



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

HIGH COURT CIVIL APPEAL NO. 23 OF 2016

IRERI MOSES.....APPELLANT

V E R S U S

PETER MUTUGI MUTHIKE *Suing as the legal administrator of estate of the late*

MARY NJERI MUTHIKE (Deceased).....RESPONDENT

RULING

The respondents Peter Mutugi Muthike (*Suing as the Legal Administrator of the Estate of the late Mary Njeri Muthike (deceased)*) filed an application to dismiss the appeal for want of prosecution dated 28/07/2017 on ground that the appellant preferred an appeal on 21/04/2016 and since then he has not taken any step towards prosecuting his appeal.

The respondent stated that stay of execution was granted and they requested the executive Officer for typed proceedings and judgment to enable them file Record of Appeal. That the delay to file record of Appeal and prosecute was occasioned by the delay from the lower court to furnish the requisite documents. In addition, the appeal is yet to be admitted under **Section 79B of the Civil procedure Act** and therefore no steps can be undertaken by the appellants.

As per the proceedings of the file, judgment was delivered on 22/03/2016, the appeal was admitted for hearing on 24/02/2017 and the parties were notified of the same through Notice dated 17/03/2017. Therefore the allegations by the appellant that the appeal is yet to be admitted are misleading.

Section 79B of the Civil Procedure Act

Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against he may, notwithstanding section 79C, reject the appeal summarily.

Order 42 Rule 35 of the Civil Procedure Rules:

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.

The Court has discretion. The court considers whether the delay was inordinate or excusable.

In **Mohamed Adan & 2 others v Hadija Hassan mohamed & 2 others (Suing as the legal representative of the estate of Ali Noor Ibrahim Karu (Deceased) [2014] eKLR**

In this case, the appellant had delayed for a period of only four months and the court held;

“In the circumstances of this matter, I am of the view that the short delay of a few months in prosecuting the appeal by the appellants cannot justify the dismissal of the entire appeal for want of prosecution. Such an action will in my view, deny the appellants the benefit of substantive justice. I will thus not allow the application.

However it is obvious to me that the counsel for the appellants went to sleep after filing the appeal. They are not even aware that the appeal has already been admitted by the court to hearing. As such, though I will dismiss the application herein, I will award costs of the application to the applicants.”

In this case, the appellant has delayed for a period of about four months since the appeal was admitted for hearing. Even so, the parties recorded consent on 08/11/2017 whereby the appellant was given 21 days to file record of appeal and take directions thereafter within a month's time.

The Record of Appeal was duly filed on 06/12/2017 and the matter came up for mention on 15/02/2018. On the said date at the registry, advocates for the appellant fixed the appeal for directions on 10/05/2018 wherein by consent matter was fixed for directions on 18/09/2018.

In all this time, the appellant was vigilant in fixing the matter for directions. I am of the view that the delay was not inordinate. The appellant should be given the opportunity to prosecute and be heard on appeal. I will therefore dismiss the application and order that each party bears its own costs.

L. W. GITARI

JUDGE

18/10/18.

Order:-

The matter be mentioned for directions on 10/12/18.

L. W. GITARI

JUDGE