

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 104 OF 2017

ANNASTANCIA OYUGI OSORE.....APPELLANT

VERSUS

SILVER STYLE INVESTMENT COMPANY LIMITED.....RESPONDENT

(Being an appeal from the original judgment and decree of Hon. FM Nyakundi, Resident Magistrate, of 4th September 2017, in Mumias PMCCC No. 40 of 2016)

RULING

1. What I am called upon to determine is the Motion, dated 20th January 2021, which seeks dismissal of the appeal herein for want of prosecution.
2. Judgment was delivered at the trial court on 4th September 2017, wherein the court awarded general and special damages. The appellant, being aggrieved, lodged a memorandum of appeal herein, on 4th October 2017. The appeal has been pending since.
3. Dismissal of appeals for want of prosecution is provided for under Order 42 Rule 35(1) of the Civil Procedure Rules, to the effect that where an appeal has not been set down for hearing within 3 months after the giving of directions, the respondent would be at liberty to have the appeal set down for hearing or apply for its dismissal. There is also provision for the deputy registrar to list the matter before a Judge, for dismissal, with notice to the appellant, if the appeal is not set down for hearing, within one year after service of the memorandum of appeal.
4. In the instant case, the appellant has not caused his appeal to be listed for hearing since October 2017 when he filed it. The respondent has exercised his option under Order 42 Rule 35, to apply for its dismissal. The appellant has responded to the application. His case is that the trial court had failed to avail the trial court records to the High Court for the purposes of the appeal, hence the delay.
5. There is a letter on record, dated 6th April 2021, from the trial court, forwarding the trial records. The original trial records were forwarded in April 2021, and are now with us.
6. Since the original trial records were sent over just this year, it cannot be said that the appellant has failed to prosecute his appeal, for the appellate court could not hear and determine the appeal without the original trial records.
7. Consequently, I shall decline to grant the orders sought in the Motion of 20th January 2021. Let the appellant file and serve his record of appeal herein within 30 days of the date of this ruling. The Deputy Registrar shall, thereafter, have the matter fixed for directions. There shall be no order on costs.
8. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 17th DAY OF SEPTEMBER, 2021

W. MUSYOKA

JUDGE