



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 285 OF 2015

KENYA MEDICAL ASSOCIATION.....APPELLANT/RESPONDENT

- V E R S U S -

MACHIRI LIMITED.....RESPONDENT/APPLICANT

RULING

1. Machiri Ltd, the respondent/applicant herein, took out the motion dated 9th April 2018 whereof it sought for the following orders:

1. THAT the memorandum of appeal dated 10th July 2014 and the record of appeal dated 22nd September 2014 be summarily rejected with cost.

2. THAT the stay of execution granted to the appellant/ respondent on 5th September 2014 in CMCC No. 2699 of 2013 be set aside.

3. THAT the decretal amount of Kenya shillings Eight hundred and twelve thousand five hundred and sixty four only (Ksh.812,564.00/=) deposited in court by the appellant/respondent be released to the respondent/ applicant together with cost and interest at court rates to satisfy the judgment entered against the appellant/ respondent on 11th June 2014.

4. THAT the cost of this application be provided for.

2. The motion is supported by the affidavit of James Mbugua Macharia. When served with the aforesaid motion, Kenya Medical Association, the appellant/respondent, filed a replying affidavit to oppose the same. When the motion came up for interpartes hearing, learned counsels appearing in the matter made oral submissions.

3. I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the motion. I have further considered the rival oral submissions of learned counsels. It is the submission of the respondent that the appellant has not taken any steps to have the appeal heard and determined more than a year since an application seeking for the dismissal of the appeal was dismissed by Lady Justice Thurairaja. It is argued that the continued pendency of the appeal has seriously prejudiced the respondent in that it is unable to enjoy the fruits of its judgment. The respondent further argued that the appellant prima facie has lost interest in pursuing this appeal. This court has been asked to summarily reject the appeal by dismissing it.

4. The appellant argued against the motion stating that it took steps to have the file placed before a judge in chambers to give directions in vain. It is stated that the court failed to respond to its request to have the appeal admitted to hearing. It was pointed out by the appellant that an application seeking to have the appeal dismissed can only be brought after the appeal has been admitted and directions taken. The appellant denied the assertion that it has lost interest in prosecuting the appeal.

5. Having considered the rival arguments and the material placed before this court, it is not in dispute that the memorandum of appeal was filed on 14.7.2014 and the same served on 26.9.2014 together with the record of appeal. It is also apparent that the parties recorded a consent order to allow the appellant to deposit the decretal sum as a condition for the grant of the order for stay execution pending appeal on 17.12.2014. It is also not in dispute that the record of appeal has been compiled and that a request in writing was made to court to have the court file placed before a judge for directions. The record shows that the respondent's application dated 12.2.2016 which had sought for the appeal to be dismissed was heard and dismissed by Lady Justice Thurairaja on 5.10.2016. The respondent has expressly stated that since the motion was dismissed on 5.10.2016, the appellant has not taken any further steps to have the appeal prosecuted.

6. I have considered the response filed by the appellant over the aforesaid assertion. The appellant has annexed copies of three letters written to the Deputy Registrar of this court in which the appellant made requests to have the file placed before a judge for directions. The

respondent does not deny the aforesaid assertion. It is therefore not true that the appellant has not taken steps to have the appeal ready for hearing. It is also not in dispute that the appeal has not been admitted. It is further apparent that the trial court's file has not been availed to this court. It is the duty of the Deputy Registrar to liaise with the trial court to have the subordinate court's file brought to this court. That failure cannot be attributed to the appellant. The order which commends itself to be issued in the circumstances is the dismissal of the motion.

7. In the end, the motion dated 9th April 2018 is found to be without merit. It is dismissed but with no order as to costs. In order to avoid the matter procrastinating further, I issue an order admitting the appeal to hearing before a single judge. The Deputy Registrar is directed to liaise with the trial court to have the subordinate court's file availed to this court.

8. Parties to take the necessary steps to have the appeal placed before a judge in chambers for further directions.

Dated, Signed and Delivered in open court this 6th day of July, 2018.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

.....for the Respondents