



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 355 OF 2012

BONIFACE NDIRANGUAPPELLANT

V E R S U S

CATERESS MILLING COMPANY LTD.....1ST RESPONDENT

PETER KUGURU2ND RESPONDENT/APPLICANT

RULING

1. The subject matter of this ruling is the summons dated 26th October 2016 in which Cateress Milling Co. Ltd and Peter Kuguru, the 1st and 2nd respondents herein applied for this appeal to be dismissed for want of prosecution pursuant to the provisions of Order 42 rule 35 of the Civil Procedure rules. The summons is supported by the affidavit of Peter Kuguru. When served, Boniface Ndirangu, the appellant herein, filed a replying affidavit he swore to oppose the summons. When the summons came up for interpartes hearing, learned counsels recorded a consent order to have the same disposed of by written submissions.

2. I have considered the grounds stated on the face of the summons plus the facts deponed in the affidavits filed in support and against the summons. I have further considered the written submissions filed. At the time of writing this ruling, the applicants were the only parties who filed their written submissions. Before considering the substance of the summons, let me set out the background of this dispute. Boniface Ndirangu, the appellant herein filed an action vide the amended plaint filed on 28th October 2011 before the Chief Magistrate's court, Milimani Commercial Courts, Nairobi in which he sought for inter alia:

i. Mesne profits and loss occasioned by the conversion of motor vehicle registration no. KBB 701A Mitsubishi Canter HD worth ksh.561,000/=.

ii. General damages for trespass and conversion.

iii. Costs and interests.

iv. Refund of ksh.49,800 for over payment.

3. The suit was heard and in the end, both the suit and the counter-claim were both dismissed in its judgment delivered on 14.2.2011. The defendant felt aggrieved, hence he filed the motion dated 26th March 2012 to have the original decision to be reviewed and set aside. The motion was heard and allowed on its merits. Consequently, the judgment in the counter-claim was entered in favour of the respondents in the sum of two hundred sixty five only for the counter-claim. The appellan'ts (plaintiff's)

suit was eventually dismissed.

4. Being further aggrieved the appellant filed this appeal in which he put forward the following grounds of appeal.

1. The learned magistrate erred in law and fact in dismissing the plaintiffs suit whereas there was clear evidence that the plaintiffs motor vehicle had been illegally held by the respondents.

2. The learned magistrate erred in law and fact in not awarding the plaintiff the sum of kshs.561,00/= being the expenses incurred by the plaintiff in hiring another motor vehicle after his motor vehicle was illegally held by the respondents.

3. The learned magistrate erred in law and fact in not awarding the plaintiff damages as pleaded in the plaint for trespass to his motor vehicle by the defendant even after proving that his motor vehicle had been illegally held by the respondents.

4. The learned magistrate erred in law and fact in awarding the defendants the sum of kshs.265,500/= and reviewing her own judgement.

5. The learned magistrate erred in law and fact in reviewing her own judgment whereas there was no new evidence or information placed before her to warrant such a review and thus sitting on her own appeal.

6. The learned magistrate erred in law and fact in alluding to extraneous issues in her judgment and which issues were not in contention or raised during the entire hearing.

7. The learned magistrate erred in law and fact in failing to make a finding on a documentary evidence produced by the plaintiff which clearly proved the plaintiffs case and thus arriving at a wrong decision to the detriment of the applicant.

5. The matter now before this court is the motion which seeks to have the appeal dismissed for want of prosecution.

6. It is the submission of the respondents that the memorandum of appeal was filed on 12.7.2012 and directions were taken on 8th October 2015. It is argued that it is now more than a year since directions were taken and the appellant has taken no step to prosecute it. The respondents further argued that the pendency of the appeal heavily prejudices them since they are unable to enjoy the fruit of the judgment in the court below. In the replying affidavit the appellant pointed out that on 8.10.2015, this court gave directions to the effect that the decree be certified thus requiring the trial court's file to be taken back to the trial court for that purpose. It is said that since then the lower court file has not been taken to the trial despite various requests being made. He annexed to the replying affidavit a copy of the letter the appellant wrote to request to be supplied with the certified copy of the decree.

7. I have considered the material placed before this court and it is clear to me that there is no dispute that directions were taken pursuant to the provisions of Order 42 rule 13(3) of the Civil Procedure Rules. It is also not in dispute that more than one year has lapsed since directions were taken yet the appeal has not been listed for hearing. Under Order 42 rule 35(2) of the Civil Procedure Rules, the respondents were entitled to file the application for dismissal of the appeal for want of prosecution. The appellant has however stated that it has been difficult to have the file taken to the trial court for certification of the decree. This assertion has not been controverted by the respondents. In fact, the record is clear that this court gave directions on 8.10.2015 indicating *inter alia* that the decree annexed to the supplementary record of appeal was not certified. I am convinced that the appellant has given plausible explanation as to why the appeal had not been prosecuted. Consequently I dismiss the motion and direct the Deputy Registrar of this court to liaise with the trial court to have the trial court's file taken to the trial court to certify the decree as a matter of urgency.

8. Costs of the motion to await the outcome of the appeal.

Dated, Signed and Delivered in open court this 9th day of June, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent