

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL APPEAL NO. 20 OF 2014

1. JACKSON MUTUNGA

2. LAWRENCE WAMBUA.....APPELLANTS

VERSUS

DOUGLAS KISOI MUTUA.....RESPONDENT

RULING

1. By a notice of motion dated 24th July, 2017 and brought under order 17 rule 2 (1), (2) and (3), order 51 rule 1 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act the respondent seeks the dismissal of the appeal for want of prosecution. The respondent stated that the appeal was last in court on 14th August, 2014. That the appellants only filed their memorandum of appeal dated 19th February, 2014 and an application for stay of execution pending appeal dated 30th July, 2014 and have since not taken any step to prosecute the appeal. He stated that the appellants have clearly lost interest in this appeal and the same should be dismissed with costs to the respondent.

2. It was the respondent's submission that the appellants deposited the entire decretal sum in affixed deposit account and did not bother to prosecute the appeal barring the respondent from enjoying the benefits of his judgement since the year 2014. That he has relied on order 17 of the Civil Procedure Rules instead of order 42 of the Civil Procedure Rules since a suit is defined in the Civil Procedure Act as all civil procedures commenced in any manner prescribed. That in the event the court finds the procedure cited to be wrong, the court has inherent jurisdiction to deal with the application to dismiss the appeal without his citing the correct provision. In this regard, the respondent cited Order 51 rule 10 (2) of the Civil Procedure Rules which saves pleadings from being rejected on technicalities or for want of form.

3. The appellants opposed the application vide an affidavit sworn on 24th November, 2017 by David Mukii Mereka. The deponent contended that the appellants filed an application for stay of execution on 11th April, 2014 which was set for inter parties hearing on 25th April, 2014. That on 25th April, 2014, the respondent had not filed his response to the application occasioning him to be granted more time till 16th May, 2014 to do so. That on 16th May, 2014, the respondent was again granted more time to file his reply to the application for stay of execution. That in the meantime, the appellant's advocates wrote to the Chief Magistrate on 28th May, 2014 and on 12th August, 2014 requesting for the judgment, the duly signed and sealed decree, and certified copy of decree to no avail. That on 14th August, 2014, the court proceeded to allow the application for stay of execution on condition that the decretal sum be deposited in a joint interest earning account within 21 days. On 23rd October, 2014, the appellants deposited the sum of KShs. 704, 540/-. That the appellants wrote to the Executive Officer on 15th October, 2014 requesting for the judgment, the duly signed and sealed decree, and certified copy of decree to no avail. That upon perusal of the court file on 22nd September, 2017, the appellant's advocate discovered that the judgment was yet to be typed; that the proceedings had been typed but still in draft form and yet to be approved and certified; that the ruling delivered on 14th August, 2014 on an application for stay had been typed but in draft form and yet to be approved and certified; that there was no copy of the decree in the file. That the appellants counsel on the same day requested that the court file be removed from the archives so that the proceedings, ruling and judgement could be approved, typed and certified. That in the circumstances, the appellants have not been indolent and unless the application is dismissed, the appellants will suffer great prejudice as this is a complex case.

4. It was the appellant's submission that appeals to the High Court are guided by Order 42 of the Civil Procedure Rules and not Order 17. The appellants cited **Pyramid Hauliers Co. Ltd v. James Omingo Nyaaga & 3 others (2017) eKLR** in support thereof. It was submitted that it is undisputed that directions have not been taken in this appeal and that the Registrar has not given any notice for listing of appeal in chambers before the judge for directions. That that being so, this application has no legal basis. To demonstrate the same, the appellants relied on **Morris Njagi & another v. Mary Wanjiku Kiura (2017) eKLR**. It was further submitted that this court is enjoined by Article 10, 48, 50 (1) and 259 (2) (d) of the Constitution to do substantive justice in all matters. That the application seeks to have the appeal dismissed without hearing it on merit. That justice of the case can be achieved the delay notwithstanding. It was submitted that the reason for delay has been given which reason the appellants say the respondent has not contended. The appellants submit that the appeal raises serious issues of law and fact and it has high chances of success. That it would amount to injustice to dismiss the appeal without giving the appellants an opportunity to canvas the arguable appeal. That since the proceedings have been typed, the appeal can be heard on merit at the earliest opportunity possible. That the respondent will not suffer any prejudice since the decretal sum is in a joint interest earning account.

5. The substantive law on dismissal of an appeal for want of prosecution is founded under Order 42 Rule 35 of the Civil Procedure Rules. As correctly stated by the respondent, failure to cite the correct provision should not invalidate an application but rather this court should in that regard focus on substance rather than technicalities. The said order provides as follows:

"35. (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 been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal.” (Emphasis own)

6. There is no doubt that directions have not been taken in this appeal. That being so, the applicable proviso is rule 35 (2). In that regard, the duty is upon the Registrar to list the appeal before a judge in chambers for dismissal. The proviso being couched in mandatory terms, filing an application such as this one is considered usurping the duties of the registrar. There is no evidence that the respondent has even bothered to list the matter for directions so as to entitle him to move for dismissal of the appeal if the appellants fail to take any proactive steps. Another easier route would have been to nudge the Deputy Registrar to take the appropriate steps under Order 42 Rule 35(1) of the Civil Procedure Rules. It is noted that the respondent has not made such a move yet and hence the present application appears premature. Again, it is noted that the decretal sums are already in an interest earning account and thus no prejudice shall be suffered by the respondent if the application is declined and parties directed to take the appropriate steps towards having the appeal set down for hearing. I also note that the appellants have already filed the record of appeal and that parties should proceed to fix the matter for directions as a matter of priority.

7. In the result, it is my finding that the respondent’s application dated 24th July 2017 lacks merit. The same is ordered dismissed with costs.

Orders accordingly.

Dated and delivered at Machakos this 16th day of July,2019.

D. K. KEMEI

JUDGE