



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL APPEAL NUMBER 460 OF 2013

BATIZA LIMITED.....APPELLANT

VERSUS

MARK KENANI NYAKWEBE.....RESPONDENT

RULING

This is an application by way of a Notice of Motion dated the 2nd July 2015 brought under order 17 (2), order 42 rule 35, order 51 rule (1) of the Civil Procedure Rules, 2010, Sections 3 and 3A of the Civil procedure Act and all other enabling provisions of the law seeking orders;

(1) That Nairobi High Court Civil Appeal Number 460 of 2013 Batiza Limited versus Mark Kenani Nyakweba, be dismissed for want of prosecution.

(2) Those other appropriate orders be made.

(3) That the costs of this application be provided for.

The application is premised upon the grounds in the body of the same and its supported by the affidavit sworn by Mark Kenani Nyakweba on 2nd July, 2015.

The facts in support of the application are that, the appeal herein was filed on the 28th August 2013 and since then, it has been almost two years and the appellant has not set down the appeal for hearing. That the appellant was ordered by this court to deposit the decretal sum as security for granting of interim orders for stay of execution and the orders have since lapsed but he never complied as ordered by the court.

That there has been inordinate delay on the part of the appellant in setting down the appeal for hearing and the same ought to be dismissed. That the delay in prosecuting the appeal has caused inconveniences and injustice on the applicant/respondent as he has not been able to enjoy the fruits of the judgment.

The Appellant has opposed the application vide a replying affidavit sworn by ERIC JOHN MUEMI on the 2nd July 2015. He avers that upon filing the memorandum of Appeal on the 28th August 2013, he filed a Notice of Motion dated 27/8/2013 seeking stay of execution and on 3rd September 2013, Waweru J granted a stay of execution orders wherein the appellant was ordered to deposit the decretal sum in court.

That, the said application has to date never been heard and it should be dispensed with first, before the appeal can be listed down for directions.

He further avers that, the application has on several occasions been taken out of the hearing list due to shortage of Judges. He has urged the court to dismiss the application dated the 2nd July 2015.

Parties agreed to canvass the application by way of written submissions which I have duly considered along with the rest of the materials filed herein. I have also taken time to peruse the court file and I note that the respondent's application dated 2nd August 2013 was last in court on the 17th September 2013 when the court extended stay of execution that had been granted on, 3rd September 2013 subject to the appellant depositing in court the decretal sum within 45 days of the date thereof. The court also granted parties the liberty to apply. The court made a further order that, in default, the stay to lapse. Thereafter, the appellant fixed the said application for hearing only once, on 8th April 2013 but on the said date, the record does not show what happened as there are no proceedings for that day.

From then hence, the appellant went to sleep and took no further action until the present application to dismiss the appeal was filed on the 10th July 2015 by which time, no action has been taken in the appeal for close to two years.

The court has noted that even after the appellant was ordered to deposit the decretal sum in court, he failed to comply and/or challenge the said orders in any way yet he blames the Respondent for the delay in having the appeal prosecuted and it is his duty to take steps towards prosecution of the Appeal.

The Respondent has relied on the provision of order 42 Rule 35 of the Civil Procedure Rules in opposing the application. It is true that the appeal has not been admitted for hearing under section 79 (G) and also directions have not been given under order 42 Rule 13 of the Civil Procedure Rules which could not have been done unless the directions had been given under section 79B. It is not difficult for this court to appreciate the fact that unless an appeal has been admitted under Section 79 (B) the appellant is not in a position to take any other step in the appeal. However, a duty is placed on the appellant under order 42 Rule 11 in that he is supposed to "*cause the matter to be listed before a Judge for directions under section 79B of the Act*" and he should do so within 30 days from the date the appeal is filed.

The respondent in this application has not exhibited anything before the court to show what he has done to cause the appeal to be listed for directions as aforesaid yet he would want the court to come to his rescue by relying on the provisions of order 42 Rule 11. This Court could have had no difficulty in dismissing the appeal for the reasons given hereinabove and also under the inherent jurisdiction of the court as envisaged in section 3 and 3A of the Civil Procedure Act, but in the interest of justice, the court will give the appellant a chance to prosecute the appeal by making the following orders.

- (1) The application dated 2nd July 2015 is hereby dismissed with no orders as to costs.
- (2) The appeal to be prosecuted within one hundred and twenty days (120), failing which it shall stand dismissed.

Dated, signed and delivered at Nairobi this 19th day of January, 2017.

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LUCY NJUGUNA

JUDGE

In the Presence of

..... for the Appellant

..... for the Respondent