



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO 387 OF 2014

MOSES MAINA MUTARU.....APPELLANT

VERSUS

STEPHEN KAMAU GITAU.....RESPONDENT

RULING

1. The respondent/applicant has filed a notice of motion dated 4th March, 2016 under order 42 rule 1 (1) 2,11,12,13 (1), 3 and 35(1) of the Civil procedure Rules and Section 3A of the Civil Procedure Act. He seeks dismissal of the appeal for want of prosecution. The grounds upon which the motion is premised are outlined on the body of the motion and the supporting affidavit of Nelson Kaburu Felix who is an advocate in conduct of this matter on behalf of the respondent.
2. He stated that the memorandum of appeal herein filed on 26th August, 2014 was filed against the decision rendered on 31st July, 2014 in Nairobi CMCC No. 7426 of 2008. That a ruling on the appellant's application for stay of execution pending appeal was rendered on 18th September, 2014 when stay order was given on terms. That Order 42 (2) required the appellant to file a certified copy of the decree appealed from with the memorandum of appeal and where that was not possible to file to it as soon as possible or within such time as the court may order. That the appellant has not complied to date. It was contended that the appellant has not applied for proceedings to be typed.
3. The respondent/appellant filed a replying affidavit and grounds of opposition in response to the application. It was contended that the respondent wrote to the executive officer requesting for typed proceedings and that the said proceedings were just recently supplied to the appellant. That the appellant has since prepared a record of appeal save for the decree and that the said record shall be ready once the decree is obtained. That the advocate who initially drafted the decree forwarded the same for approval but the same has not been approved by the lower court registry. It was further contended that the motion has been brought under the wrong provisions of the law since Order 42 Rule 11 does not provide for dismissal of appeal. That in accordance with section 79B of the Civil Procedure Act and without admission of an appeal, no steps can be taken in the appeal.
4. The submissions by the parties are a reiteration of their dispositions in their affidavits.
5. The substantive law on dismissal of an appeal for want of prosecution is order 42 Rule 35 of the Civil Procedure Rules. The said provision provides:

***“35 (1) unless within three months after the giving of directions under rule 13 the appeal shall have been set down for hearing by the appellant, the respondent shall be at liberty to set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.*”**

(2) if, within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal.”

6. The court has considered the material before it. The application is mainly brought under Order 42 Rule 35 (1) which deals with dismissal of appeals for want of prosecution. Under that provision, the court can only dismiss the appeal if within three months after the giving of directions it has not been listed for hearing. I note that directions have not been given in this appeal but that notwithstanding, the court could still dismiss the appeal under its inherent powers donated by Section 3A of the CPA.

7. The court has also noted that the respondent has filed a record of appeal although the same was filed after the application herein had been filed which is, nevertheless, a positive step towards prosecution of the appeal. I have perused the annexures to the replying affidavit and all of them were done in the year 2014 and no action was taken the whole of 2015.

8. This court is not convinced that the appellant has done enough to prepare the appeal for hearing but for the reason that the lower court file is yet to be received in this court, I will not dismiss the appeal.

In the upshot, the application dated 4th March, 2016, is hereby dismissed with no orders as to costs.

Dated, signed and delivered at Nairobi this 23rd day of February, 2017.

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L NJUGUNA

JUDGE

In the presence

..... ***For the Appellant***

..... ***For the Respondent***