

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 61 OF 2018

TONONOKA ROLLING MILLS LIMITED.....APPELLANT

VERSUS

ALBERT KIOKO MUTUKU.....DEFENDANT

RULING

Following the judgment of the lower court delivered on 29th January, 2018 the appellant filed a memorandum of appeal on 12th February, 2018. The appellant was aggrieved by the finding of the lower court in respect of liability which was 100% and assessment of general damages of Kshs. 600,000/=. The lower court also had made an award of Kshs. 10,000/= in respect of special damages.

The appellant having failed to file the record of appeal, the respondent lodged an application by way of Notice of Motion dated 14th and filed on 19th January, 2021 seeking the order that the appeal be dismissed for want of prosecution. There is also the prayer that the stay of execution allowed by the lower court on 22nd March, 2018 be vacated.

As at the time of filing the said application, 3 years have lapsed and no steps have been taken by the appellants toward the conclusion of the appeal. The application is supported by an affidavit sworn by the advocate for the respondent. Despite service however, no response has been received from the appellant.

The application came up for hearing on 23rd February, 2021. A hearing notice had been served and there is an affidavit of service sworn by Mathew Musotsi, who annexed the copy of the Notice of Motion acknowledged by the advocate for the appellant on 20th January, 2021.

The said application is said to be under Article 159 2 (b) of the Constitution, Sections 1A, 1B and 3A of the Civil Procedure Act and Order 42 rule 35 (2) of the Civil Procedure Rules. Order 42 rule 35 (2) of the Civil Procedure Rules states as follows,

“If, within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal.”

In the letter to the Deputy Registrar dated 29th January, 2020 and copied to the advocates for the appellants, the advocate for the respondent states that they were served with the Memorandum of Appeal on 15th February, 2018. It is therefore over 1 year and no steps have been taken by the appellant to move the process forward.

This court has observed in similar applications that no party should be blamed for the shortcomings of the court process where lower court records have not been availed to facilitate the filing of the record of appeal. However, that observation is informed by the facts where the appellant has responded to such an application and specifically stated that, despite efforts made, the proceedings have not been supplied.

In the present case however, the appellant has been served with the application but no response has been filed. The only logical conclusion is that the appellant has lost interest in the appeal, notwithstanding the memorandum of appeal filed. The law enjoins the court to administer justice without undue delay and in this case, the delay of 3 years, without taking any action, after the filing of the memorandum of appeal, is inordinate and inexcusable. The respondent has a judgment in his favour and any further delay to enjoy the fruits of that judgment may lead to injustice.

Accordingly, the application dated 14th January, 2021 is allowed, and this appeal is therefore dismissed for want of prosecution under Order 42 rule 35 (2) of the Civil Procedure Rules aforesaid. It follows therefore the stay of execution allowed by the lower court on 22nd March, 2018 is hereby vacated. The respondent shall also have the costs of this application.

Dated, signed and delivered at Nairobi this 11th day of March, 2021.

A. MBOGHOLI MSAGHA

JUDGE