



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CIVIL APPEAL NO. 26 OF 2013**

**KARA ROADWAYS LIMITED.....APPELLANT**

**VERSUS**

**BERNARD MUSEMBI KIKUVI.....RESPONDENT**

*(Being an appeal from the Judgment of the Chief Magistrate's*

*Court at Machakos by Hon. K. Mwangi (PM) in*

*Civil Case No. 416 of 2012 dated 17<sup>th</sup> January, 2013)*

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**RULING OF THE COURT**

**The application**

1. The Notice of Motion application before the court is dated **2<sup>nd</sup> June, 2016**. It prays for orders that the appeal filed herein be dismissed with costs for want of prosecution. The application is premised on the grounds that;

- a. That judgment herein was delivered way back on **31<sup>st</sup> January, 2013**.
- b. That the applicant filed a Memorandum of Appeal on **15<sup>th</sup> February, 2013**.
- c. That it is now over **3 years** and no steps have been taken to prosecute the appeal.
- d. That the appellant has never compiled, filed and served the Record of Appeal.
- e. That by a letter dated **13<sup>th</sup> February, 2014** the appellant were notified by the Deputy Registrar of admission of the appeal but have never listed it down for directions.
- f. That it is clear the appellant is not interested in prosecuting the appeal and the same should be dismissed.
- g. That it is in the interests of justice that the orders sought herein be dismissed.

2. The application is supported by the affidavit of **Francis N. Sila** sworn on **2<sup>nd</sup> June, 2016**. The deponent is the applicant's advocates. The applicant's case is that the judgment in the subordinate court

was delivered on 31<sup>st</sup> March, 2013 wherein the respondent/applicant was awarded Kenya Shillings 183,150/= as general damages and costs of the suit were assessed at Kenya Shillings 35,815/=. The appellants were dissatisfied with the decree and filed their Memorandum of Appeal on 15<sup>th</sup> February, 2013. On 20<sup>th</sup> February, 2013 the Deputy Registrar requested for the lower court file together with the typed proceedings. By a letter dated 7<sup>th</sup> June, 2013 the lower court file was forwarded to the High Court. By a letter dated 23<sup>rd</sup> July, 2013 the appellants were notified by Deputy Registrar that the appeal had been admitted for hearing. The respondents also notified them of the same vide their letter dated 12<sup>th</sup> August, 2013 but to date the same has never been fixed down for directions. On 13<sup>th</sup> February, 2014 a 2<sup>nd</sup> reminder was sent to the appellants to fix the appeal for directions but that has not been done. It is now over three (3) years since the appeal was filed but the appellants have never taken any positive steps to prosecute the appeal. The applicant states that the appeal herein was merely on quantum and the respondent/applicant is anxious to get compensation for the injuries sustained. It is the applicant's case that the appellants have lost interest in the appeal and the same should be dismissed for want of prosecution and with costs to the respondent/applicant.

### **The Response**

3. The application is opposed vide a replying affidavit sworn by **Alfred Deya**, advocate for the respondent, on **4<sup>th</sup> November, 2016**. The Respondent's case is that where as the Appellant was informed of the admission of the Appeal for hearing, the respondent was unable to set the appeal down for directions for they needed to prepare the Record of Appeal first, pursuant to the provisions of **Order 42 Rule of 13 of the Civil Procedure Rules**. In that regard the respondent wrote to the Applicant's advocates vide a letter dated 23<sup>rd</sup> June, 2014, whose subject was Civil Appeal No. 26 of 2013, informing them of their desire to expedite the matter, the fact that the certified copies of the proceedings, judgment and decree not being ready notwithstanding. Further, the respondent states that they have not managed to obtain copies of the typed proceedings and judgment in this matter, this notwithstanding the endeavor and energy expended by them towards obtaining the same. Also compounding the problem further in this matter is the fact that the certified copy of the decree was missing in the Lower Court file. On various occasions the respondent states that they engaged the registry staff to have the decree extracted but in vain. They were informed that the same could not be done in Machakos, and that the Lower Court file had to be transferred to the Chief Magistrates Court at Mavoko to have the decree extracted and/or certified. The appellant took heed of the advice and wrote a formal letter to the Deputy Registrar to cause the Lower Court file to be returned to the Chief Magistrates Court at Mavoko for purposes of extracting the decree to enable them prepare the Record of Appeal.

4. The appellant have looked at the provisions under which the present application has been brought and strongly believe that the present application is premature as the scenarios envisaged under **Order 42 Rule 35 of the Civil Procedure Rules** have not crystallized. The directions have not been taken as required under the provision of **Order 42 Rule 11 of the Civil Procedure Rules**. The dismissal of this appeal can only be pursued under the provision of **Order 42 Rule 35 (2) of the Civil Procedure Rules**; however the Registrar has not yet served a Notice to Show Cause. In light of the above, the applicant's application at present is incompetent, lacks merit and an abuse of the court process.

### **Determination**

5. Parties did not submit on the application and merely relied on their affidavits. I have considered the application and the opposition to it.

6. It is true that there is inordinate delay in the finalization of appeal. The respondent is merely relying on procedural technicalities to delay the appeal. I have noted the respondent's allegations of difficulties to secure proceedings. The respondent cannot only rely on letter writing. He should make concrete steps to secure the proceedings and certification of the judgment. The respondent is relying on **Order 42 rule 35 (2) of the Civil Procedure Rules**, and stating that the Registrar has not yet served a Notice to Show Cause. The respondent should know that this is not a court of technicalities. If the Registrar shall not serve the Notice to Show Cause, does it therefore mean that the appeal will forever remain on record

without being heard until the Registrar complies? It is the finding of this court that all interested parties in a suit have an obligation to ensure the appeal is heard, and the action taken by the applicant herein to have the appeal dismissed is in order.

7. For those technicalities the respondent is relying on, I will not allow the application, so that the respondent vindicates those technicalities. However, this court hereby orders and directs the Respondent to ensure that the Record of Appeal is prepared and filed within ninety (90) days from today. On the ninety first (91<sup>st</sup>) day, and the same is not filed, the appeal herein will automatically stand dismissed with costs to the respondent in the Appeal.

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**E.K.O. OGOLA**

**JUDGE**

**DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 9<sup>TH</sup> DAY OF FEBRUARY, 2017**

.....

**DAVID KEMEI**

**JUDGE**

**In the presence of:**

Mburu – for Sila for Respondent

Mapesa – for Deya for Appellant