



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 445 OF 2017

EDWIN NGAIRA LUKULU.....APPELLANT

VERSUS

ALEX MUTINDI.....RESPONDENT

RULING

INTRODUCTION

1. The Appellant's Notice of Motion application dated 25th March 2019 and filed on 27th March 2019 and filed on 27th March 2019 supported by the Affidavit of Amos Ogutu Wandago that was sworn on 25th March 2019 seeks to dismiss the Appellant's appeal for want of prosecution.
2. It is opposed. The Appellant filed Grounds of Opposition dated 10th April 2019 on 11th April 2019. The Replying Affidavit of Felix Momanyi was sworn on 5th April 2019 and filed on 11th April 2019.
3. Having heard oral submissions by the counsel for the Appellant and counsel for the Respondent, the court notes that directions under Section 79B of the Civil Procedure Act Cap 21 (Laws of Kenya) are yet to be given. Directions have also not been given under Order 42 Rule 13 of the Civil Procedure Rules, 2010.
4. Although the Civil Procedure Rules mandates the Appellant to list the appeal before the judge under Order 42 Rule 13 of the Civil Procedure Rules, in the Civil Division Milimani Law Courts, the Deputy Registrar has been issuing the notices for parties to take directions of the Appeal. The Appellant does not seem to have a role in the taking of the directions under Order 42 Rule 13 of the Civil Procedure Rules.
5. The two (2) scenarios envisaged for dismissal of the Appeal do not apply in this case as the Appeal has not been set down for hearing and the Appellant failed to prosecute his case and the Registrar has also not set down the appeal for dismissal.
6. As the Appeal herein is yet to be admitted for hearing and no directions have been given, it is the considered opinion of this court that allowing this application will be shutting out the Appellant from accessing court contrary to the provisions of Article 50 of the Constitution of Kenya, 2010.

DISPOSITION

7. Accordingly, I hereby dismiss the Respondent's Notice of Motion application dated 25th March 2019 and filed on 27th March 2019 as it was premature.
8. I hereby direct that the Appellant files and serves its Record of Appeal within sixty (60) days from today i.e by 15th July 2019.
9. In the event the Decree will have been certified and the Appellant fails to file his Appeal with the time stipulated, the Appeal will stand as automatically dismissed.
10. Costs of the application will be in the cause. Either party is at liberty to apply.

11. Orders accordingly.

DATED and DELIVERED at NAIROBI this 13th day of May 2019

J. KAMAU

JUDGE