



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CORAM: R MWONGO, J

CIVIL APPEAL NO. 1 OF 2016

(Being an Appeal from the Judgment delivered on 8th December, 2015 in Engineer SRMCC No 27 of 2014, (Hon. Martin Mutegi – SRM))

SAMUEL MBUGUA NGANGA.....1ST APPELLANT/RESPONDENT

DAVID GACHUI MAINA.....2ND APPELLANT/RESPONDENT

-VERSUS-

ALICE WANGU MAINA.....RESPONDENT/APPLICANT

RULING

1. This is an application brought under **section 3A** the **Civil Procedure Act** and **Order 42 Rule 35** of the **Civil Procedure Rules**. It seeks that the appeal be dismissed for want of prosecution and that the costs of the entire application and appeal be awarded to the respondents.
2. The application is supported by the affidavit of Kennedy Achieng Owuor who has deposed that the judgment in the lower court was entered on 8th December, 2015 and served on the defendant on 16th December, 2015.
3. Thereafter the memorandum of appeal was then filed on 18th December 2015, but since then the appellants have failed to prosecute the appeal. As such the appellants are not keen to have the appeal heard and determined.
4. The applicant accuses the appellants of laches and of causing the respondent undue hardship; and prays that the appeal be dismissed since litigation cannot continue *ad infinitum*.
5. Although the applicants have not annexed any evidence to their application, the court has seen the Memorandum of appeal filed on 29th January, 2016, and has noted that there are no other filings or proceedings since that time except the present application and response thereto.
6. In his oral submissions, Mr Owuor for the applicant pointed out that the applicant has been unfairly kept away from enjoying the fruits of the judgment in the lower court, and that no security deposit has been paid to them or into court.
7. The appellants filed a Replying affidavit deposed by Kinyanjui Theuri, their advocate, who deponed that they wrote to Engineer Law Courts vide a letter dated 15th June 2017 seeking to have the proceedings typed to enable them to file the record of appeal, and a reminder dated 28th June 2017. Both letters are attached to the affidavit.
8. Mr Kinyanjui argues that the parties were negotiating a settlement but that the applicants declined the offer in April, 2017.
9. In his oral submissions, Mr Kariuki stated that directions under Order 42 Rule 35 cannot be given until the court has admitted the appeal under section 79B of the Civil Procedure Act, and that if the application is allowed the appellant will lose their constitutional right of appeal.
10. I have considered the application and the parties' arguments carefully, and agree with the respondent.
11. The procedures for appeals are treated under **Order 42** of the **Civil Procedure Rules**. **Rule 11** requires the Appellant to cause the matter to be listed before a judge, within thirty days of filing, for directions under **section 79B** of the **Civil Procedure Act**. If a judge refuses to reject the appeal, then under **Rule 12** the Registrar shall notify the appellant who, shall serve the memorandum of appeal within seven days on every respondent. **Rule 13** then kicks in and requires the Appellant within twenty one days of service of the memorandum, to cause the

appeal to be listed for directions

12. In this matter, none of the steps under **Order 42 Rules 11 -13** have been taken. The appellants have not submitted any evidence that, after filing the Memorandum of appeal, they have themselves taken any interest in pursuing the proceedings or record of appeal. And this is perhaps because of the condition created by Rule 35 which requires the giving of directions under Rule 13 before dismissal action can be taken. To that extent, the application herein is premature.

13. This situation will persist unless and until the lower court proceedings become available to the appellants. As a result, the appeal herein cannot be listed before a Judge for directions under **Section 79B** as there is no Judgment or Ruling of the lower court before the judge to enable him to consider it for summary rejection.

Disposition

14. The application is dismissed.

15. However, in order to ensure that the appellant takes measures to keenly follow up the proceedings and ensure the record of appeal is filed, and in the interests of justice, I order as follows:

a. The appellants shall pay 50% of the decretal sum to the respondents in the appeal being the judgment creditor within thirty (30) days from the date hereof;

b. Liberty to apply is hereby given.

16. Costs shall be in the cause..

Orders accordingly.

Dated and Delivered at Naivasha this 22nd Day of November, 2018

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Mr. Owuor for the Respondent.
2. Appellants – Not represented.
3. Court Clerk – Quinter Ogutu