



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO. 539 OF 2015

RUSHBAH INDUSTRIES LIMITED.....APPELLANT

-VERSUS-

ELIJAH SEKA OWINO.....RESPONDENT

RULING

1) The application before the court is a Notice of Motion dated 15th June, 2018 brought by the Respondent herein under Order 17, Rule 2 (3), Order 41, Rule 35 (2) and Order 51, Rule 1 of the Civil Procedure Rules, 2010; and is supported by the grounds set out in the body thereof and the facts deponed in the affidavit of **Musili Mbiti** sworn on 15th June, 2018.

2) In the aforesaid motion the respondent/applicant sought for the following orders

i. THAT the appeal be dismissed for want of prosecution.

ii. THAT the Registrar do list the appeal before a judge in chambers for dismissal.

iii. THAT the costs of the application and the entire suit be awarded to the Respondent in the appeal.

3) The Appellant filed the Replying Affidavit sworn by **George Mahugu** on 5th October, 2018 to oppose the motion.

4) The application was canvassed by way of written submissions, with the Respondent filing his submissions on 12th October, 2018 whereas the Appellant put in its submissions on 15th October, 2018.

5) The Respondent submitted through his advocates that he has never been served with a Reply or other responses from the Appellant and as such, prays that the application be allowed as it stands unopposed.

6) The Respondent argued that there has been no prosecution of the appeal for over one (1) year. The respondent cited **Order 42, Rule 35** of the Civil Procedure Rules which stipulates inter alia as follows;

“(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.”

7) The Respondent averred that since 21st April, 2017, the Appellant has neither prosecuted nor taken any active steps to prosecute the appeal and that the appeal is not made in good faith; rather, it is intended to only delay the execution process.

8) It was also the Respondent’s submission that the Appellant has given no explanation at all for the undue delay in setting down the appeal down for hearing. In view of this, the Respondent is convinced that the delay is not only inexcusable but intentional and contumelious thus hindering him from enjoying the fruits of his judgment.

9) The Appellant largely submitted that the application is *mala fides* in nature and an abuse of court process due to the fact that the appeal was filed in 2015; the Appellant is ready and willing to prosecute the appeal and there has been no undue delay since the Appellant was led to believe that the Respondent was willing to have the matter settled out of court.

The Appellant cited the authority of **PROFESSOR MWANGI S. KIMENYI VERSUS THE HON. ATTORNEY GENERAL & ANOTHER (HIGH COURT CIVIL CASE NO. 720 OF 2009)** in submitting that the measure of what would by and large amount to inordinate delay differs from case to case, but that at the end of the day the test should be measured against the duty of the court to do justice to the parties. Further to the aforementioned, the Appellant cited the case of **AUSTIN SECURITIES VERSUS NORTHGATE AND ENGLISH STORES LTD [1969] 1 WLR 529** relied upon in the above cited case where it was held that;

“...the court will look at the conduct of both parties. If the defendant has considerably contributed to the delay or...has actually agreed to it, he will seldom obtain a dismissal of the action...”

10) It was the Appellant’s further submission that the Respondent has misapprehended the purpose and meaning of **Order 17, Rule 2** of the Civil Procedure Rules, which provision relates to dismissal of suits and went ahead to argue that in line with **Order 42, Rule 35 (1)**, where an application for dismissal of the appeal can only be made after the expiry of three (3) months from the date of directions under **Order 43, Rule 13** and that in view of the fact that such directions are yet to be given, the Appellant should not be faulted for the delay.

11) The Appellant also submitted that the court is yet to admit the appeal under Section 79B of the Civil Procedure Rules, 2010 and that such admission is done purely *suo motu* upon availing of the certified copies of the typed proceedings, judgment and decree, by the trial court. Similarly, the Appellant argues that no Notice to show cause has been issued against it and that the application is therefore contemptuous, an abuse of court process and ought to be dismissed with costs.

12) Before determining this application, it is important to make reference to the respondents assertion that it was never served with a response by the Appellant. The court has notes that there is a copy of the filed Reply by the Appellant. However, this court is not in a position to tell whether or not the Reply was served since the Appellant has not disputed such allegation. That notwithstanding, the court will make reference to both the application, Reply and submissions by both parties.

13) The main issue is whether the appeal ought to be dismissed for want of prosecution on the basis of grounds raised by the Respondent.

14) The court records shows that the appeal was filed on 16th November, 2015. Before going any further, it has been noted that the Respondent has cited Order 41 in the heading of his application but subsequently referred to Order 42 instead. For purposes of clarity, reference shall be made to the correct legal provision.

15) The provisions of **Order 17, Rule 2 (3)**, of the Civil Procedure Rules provides as follows;

“Any party to the suit may apply for its dismissal as provided in sub-rule 1.”

If we may refer to sub-rule 1 mentioned hereinabove, the same states that;

“In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.”

Order 42, Rule 35 (2) stipulates as follows;

“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.”

16) As concerns the application of Order 17 of the Civil Procedure Rules relied upon by the Respondent, I am of the considered view that the same is not applicable herein on the basis that Order 42, Rule 35 is the provision that expressly deals with dismissal on appeal.

17) Whereas the Respondent brought the application under Order 42, Rule 35 (2), he makes reference to Rule 35 (1) in his submissions, which provision has already been expressly cited hereinabove. As such, there is no need to delve further into Rule 35 (1). In regards to Rule 35 (2), the same is clear that only the Registrar has the power to invoke the dismissal of an appeal in the instance where the same has not been set down for hearing within one year after service of the memorandum of appeal.

18) It would appear that there are two instances where an appeal can be dismissed as indicated in Order 42, Rule 35 Civil Procedure Rules as restated by Justice L.W. Gitari in the case of **Morris Njagi & another-v- Mary Wanjiku Kiura CIVIL APPEAL NO. 17 OF 2015** inter alia as follows;

“The rule is clear that there are two situations where an application for dismissal can be made. The respondent can only apply if after directions have been given the appellant has not taken action to set down the appeal for hearing. The second is where the registrar with notice to the parties shall place the appeal before the Judge for dismissal if one year after service of memorandum of appeal the appeal has not been set down for hearing. The applicant is not in order to have brought the application under Order 42 rule 35 (2). Under this provision the respondent should have requested the Registrar to list the matter for dismissal.”

19) Since there is no indication that directions have either been given or the appeal has been listed before the judge for dismissal by the Registrar, I am of the view that the Respondent could not apply for dismissal under Order 42, Rule 35 (2) Civil Procedure Rules.

20) The motion is premised on Order 42 rule 35 of the Civil Procedure Rules. It has been demonstrated that the respondent could not rely on sub rule 1 to dismiss the appeal because directions haven not been taken. It has also been shown that the respondent could not come within sub-rule 2 because that provision falls within the purview of the Registrar of this court. The motion must fall on the wayside for want of foundation. The same is dismissed. In the circumstances of this appeal a fair order on costs is to order which I hereby do that each party bears its own costs.

Dated, Signed and Delivered at Nairobi this 16th day of November, 2018.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant/Applicant

..... for the Respondent