



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 82 OF 2018

ISAAC KARANJA & 2 OTHERS.....APPELLANTS

VERSUS

HENREY SAKAYA MUKONYI.....RESPONDENT

RULING

1. The appeal hereof was filed by a Memorandum of Appeal dated 28/6/2018 and filed on the 17/7/2018 against the judgment of the trial court in Nakuru CMCC NO. 738 OF 2018.

2. By an **application dated 10/7/2019**, the Respondent Henry Sakaya Mukonyi seeks for an order of dismissal of the appeal for want of prosecution, upon grounds stated on the face of the application that since filing of the Memorandum, no step has been taken to progress the appeal and upon averments in the supporting affidavit sworn by the Advocate for the applicant on the 10/7/2019 and filed on the 4/11/2019.

3. The application is premised **on Provisions of Order 42 rule 35 of the Civil Procedure Rules and Section 1A of the Civil Procedure Act**. It is averred that the appellants have lost interest in the appeal and the respondent has been prejudiced in the inordinate delay, thus the application.

The application is opposed by a Replying Affidavit sworn by one Allan Odongo advocate for the appellants. It is averred that by consent of both parties recorded and adopted by the court requiring the appellants to deposit half of the decretal sum, (Shs.979,926/=) in court, and pay out to the respondent the other half, was complied with.

4. The Respondent states that by a letter dated 27/5/2019, the appellants requested for typed proceedings and the decree but has not been supplied with, to facilitate filing of the Record of Appeal.

5. I have been urged that under **Provisions of Order 42 Rule 35 (1) CPR**, the appeal can only be dismissed for want of prosecution if after three months, upon giving directions **under Rule 13**, the appeal is not set down for hearing, only then may it be dismissed.

6. **Under Article 50 of the Constitution**, every person has a right to have any dispute resolved by application of the law in a fair and public hearing in a court or by an independent and impartial tribunal or body.

It is trite that a court ought not to shut out a litigant from accessing the court. On the other hand, an indolent party ought not to be allowed to shut out a successful party from enjoying fruits of its judgment by failure to take steps to progress an appeal. Half of the judgment sum is deposited in court. The respondent is unable to enjoy the same – **Njai Stephen Vs. Christine Khatiala Andika (2019) e KLR**.

7. I have considered Provisions of **Order 42 Rule 11 and 13 CPR**.

It is the appellants who ought to cause the appeal to be listed before a judge for taking directions as the appeal belongs to the appellants. That burden cannot be shifted to the respondent.

Haron E. Ongeshi Nyaberi Vs. British American Insurance Co. Ltd HCCA NO. 110 of 2001 (2001) e KLR.

8. There is no doubt that the appellants abdicated their duty, and then blames the respondent stating that it too ought to have done that which it was not its duty to do.

Though the right of appeal is a constitutional right, the prejudice caused to the respondent by the inordinate delay cannot be down played. Justice is to both parties.

Order 42 rule 35 (2) is categorical that if, upon service of the Memorandum of Appeal, the appeal shall not has been set down for hearing, for

no plausible reasons the registrar shall serve a notice to the parties for dismissal of the appeal.

The Memorandum of Appeal hereof was filed on the 17/7/2018.

One year down the line the appeal had not been set down for hearing, for no plausible reason.

9. However, I shall not dismiss the appeal. I will grant time to the appellants to take steps to progress the appeal, but upon terms:

i. That the Record of Appeal be filed and served within a period of 60 days from the date of this ruling, failing which the appeal shall stand dismissed for want of prosecution, unless by a further order of the court.

ii. The appellants are condemned to pay throw away costs to the Respondent in the sum of Kshs. 25,000/= within 60 days.

iii. Failure to abide by the two conditions above the Appeal shall stand dismissed.

Orders accordingly.

Delivered, Signed and Dated electronically at Nairobi this 20th Day of May, 2020.

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J.N. MULWA

HIGH COURT JUDGE