



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 81 OF 2015

1. KEAN TRANSPORTERS LIMITED
2. KENNETH GIKONYO MUNGAI.....APPELLANTS/RESPONDENTS
VERSUS
ANASTACIA WANGECI NJOGU (*the administrator of the estate of*
CHARLES NJOGU NGUGI (Deceased).....RESPONDENT/APPLICANT

R U L I N G

1. The Respondent filed a Notice of Motion dated 8th April, 2016 seeking the following orders:

- i. That this appeal be dismissed for want of prosecution.
- ii. That the court do order that the proceeds of the fixed deposit account No. 01282011208500 at National Bank of Kenya in the joint names of Gichachi & Co. and Miller & Co. Advocates opened on 12th March, 2015 be released to the Respondent forthwith.
- iii. That the Appellants be ordered to pay costs of the appeal and the application dated 8th April, 2016.

2. The motion is premised on the grounds on the body of the application and the supporting affidavit of the Respondent sworn on 8th April, 2016. The Respondent claims that the Appellant filed this appeal on 4th March, 2015 and served her advocates on 17th March, 2015. That since the filing of this appeal, the Appellant has made no steps to prosecute this appeal. That in so doing, the Appellant has displayed lack of interest in the appeal and that all the Appellant wanted was to deny the Respondent enjoyment of the fruits of her judgment.

3. In response to the motion, a replying affidavit was filed on 27th May, 2016. It was contested that the Appellants' advocate has been following up on the typing of the proceedings. That after the judgment was delivered, the Appellants' advocates by a letter dated 7th October, 2015 requested for certified typed copies of the proceedings, judgment and decree for purposes of lodging an appeal. That several letters have been written to the Executive Officer, Chief Magistrates' Court for assistance in obtaining the said copies but to no avail. That the Deputy Registrar of High Court served the Appellants' advocates with a notice on 21st July, 2015 and 15th May, 2015 addressed to the Chief Magistrate informing him of the

subsistence of this appeal and advising that the request for proceedings be treated with urgency. That failure on the part of the appellants to set down the appeal for hearing is borne out of factors beyond the Appellants' control. That the appellants complied with the conditions given when time was enlarged and are serious in prosecuting this appeal. That this application is premature as the scenarios envisaged in order 42 rule 35 of the Civil Procedure Rules have not been crystalised. It was further contended that directions have not been taken as required under the provisions of Section 79B of the Civil Procedure Act and that dismissal can only be pursued under Order 42 Rule 35 (2).

4. In the Respondents further affidavit sworn by Anastacia Wangechi Njogu and filed in court on the 20th June, 2016, the Respondent has taken issue with the letter dated 13th April, 2016 annexed to the replying affidavit sworn by Paul Kariba alleging that it was written just a day before the Advocate for the Respondent filed the application herein and according to him, the same must have been back dated for purposes of opposing the application herein.

5. It is further averred that the letter dated 7th October, 2014 is requesting for certified typed copies of the proceedings, judgment and decree as alleged but its addressed to the insurance company advising it about the Respondent's tabulation of costs. That the letters exhibited as annexure PK 3 to the Replying affidavit and addressed to the Executive Officer do not bear the court stamp and it's doubtful if they were ever received by the Executive Officer. It is also averred that the notice exhibited as annexure PK 4 is just a normal way of the Deputy Registrar asking for the court file from the lower court after a memorandum of appeal is filed and does not prove that the Appellant has made efforts to prosecute the appeal.

6. I have taken due consideration of the disposition by the parties and the submissions tendered therein. The Appellant does not deny that there has been delay in prosecuting this appeal but rather explained that there has been delay in securing typed proceedings. What this court needs to consider is whether the delay is inordinate. The Appellants has exhibited letters written to the executive officer and the Chief Magistrate making a follow up on the typed proceedings. What is not clear, however, is when the proceedings were applied for as there is no letter to that effect and a receipt has not been annexed as evidence for payment for the proceedings. The letters annexed to the replying affidavit are rather elusive and there is no evidence that, for those meant for the Executive Officer, they were ever received at the registry, but in the interest of justice, the court shall give the Appellants a chance to prosecute the appeal. The application dated 8th April, 2016 is therefore, dismissed but with no orders as to costs.

Dated, signed and delivered at Nairobi this 2nd day of February, 2017.

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L NJUGUNA

JUDGE

In the presence of

..... *For the Appellants*

..... *for the Respondents*