



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 15 OF 2014

(An appeal from the Judgment of the Ag. Senior Resident Magistrate, Runyenjes in PMCC No. 9 of 2005 dated 12/06/2014)

MUNGANIA TEA FACTORY.....APPELLANT

VERSUS

JOHN MURIITHI.....RESPONDENT

R U L I N G

1. This is the application dated 16/7/2015 seeking that the memorandum of appeal filed on 15/5/2014 be dismissed for want of prosecution and that the orders of stay granted in the lower court be vacated. The application is supported by the affidavit of Julius Orege.
2. In the affidavit, it is stated that the appellant was granted conditional stay pending appeal and was ordered to deposit the decretal amount in a joint interest account orders which he never complied with. No action has been taken since the appeal was filed on 15/5/2014 despite requests by the applicant.
3. In a replying affidavit, it is stated that the cheque to deposit the decretal amount was issued by the respondent on 14/7/2014. Counsel for the respondent then wrote to the applicant's advocate asking them to forward executed documents for purposes of opening a account but the applicant's advocate never complied.
4. The applicant submitted that the replying affidavit was filed out of time and hence the court should strike it out. The respondent has not explained in the affidavit why the record of appeal has not been filed and served and as such the court should dismiss the appeal under Section 3A. The appellant cannot be allowed to slumber on the appeal at the prejudice of the respondent.
5. The respondent submitted that the application is brought under the wrong provisions of the law. A party cannot set down the appeal for hearing before the same is admitted and it is therefore premature to apply for dismissal of the appeal. It was argued that there is no legal provision for dismissal of appeal for want of prosecution. It is evident that the respondent complied by drawing a cheque. The applicant's advocates have failed to avail themselves for purposes of opening a joint account.
6. Order 42 rule 35 of the Civil Procedure Rules provides that ;

(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.*

7. In the case of **JURGEN PAUL FLACH VS JANE AKOTH FLACH [2014] eKLR** the court cited the case of **KIRINYAGA GENERAL MACHINERY VS HEZEKIEL MUREITHI IRERI HCCC NO. 98 OF 2008** where Mary Kasango J interpreting Order 42 Rule 35 held that

It is clearly seen from that rule that before the respondent can move the court either to set the appeal down for hearing or to apply for dismissal for want of prosecution, directions ought to have been given as provided under rule 8B. Directions have never been given in this matter. The directions having not been given the orders sought by the respondent cannot be entertained.

8. In the case of **PROTEIN & FRUITS PROCESSORS LIMITED & ANOTHER VS DIAMOND TRUST BANK KENYA LIMITED [2015] eKLR** the court held that from the provisions of Order 42 Rule 35 an appeal can only be dismissed for want of prosecution in two instances. Firstly where there has been failure to list the appeal for hearing for three months after directions have been made under Order 42 Rule 13 and secondly if after one year of service of the memorandum of appeal the appeal has not been listed for hearing. Under the first scenario the appeal can only be dismissed if it has been admitted and directions have been given.

9. The authorities cited herein give concern the first ground. Order 42 Rule 3 gives the respondent an option to write to the registrar to set down the appeal for dismissal for want of prosecution. The respondent did not comply with Rule 35 in that he did not write to the registrar. For this reason the respondent does not deserve to get a remedy under this ground.

10. The second ground is based on non-compliance with stay orders given by the trial magistrate on 12/06/2014 as follows:-

The stay of execution is hereby granted pending the hearing and determinations of the Embu HCCC 15 of 2014 on condition that the defendant/applicant to deposit the decretal sum in a joint income earning account in the names of the lawyers of both parties in 45 days from the date hereof failure the stay lapses.

11. After obtaining orders for stay of execution the applicant went to sleep. This application was filed in July 2015 which was over one (1) year after the orders were granted. Even after the application was filed, the appellant did not move to comply with the orders of the court.

12. The money was supposed to be deposited in an interest earning account in the joint names of the parties within 45 days. The time for depositing the money expired on 27/07/2015. The appellant is not bothered that he continues to enjoy the stay orders while he disobeys the order which formed the condition upon which stay was granted.

13. The parties have exchanged correspondence on the cheque for the decretal amount. A cheque for Kshs.69,574/= dated 14/07/2014 was sent to the respondent's advocate but an account was not opened due to the fact that the counsel was admitted in hospital.

14. On 31/7/2014, the respondent's counsel in a letter explained the circumstances for failure to act on the cheque. She requested for duly executed documents from the appellant to enable her open the account in Equity Bank. The appellant did not respond to the letter and to two others which followed dated 20/01/2015 and 22/01/2015. The appellant did not failed to send a fresh for the earlier one had gone stale and neither did he send duly executed documents to the respondent's counsel.

15. With the brief conduct of the parties in this matter, the appellant who had obtained the orders failed to do his part of the deal and also neglected to respond to correspondence. I reach a conclusion that the appellant breached the condition upon which the stay was based. He does not deserve to continue

enjoying the stay. The respondent on the other hand deserves a remedy in the prevailing situation.

16. I decline to grant the orders for dismissal of the appeal for the foregoing reasons.

17. However, I grant prayer 2 of the application and order that the orders for stay of execution granted on 12/06/2014 are hereby vacated.

18. The respondent is granted 30 days within which to have directions taken and appeal listed for hearing failure to which the appeal will stand dismissed.

19. Costs in the cause.

DELIVERED, DATED AND SIGNED AT EMBU THIS 13TH DAY OF JULY, 2016.

F. MUCHEMI

JUDGE

In the absence of both parties