not assist him. In a similar case of ***Gusii Farmers Rural Sacco Ltd –vs- Henry Mageto Kerwa and two others HCCA NO. 91/03 – High Court Kisii*** – the Hon. Justice Kaburu Bauni (late) dismissed the Appeal. I would have done the same to the Appellant herein save for the reason that this station has not had a Resident Judge for about a year. This may have contributed to the scenario prevailing. I will therefore not allow the Application but give the Appellant 45 days within which to comply with all requirements to enable him have the matter set down for hearing.

Costs to the Applicant/Respondents.

This Ruling will apply to Embu HCCA NOS. 143/09, 144/09 & 145/09.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT EMBU THIS 15TH DAY OF NOVEMBER 2011.

H.I. ONG’UDI

JUDGE