



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. 6 OF 2020

THOMAS KIMANI NJOROGE.....APPELLANT

VS

DANIEL CHEGE NJOROGE.....RESPONDENT

RULING

1. The respondent to this appeal has moved this Court by a Notice of Motion application dated 7th September, 2020 seeking the dismissal of this appeal for want of prosecution. In his affidavit in support of the application the respondent stated that the ruling of the lower court, which is the subject of this appeal, was delivered on 20th January, 2020. That the appellant has since filing the appeal neglected to prosecute it. As a consequence of that refusal/failure to prosecute the appeal, the implementation of the lower court's ruling had been delayed, and that the appellant was using the appeal to deliberately delay the implementation of the lower court's ruling.

2. I have considered the affidavit in reply filed by the appellant, and whereas the appellant cannot be blamed for delay in obtaining typed copies of the lower court's proceedings, the appellant cannot entirely be exonerated from the fact that this appeal has not proceeded. An examination of provisions of **Order 42** of the **Civil Procedure Rules** make that very clear.

3. **Order 42 Rule 11** provides:-

“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.” (underlining mine)

4. That rule mandated the appellant to move the court, thirty days after filing a memorandum of appeal, for direction to be given by a judge. The appellant did not do so in this case.

5. **Order 42 Rule 12** provides:-

“After the refusal of a judge to reject the appeal under section 79B of the Act, the registrar shall notify the appellant who shall serve the memorandum of appeal on every respondent within seven days of receipt of the notice from the registrar.” (underlining mine)

6. Again the appellant was required to serve a memorandum of appeal as stated above. It does seem probable that the same was served, since the respondent did not raise an issue in that regard.

7. The only action appellant took after filing this appeal was to write one letter to the lower court requesting for the proceedings of that court to be typed. Even after those proceedings were typed and were brought to this Court together with Lower court's file, as I note from the lower Court's letter dated 25th August, 2020, the appellant remained in his slumber.

8. I have considered the affidavit evidence. I do note that this Court ought to have been moved by a notice issued by the Deputy Registrar of this Court to require the appellant to show cause why this appeal should not be dismissed for want of prosecution. That is what **Order 42 Rule 35(2)** provides. It states:-

“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.

9. In view of the fact **Order 42 Rule 35(2)** was not followed by this court, I will decline to grant the orders sought by the respondent.

DISPOSITION

10. In view of the foregoing, I make the following orders:-

- (a) The appellant shall file and serve the record of appeal within 14 days from today.
- (b) This appeal shall be heard by written submissions.
- (c) The appellant shall file and serve his written submissions within 14 days from today's date.
- (d) The respondent shall file and serve his written submissions within 14 days of service by appellant.
- (e) The court shall receive the said submissions on a date to be fixed at the reading of this ruling.
- (f) Cost of the notice of motion dated 7th September, 2020 shall in any event be paid by the appellant.

RULING DATED AND DELIVERED AT KIAMBU THIS 10TH DAY OF JUNE, 2021.

MARY KASANGO

JUDGE

Coram:

Court Assistant: Ndege

For the appellant: Mr. Mulinge

Respondent: present

For the respondent: No appearance

COURT

Ruling delivered virtually.

MARY KASANGO

JUDGE