



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

HCCA NO. 215 OF 2013

(FORMERLY HCA NO. 59 OF 2009 AT EMBU)

EDWARD MBUTE.....APPELLANT

V E R S U S

JAMES ROBINSON MUGO & 27 OTHERS.....RESPONDENTS

RULING

The respondents James Robinson & 27 Others T/A Kathare Mwireri filed an application to dismiss the appeal for want of prosecution dated 16/10/2017 on ground that it was admitted for hearing on 22/10/2014 and since then appellant has not taken any step towards prosecuting his appeal. That the appeal has become a gross abuse of the court process and is unfair and unjust for the appellant to endlessly subject the respondent to anxiety by not prosecuting the appeal.

The appellant did not file any response to the application.

Dismissal for want of Prosecution:

Order 42 Rule 35 of the Civil Procedure Rules:

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.

From the history of the file, judgment was delivered on 30/03/2009, the memorandum of appeal was filed on 28/04/2009 and it was admitted for hearing on 22/10/2014. The application for dismissal was filed on 16/10/2017 since no action was taken by the appellant for close to a year.

This issue was addressed in a persuasive decision which had similar circumstances.

In Sotik Tea (K) Ltd v Duncan Momanyi Nyaribari [2016] eKLR

The appeal was admitted for hearing but the appellant has not taken any steps in prosecuting the same, the court in dismissing the appeal stated:

It is noted that the appellant did not file a replying affidavit. This would have been helpful as it would have accorded him the opportunity of putting in annexures indicating what steps it had undertaken in ensuring that the appeal was prepared for hearing. What is apparent from the record before this court is that after filing the appeal, the appellant went into slumber. There is nothing to show that it undertook any of the relevant steps within the time prescribed by the rules.

This court where and when necessary can invoke its inherent jurisdiction under section 3A and the overriding objectives under section 1A and 1B of the Civil Procedure Act and article 159 (2) (b) of the Constitution so as to prevent abuse of court process.

I find the appellant in the present case went into slumber and was indolent. This is an old appeal of 2013, three years have since lapsed. Justice delayed is justice denied.

It's been more than three years since the appeal was admitted for hearing. There is no explanation for the failure by the appellant to act since he has not filed a replying affidavit. Therefore he is clearly not deserving of the exercise of the Court's discretion. The appellant is abusing

the court process by using the appeal to deny a party the fruits of Judgment. Justice is two ways and must be done to all irrespective of status as provided under **Article 159 of the Constitution**. A party should not be allowed to use the appeal to delay justice. Justice delayed is justice denied. I find that the application has merits. I order that the appeal be dismissed with costs for want of prosecution.

Dated and delivered at Kerugoya this 3rd day of May 2018.

L. W. GITARI

JUDGE

Read out in Open court, Mr. Maina for M/s Wanjiru for Appellant.

M/s Muthoni for – Respondent.

C/A – Naomi

L.W. GITARI

JUDGE

3/05/2018