



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CIVIL APPEAL NO. 10 OF 2017

MBAKU NGUNGA.....1ST APPLICANT

MUTUNGA MALUKI.....2ND APPLICANT

VERSUS

SILA MUMO MULI.....RESPONDENT

R U L I N G

1. The Applicants/Respondents herein, **Mbaku Ngunga** and **Mutunga Maluki** approached this Court on the **13th day of January, 2017** by way of Chamber Summons pursuant to the provisions of **Order 42 Rule 35** of the **Criminal Procedure Rules, Section 1A, 1B** and **3A** of the **Civil Procedure Act** seeking orders that the Appeal herein be dismissed for want of Prosecution and costs of the application and Appeal be awarded to them.

2. The application is premised on grounds that the Appeal was filed on **8th May, 2008**; the Respondent/Appellant has not taken steps to have the Appeal heard, he has lost interest in the Appeal as the Appeal has been in Court for the last nine (9) years and that the Applicants have been unable to enjoy the fruits of their successful litigation for the fact that the Lower Court has not been available for execution because of the Appeal. The 1st Applicant with authority of the 2nd Applicant deposed an affidavit in support of the application.

3. On the **2nd day of March, 2017** the Respondent was granted leave to file a Replying Affidavit. They opposed the application.

4. The matter which was all along before Machakos High Court was transferred to this Court on the **20th April, 2017**.

5. Following directions taken, the application was canvassed by way of written submissions which I have duly taken into consideration.

6. As clearly pointed out by the Applicants, the Appeal herein was filed on the **8th day of May, 2008**. Service upon the Respondents was effected on the **4th June, 2008**. The Deputy Registrar High Court requested for the Lower Court file that was forwarded on the **18th day of August, 2008** and received on the **25th August, 2008**. Consequently the Appeal was admitted for hearing on the **10th day of February, 2009**.

7. It is urged by the Respondent that the Court Registrar did not comply with the law by notifying the Appellant and/or his Advocate on record that the Appeal had been admitted. That having remained unaware of the Appeal the Appellant cannot be blamed for failure of this Court's Registrar to comply. The law in operation in **2009** was **Order 41 Rules 8A** and **8B** of the **Criminal Procedure Rules** that provided thus:

Rule 8A

“After the refusal of a Judge to reject the appeal under Section 79B of the Act, the Registrar shall notify the appellant who shall serve the memorandum of appeal on every respondent.”

Rule 8B(1)

“On noticed to the parties delivered not less than twenty-one days after the date of service of the memorandum of appeal, the registrar shall list the appeal for the giving of directions by a Judge in chambers.”

8. At the point of admission of the Appeal the Memorandum of Appeal was already served upon the Respondents (Applicants).

9. The omission of the Registrar was listing the matter before the Judge for directions within 21 days.

10. The Appellant did not demonstrate any diligence in attempting to find out the position of the Appeal even after the law was repealed. Eight (8) years later the Applicants/Respondents acted by causing the matter to be listed for directions on the **16th February, 2018**. It is not clear if the Applicants were notified but they made no appearance on the **11th May, 2016** therefore the matter was stood over generally by **Muriithi J.**

11. On the **13th June, 2016** **Nyamweya J.** gave directions for issuance of a Notice to Show Cause why the Appeal should not be dismissed for want of Prosecution. There is no indication of the order having been complied with but subsequently the instant application was filed.

12. **Order 42 Rule 35(1)(2)** provides thus:

“(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 have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal.”

13. Although the Appeal has been pending in Court for the last ten (10) years, no directions have been given. The matter was to be placed before the Presiding Judge, Machakos for directions on **20th April, 2014**. When it came up, an order for transfer of the case to this Court was made.

14. As a result of what transpired the Appeal cannot be dismissed for want of Prosecution as required by **Order 42 Rule 35**.

15. However, I cannot overlook the conduct of the Respondent/Appellant. I do note that even after the instant application was filed, the Appellant waited until the **24th November, 2017** when he filed the Record of Appeal. In the premises I dismiss the application but direct the Respondent/Appellant to fix a date for giving directions within 7 days from the date hereof. In default the Deputy Registrar shall be directed to cause the matter to proceed pursuant to the provisions of **Order 42 Rule 35(2)** of the **Civil Procedure Rules**.

16. No orders as to costs.

17. It is so ordered.

Dated, Signed and Delivered at Kitui this 19th day of September, 2018.

L. N. MUTENDE

JUDGE