



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 9 OF 2016

MWANGI HASSAN.....1ST APPELLANT/RESPONDENT

JOHN CHEGE MWANGI.....2ND APPELLANT/RESPONDENT

-VERSUS-

STEPHEN WAWERU MARANGA.....RESPONDENT

RULING

1. The Respondent/Applicant has moved the court by way of a Notice of Motion dated 18th August 2017 seeking orders that the Appeal herein be dismissed for want of prosecution. He has also prayed for costs of the Appeal.

2. The application is made on the grounds that since the Appeal was filed on 11/1/2016, the Appellant has not taken any steps to prosecute the same. The Respondent avers that the Appellant has lost interest in the Appeal and its only fair that the same be dismissed for want of prosecution.

3. The Appellant filed a replying affidavit on 30/10/2017 in which it is deponed that the delay in prosecuting the Appeal has been caused by court by its failure to supply him with certified copies of the decree, judgment and typed proceedings to enable him file a Record of Appeal.

4. The Appellant avers that the Appeal is yet to be admitted in accordance with section 79B of the Civil Procedure Act before which, no steps can be undertaken in the Appeal. The Appellant further depones that before the Respondent can move the court to either set the Appeal down for hearing or apply for its dismissal for want of prosecution under Order 42 Rule 35 (2), the appeal ought to have been admitted and thereafter directions given under order 42 rule 13 of the Civil Procedure Rules. It has also been contended that the lower court file has not yet been availed to the High Court and that in the interest of justice, the application should be dismissed and the Appellant be allowed to prosecute the Appeal to its logical conclusion.

5. The application was disposed of by way of written submissions which the court has duly considered.

6. The same has been brought under Order 42 Rules 35 (2) of Civil Procedure Rules though the correct provision ought to be Order 42 Rule 35 (1). The Appellants have submitted that the application is premature in that the Appeal has not been admitted and directions have not been given in accordance with Order 42 Rule 13. They have relied on the case of *Kirinyaga General Machinery Vs Hezekiel Mureithi* (2007) eKLR wherein Kasango J observed thus;

“It is clearly seen from that Rule that before the Respondent can move the court either to set the appeal down for hearing or to apply for dismissal for want of prosecution, directions ought to have been given as provided in Rule 8B. Directions have never been given in this matter. Directions having not been given, the orders sought by the Respondent cannot be entertained.”

7. The Appellants also relied on the case of *UAP Insurance Company Limited Vs Washington Gatura Kimani* (2016) eKLR which was my own ruling in the matter where similar orders were sought. Whereas I concur with the Appellants' submissions, I am also of the view that the courts have inherent powers donated by section 3A of the Civil Procedure Act to dismiss suits for want of prosecution even before the directions have been given under Order 42 Rule 13 if no action has been taken and where no good reason has been given for the inaction.

8. The reason given by the Appellants for failure to prosecute the Appeal is that they have not been provided with the decree, certified copies of the judgment and the proceedings. The court has noted that the Appellants have not annexed any evidence to show that they applied for the said documents. However, the lower court file has not been forwarded to this court despite several reminders by the Deputy Registrar to the Chief Magistrate's Court to do so. This court takes judicial notice of the fact that without the lower court file, no action could be taken in the matter.

9. In the circumstances, I decline to grant the orders sought. The application is therefore dismissed but with no orders as to costs.

Dated, Signed and Delivered at Nairobi this **10th** Day of **May, 2018**.

.....

L. NJUGUNA

JUDGE

In the Presence of

..... *For the Applicant*

..... *For the Respondent*