

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 246 OF 2016

NANCY WANJIRA1ST APPELLANT/RESPONDENT

JOSEPH KARIUKI2ND APPELLANT/RESPONDENT

VERSUS

PETER NJOROGE KAMOTHO....1ST RESPONDENT/APPLICANT

ONCHARI ERICK2ND RESPONDENT/APPLICANT

(Being an appeal from the whole of the judgment delivered by Hon. M. Chesang Resident Magistrate at Milimani on the 18th April, 2016)

RULING

This is an application by way of Notice of Motion dated 12th September, 2018 under Order 17 Rule 2 (1) of the Civil Procedure Rules, Sections 1 (a) 1 (b) and 3 (a) of the Civil Procedure Rules seeking an order that the appeal herein be dismissed for want of prosecution, and that the money deposited with NIC Bank pending the hearing of the appeal be released to the respondent.

The application is supported by an affidavit sworn by P.W. Kariuki, the advocate for the respondent alongside the grounds set out on the face of the application. There is a replying affidavit sworn by Alan Odongo, the advocate for the appellant which sets out the reasons as to why this appeal has not been prosecuted. Both parties have filed submissions which I have on record.

The judgment of the lower court was delivered on 18th April, 2016. The Memorandum of Appeal was dated and filed on 11th May, 2016 which was within the time allowed to file an appeal.

The respondent has stated that for over 2 ½ years no progress has been made to prosecute the appeal. It is acknowledged that the decretal sum was deposited in an interest earning account in the names of both advocates on record which amount continues to earn interest.

In the replying affidavit sworn on behalf of the appellant, it is stated that the appeal is both on liability and quantum as set out in the Memorandum of Appeal, and that the decretal sum held as security was on condition that there be a stay pending the hearing and determination of the appeal. It cannot therefore be released as this will be prejudicial to the appellant, and the appeal shall be rendered nugatory. The appellants are keen to prosecute the appeal and the court should exercise indulgence so that they are not ousted from the seat of justice.

Annexed to the replying affidavit are copies of letters addressed to the Executive Officer of the Chief Magistrate's Court requesting for certified copies of Judgment and decree of the lower court to facilitate the preparation of the record of appeal. To date this has not borne any fruit.

The cited provisions of law cited in the application are incorrect. The applicable order is 42 Rule 35 of the Civil Procedure Rules. It is also clear that the appeal has not been admitted and for good reasons; the proceedings have not been availed to allow the preparation of the record of appeal. Even after the admission of the appeal, directions would follow before the appeal is ready for hearing.

In the record before me, the High Court has written four times to the lower court asking for the certified copies of the proceedings but this has not been complied with. It is clear that the delay cannot be attributed to the appellants or indeed any party but to systemic shortcomings of the court system. It will not serve the ends of justice if this appeal were to be dismissed for reasons which can only be attributed to the registry in the lower court.

I am satisfied therefore that the delay has been adequately explained and cannot be attributed to the appellants. In any case, this is a money decree whose proceeds have been secured and minimal prejudice is being caused by the delay. The application is therefore dismissed and the costs shall be in the cause.

I direct that the Deputy Registrar shall secure the lower court record within 30 days from the date of this ruling and on receipt thereof inform both counsel to facilitate the prosecution of this appeal.

Dated, signed and delivered at Nairobi this 4th Day of April, 2019.

A. MBOGHOLI MSAGHA

JUDGE