



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL 95 OF 2000

1. SAIDA HEMED

2. BAKARI A. MWACHECHE.....APPELLANTS

VERSUS

JOYCE KAIRU.....RESPONDENT

RULING

This is an application by the respondent for one primary order that the appeal filed herein be dismissed for want of prosecution. The application is brought under Order XLI Rule 31 (1) of the Civil Procedure Rules, sections 3A and 63 (e) of the Civil Procedure Act and all other enabling provisions of the Law. The application is founded on the main ground that the appellant has not for the past six (6) months endeavoured to have the appeal fixed for hearing and has therefore abandoned the same. The application is supported by an affidavit sworn by the respondent which narrates the history of the appeal which history shows that any attempts to have the appeal finalized have been at the behest of the respondent's advocates and never at the instance of the appellant or the appellants.

The application is opposed and there is a replying affidavit sworn by the 1st appellant who has sworn the same on his own behalf and on the authority of the 2nd appellant. The appellants blame the failure to prosecute the appeal on previous advocates who withdrew from acting and one who passed on. The current advocate for the appellants is said to have had problems obtaining the appellant's file from the previous advocates. The appellants otherwise contend that they are still interested in the appeal.

When the application came up for hearing before me on 9th July 2009, counsel agreed to file written submissions which were duly filed by 30th July 2000. The submissions substantiate the parties' stand points taken in their respective affidavits.

I have considered the application, the affidavits filed and the rival submissions of counsel. I have further given due consideration to the record of this appeal. Having done so, I take the following view of the matter. The decision which gave rise to this appeal was given on 20th July 2000. This appeal was then lodged on 27th July 2000. The appeal was, on 28th February 2002, admitted to hearing. On 26th April 2002, the Deputy Registrar certified that the record was in order and that the appeal was ready for hearing. On 21st August 2002, the appellants were granted leave to file a supplementary record herein. For one reason or another, the appeal could not be heard until the respondent by his application dated 5th May 2006 sought dismissal of the appeal. *Sergon J.* on 29th June 2007 struck out the application on the

ground that the wrong procedure had been invoked in moving the court.

The respondent then lodged the present application on 24th August 2007. It is significant that since the first application to dismiss the appeal was struck out on 29th June 2007, the appellants have never attempted to fix this appeal for hearing. The appellants reasons for not fixing their appeal for hearing are that they were unable to secure their file from their previous advocates and that there were various interlocutory applications which had to be disposed of first. With regard to the failure to secure their file from their previous advocates, I note that their advocates have not filed any affidavit to explain the position. In any event, the appeal had already been admitted for hearing and a record of appeal was in place. It is difficult to appreciate how the file with the previous advocates would have been of any significance in the prosecution of the appeal. All arguments in the appeal would be based on the material in the record of appeal which record was readily available even to the appellants' current advocates. There is no allegation that the entire record of proceedings herein was inaccessible to the appellants and their legal consultants. In the premises, I do not find as reasonable, the explanation that the appellants failed to prosecute their appeal because of their inability to secure their original file from their previous advocates.

With regard to the explanation that there existed various interlocutory applications which prevented the appellants from prosecuting the appeal, I have noted that only one of those applications was by the respondents and it was the one for dismissal of the appeal. The others were by the appellant's previous advocates to cease acting. The appellants cannot escape blame for those applications. The respondent's previous application to dismiss the appeal cannot also be a reason for the appellant's failure to prosecute their appeal. Indeed even as the respondent's applications were pending hearing, there was no attempt by the appellants to fix the appeal for hearing. Consequently, I do not also find as reasonable the explanation that the appellants could not prosecute their appeal by reason of the existence of the interlocutory applications.

Order XLI Rule 3i (1) is in the following terms:-

“31. (1) Unless within three months after the giving of directions under rule 8B 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.”

Under the said sub-rule, the respondent had the option to set down the appeal for hearing or apply for its dismissal for want of prosecution. She has opted for the latter. She was perfectly entitled to do so.

As the appellants have not satisfactorily explained the reasons for the long delay in setting down this appeal for hearing, I am constrained to agree with the respondent. I will therefore allow the application dated 23rd August 2007 and filed on 24th August 2007 in terms of prayer 2 thereof. The respondent shall have the costs of this application and the appeal.

It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 9TH DAY OF OCTOBER 2009.

F. AZANGALALA

JUDGE

Read in the presence of:-

Waithera for the Applicant and Simiyu holding brief for Gunga for the Respondent/Appellant.

F. AZANGALALA

JUDGE

9TH OCTOBER 2009