



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 144 OF 2014

1. JOSEPHAT MULEI MUSYOKI1ST APPELLANT

2. JOSEPH MATATA KYENZE2ND APPELLANT

VERSUS

MARTIN SHIKUKU..... RESPONDENT

RULING

I have carefully considered the rival submissions made by counsel on record for the parties in respect of the Notice to show cause why the instant appeal should not be dismissed for want of prosecution. I have also perused the court record.

I note that the notice to show cause was issued on 27th March, 2018 under *Order 42 Rule 35 (2)* of the *Civil Procedure Rules*. The rule empowers the Registrar of this court to list on notice to the parties, an appeal before a Judge for dismissal if within one year of service of the Memorandum of Appeal on the Respondent, the appeal has not been set down for hearing.

The record shows that the Memorandum of Appeal in this case was filed on 15th April 2014 and the claim by the Respondent's counsel that it was served on 28th April, 2014 has not been disputed by the Appellant's counsel. It is also not disputed that to-date, the appeal is yet to be fixed for hearing.

The Appellant's counsel in his affidavit sworn on 6th October 2017 and in his submissions in this court has explained the long delay in having the appeal set down for hearing.

In his view, the Notice to Show Cause was issued prematurely and in error as the original record of the lower court is yet to be forwarded to this court and without it, the Appellant's hands were tied as they could not take even the initial steps of causing the appeal to be admitted and directions given under *Order 42 Rule 13* of the *Civil Procedure Rules* let alone fix the appeal for hearing.

After perusing the court record, I have confirmed that the Appellant's counsel has on several occasions written to the Deputy Registrar requesting her to have the lower court's file forwarded to this court and to list the appeal for directions – See letters dated 11th April 2016; 17th May 2016 and 14th June, 2016.

Though it is indeed true that these letters were written after the Respondent filed an application for dismissal of the appeal, the court record reveals that the said application was heard and dismissed by Hon. Mbogholi J on 25th February, 2016. And, thereafter, the Appellant in my view made some reasonable effort to facilitate the prosecution of the appeal by writing the aforesaid letters to the Deputy Registrar which have to date not borne any fruit.

It is the responsibility of the court through the Deputy Registrar to ensure that the original record of the lower court is forwarded to the court once an appeal is filed against the decision or orders of the lower court. All the appellant can do is to be proactive and follow up on the matter with the Deputy Registrar to hasten the process which is what the appellants have done in this case.

I appreciate the Respondent's frustrations considering that to date, about four years after the appeal was filed, it is yet to be fixed for hearing and for this period of time, the Respondent has been unable to enjoy the fruits of his judgment. But the truth of the matter is that the Appellants' hands are tied because without the availability of the original record of the lower court, he cannot cause the appeal to be listed for admission or for directions and these two initial steps must be undertaken before the appeal can be set down for hearing.

In the circumstances, I am satisfied that the appellant is not entirely to blame for the long delay in the prosecution of the appeal. The appellants have therefore demonstrated good cause why the appeal should not be dismissed for want of prosecution.

I thus decline to dismiss the appeal as sought. I instead remit the matter to the Hon. Deputy Registrar with the direction that she should fast track the forwarding of the lower court's file to this court and ensure that the file is so forwarded within the next 90 days from today. Once the lower court's file is received, the Deputy Registrar shall place the appeal before a judge for directions on admission. The appeal shall be mentioned before the Hon. Deputy Registrar on **10th May, 2018** for further orders.

It is so ordered.

Dated, delivered and signed at Nairobi this 4th day of May 2018.

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C . W GITHUA

JUDGE