



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MURANG'A

ELCA 15 of 2018

LUCIAH WANJIKU MURIMA.....APPELLANT/RESPONDENT

VERSUS

AMICA SAVINGS & CREDIT LIMITED.....1ST RESPONDENT /APPLICANT

RESTORES CONSULTANT AUCTIONEERS.....2ND RESPONDENT /APPLICANT

RULING

1. The application is brought under a Notice of Motion filed on the 22/11/19 and dated the 13/11/19 seeking orders that the Appeal be dismissed for want of prosecution.
2. The application is supported by the grounds that the period of one year has lapsed since the Appellant filed her Appeal and no steps have been taken to file and serve the Record of Appeal nor to fix the Appeal for directions/hearing. That the delay is inordinate.
3. The application is further supported by the Supporting Affidavit of Jonathan Ngumo Mbogo who deponed and reiterated the grounds in support of the application. That the Applicant has been prejudiced in terms of increased costs and the delay in determining the suit in the lower Court occasioned by the pendency of this Appeal.
4. **Order 42 Rule 35** of the Civil Procedure Rules states as follows;

“(1)Unless within three months after the giving of directions under Rule 13 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.

(2)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”.
5. I have perused the record and find that the Memorandum of Appeal was filed on the 14/9/18. In according with the dictates of Order 42 Rule 35 (1) the action of the Respondent should come three months after the giving of directions under Rule 13 of the said order. The said Rule 13 states as follows;

“On notice to the parties delivered not less than twenty-one days after the date of service of the Memorandum of Appeal the Appellant shall cause the Appeal to be listed for the giving of directions by a judge in chambers”
6. My perusal of the record shows that direction is yet to be taken under Order 42 Rule 13. It is also correct that the Appellant has not filed and served the record of Appeal. It then follows that the procedure adopted by the Applicant is premature.
7. That said it is observed that there is no lacuna in the procedural steps to be taken as such circumstances are addressed by Order 42 Rule 35(2) of the Civil Procedure Rules.
8. The Court observes that the pendency of this Appeal is not an impediment to the hearing of the case in the lower Court except where a stay of proceedings has been granted. In this case there is neither stay of proceedings issued by the Court below nor by this Court. This Court finds that there is no prejudice suffered or likely to be suffered by the Respondent.
9. For those reasons the Court is of the view that the application is for striking out with no orders as to costs.

10. It is so ordered.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 16TH DAY OF JANUARY 2020.

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Appellant: Absent

Ms Ajjambo HB for Mbogo for the 1st and 2nd Respondents

Irene and Kuyiki, Court Assistants