



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 23 OF 2015

JOHN NYAKONDO.....APPELLANT

JAMES NYAKONDO.....APPELLANT

VERSUS

JAMES O. OROGO.....RESPONDENT

(Appeal from the Judgment and Decree of J.M. Njoroge, CM delivered at Kisii in Civil Suit No. 676 of 1999)

RULING

1. The application vide a Notice of Motion dated 31st March 2016 sought the basic order that the appeal filed herein be dismissed for want of prosecution on grounds that one year had elapsed since the memorandum of appeal was filed and served but no effort had been made by the appellants to have the appeal set down for hearing thereby holding the applicant at ransom by the obtaining state of affairs.

The grounds were enhanced and fortified by the facts contained in the applicant's supporting affidavit dated 31st March 2016.

2. A replying affidavit in opposition to the application deposed by the appellants' advocate was filed herein on 12th April 2016. The appellants thus contended that they lodged the memorandum of appeal on 17th February 2015 after applying for typed copies of proceedings which were not availed by the court registry despite several visits thereto. That, the proceedings were according to the courts' executive officer typed but not proof read thereby causing delay in preparing, filing and fixing the matter for directions.

The appellants further contended that the application was misconceived and otherwise an abuse of the court process.

3. When the matter came up for "inter-partes" hearing the court noted that the application was premature since the appeal had not been admitted for hearing.

Consequently, the applicant withdrew the application on 19th May 2016.

However, on the 25th August 2016, the appellant filed the present application dated 24th August 2016, seeking similar orders as the previous application only that this time around the request for dismissal was directed at the memorandum of appeal.

4. The application is grounded on the facts set out in the appropriate notice of motion as supported by the averments in the supporting affidavit dated 24th August 2016 deponed by the applicant.

The appellants oppose the application on the basis of the facts contained in the replying affidavit dated 21st October 2016, deponed by their advocate, **Kennedy Bosire Gichana**.

5. On the 26th October 2016, the court directed that the application be canvassed by way of written submissions and in that regard, both parties filed their respective submissions.

Having considered the application in the light of the written submissions it is clear to this court that Order 42 Rule 35 of the Civil Procedure Rules under which the application is made is inapplicable in the present circumstances because necessary directions for the hearing of the appeal have not been given by the court as contemplated under Rule 35(1) and if the appeal was not set down for hearing one year after the service of the memorandum of appeal it was upon the registrar of this court on notice to the parties to list the appeal before the judge in chambers for dismissal as contemplated under Rule 35(2). It was not open to either party to apply for dismissal of the memorandum of appeal for want of prosecution as has been done herein by the applicant. Perhaps, the applicant would have invoked the necessary provision of the Civil Procedure Rules to apply for striking out of the memorandum of appeal for being an abuse of the court process.

6. For the reasons foregoing, it is the finding of this court that the present application is not only premature and misconceived but also an abuse of the court process. It is therefore dismissed with costs to the appellants.

It may however, be noted that the application was clearly brought to counter the frustrations caused to the applicant by the appellants' indolence in having the intended appeal prosecuted expeditiously. It is therefore necessary for this court to order and hereby orders the appellants to have the appeal listed for directions within the next twenty one (21) days from this date hereof failure to which the appeal shall stand dismissed forthwith.

[Read and signed this 12th day of January 2017].

J.R. KARANJAH

JUDGE

In the presence of

Mr. Nyangwencha holding brief for Mr. Nyamwange

for applicant and for Mr. Bosire for respondent

Njoroge CC