



REPUBLIC OF KENYA
IN THE HIGHCOURT OF KENYA AT NYERI

CIVIL APPEAL NO. 23 OF 2014

T.M. KIMANI.....1ST APPELLANT/RESPONDENT

FIRESTONE K. KAMAU.....2ND APPELLANT/RESPONDENT

VERSUS

TERESIA NGENDO KENYU..... RESPONDENT/APPLICANT

RULING

By a motion dated 3rd July, 2016, the applicant moved this court for orders that this honourable court be pleased to dismiss the appeal herein for want of prosecution and that the costs of the costs of the motion be borne by the appellants. The motion was made under **order 42 rule 35 (2)** of the Civil Procedure Rules and **sections 1A 1B and 3A** of the **Civil Procedure Act (cap 21)**. It was supported by the affidavit of the learned counsel for the applicant, Mr. Anthony Mwangi Ng'ang'a sworn on 4th June, 2016 and which was filed in court on 5th July, 2016.

According to Mr Nganga, the judgment appealed against was delivered on 4th April, 2014. The appellants filed their appeal on 29th April, 2014 and served it on 10th November, 2014. However, despite the appeal having been admitted, neither the record has been prepared by the appellants nor have they taken any step towards having the appeal heard. In the meantime, the respondent cannot enjoy the fruits of her judgment and she continues to suffer from the effects of the accident out of which the case against the appellants arose.

The appellants opposed the motion and filed grounds of objection and a replying affidavit in that respect. Two cardinal points which they raised in their grounds of objection are that it is mandatory that directions should be given as provided in **section 79B** of the **Civil Procedure Act** before the respondent can make an application for dismissal of the appeal for want of prosecution. Secondly, according to **order 42 rule 35(2)** of the Civil Procedure Rules, it is only the registrar who can place an appeal before a judge in chambers for dismissal if directions under section 79B of the Civil Procedure Act have not been issued.

Both counsel filed written submissions in which they reiterated more or less what they raised in the supporting affidavit and in the grounds of objection.

The law applicable to dismissal of appeals filed in this court against decisions of the lower court is **Order 42 rule 35** of the **Civil Procedure Rules**; this rule provides as follows: -

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 either 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.

According to this rule, there are two occasions that may invite dismissal of an appeal for want of prosecution; first, if the appeal has not been set down for hearing within three months of the date of the issuing of directions under **rule 13** of the rules, the respondent may take the initiative and have the appeal dismissed. The second scenario is where the appeal has not been set down for hearing within one year of the date of service of the memorandum of appeal; in this latter case, it is the court which acts *suo moto* and lists the appeal for dismissal.

It follows that although the applicant invoked **rule 35(2)**, it is not available to her; the rule applicable, assuming that her application is mature, is **rule 35(1)** instead.

A plain reading of **rule 35(1)** presupposes that directions on the hearing of the appeal must have been given before a respondent can initiate an application for its dismissal for want of prosecution; time for initiating such an action starts running only after the directions have been issued. The literal and plain meaning of this rule is that until such a time that directions have been issued, the appeal is not mature for hearing and therefore it would be premature in such a case to dismiss it for want of prosecution; the appeal is simply not yet due for such prosecution.

Apart from **rule 35(1) of the rules, section 75B** of the **Civil Procedure Act** has it that even before those directions are given, the judge must have perused the appeal and considered that it is an appeal that deserves to be admitted and heard on merit rather than rejected summarily. That section provides:-

79B. Summary rejection of appeal

Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against he may, notwithstanding section 79C, reject the appeal summarily.

Considering the forgoing provisions of the law, I would say in conclusion that since the conditions precedent to making the application for dismissal of the appellants' appeal for want of prosecution have not been satisfied, the applicants' application is premature and therefore misconceived. I would dismiss it with no order as to costs.

On the other hand, it is evident that the appellants have gone to slumber. There is no reason why they have not compiled the record of appeal and filed it since the record from the lower court show that a certified copy of the proceedings has always been available. If this will help nudge them into action, I direct that the appellants file and serve their record of appeal within 30 days of the date hereof and in default their appeal automatically stands dismissed.

Dated, signed and delivered in open court this 12th day of May, 2017

Ngaah Jairus

JUDGE