



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 99 OF 2014

TIPIS JAMES 1ST APPELLANT

JAMLEK MACHARIA 2ND APPELLANT

VERSUS

PHILIP ONGERI KIMARI RESPONDENT

RULING

1. The Application under consideration is dated 07/12/2017. It seeks one substantive prayer thus: That the Appellant's appeal herein be dismissed with costs for want of prosecution.

2. The Respondent/Applicant has expressed the Application as being brought under Order 51 Rule 1. That is a curious rule to ground the Application. Ordinarily, applications for dismissals for want of prosecution by a party in an appeal are brought under Order 42 Rule 35(1).

3. It is probably not inadvertent that the Respondent/Applicant did not bring himself under that Rule. The Rule reads as follows:

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.

4. In the present case, the course of action envisaged under this Rule is not open to the Respondent/Applicant. This is because the appeal has never been set down for directions. Indeed, no record of appeal has been filed in the appeal. In fact, by the Respondent/Applicant's undisputed affidavit evidence, even the Memorandum of Appeal was never served on him.

5. That memorandum of Appeal was filed on 07/07/2014. That is exactly four years ago. Forty eight months. Since then, the Appellant, apparently, did not do anything. They did not even serve the Memorandum of Appeal on the Respondent!

6. When confronted by the present Application, the Appellants have, through their lawyer, produced a letter dated 27/01/2017 requesting the Executive Officer of Molo Law Courts to furnish them with proceedings and judgment. Nothing was done before then. And nothing was done afterwards. Yet, the Appellants say that that letter is enough proof that it is not their fault that nothing has happened in the appeal for forty eight months.

7. I would ordinarily not be taken by this kind of inexcusable delay. I note that the Appellants did not even produce any evidence of payment of deposit for the proceedings let alone any follow up. I, of course, also notice that this lone, lame attempt at action was done more than two years after the Appeal was filed. However, I am bothered here that the circumstances are not quite ripe to dismiss the appeal at the instance of the Respondent. The appropriate thing for the Respondent to have done would have been to move the Deputy Registrar of the Court to list the matter for dismissal under Order 42 Rule 35(2). It is only for this reason that I will decline to accept the invitation to dismiss the Appeal herein for want of prosecution. In part, this is so as not to depart from a reasonable consensus on the proper interpretation of Order 42 Rule 35 by different judges of the High Court. See, for example, *Jurgen Paul Flach -V- Jane Akoth Flach (2014) eKLR* and *Rosarie (EPZ) Limited -V- Stanlex Mbithi James (2015) eKLR*.

8. In the circumstances, and to balance the rights of the parties, I will order as follows:

a) The Appellants to file the Record of Appeal within twenty-one (21) days of today otherwise the Appeal herein to stand automatically dismissed.

b) Appeal shall be set down for directions on 25/09/2018.

c) The Appellants shall pay the costs of this Application.

Orders accordingly.

Delivered at Nakuru this 20th Day of September, 2018

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JOEL NGUGI

JUDGE