



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 21 OF 2013

MOHAMED SALIM BASHIRAPPELLANT

VERSUS

SHAMI TRADING CO. LIMITEDRESPONDENT

RULING

1. Through an application dated 11th July, 2016 the respondent/applicant seeks orders that:-

- i. This Honourable Court be please (sic) to dismiss this appeal;
- ii. In the alternative, if the Honourable court is not agreeable to issue order number 1, this Honourable court be pleased to order for the file to be placed before a Judge for directions under section 79B of the Civil Procedure Act (Cap 21) Laws of Kenya;
- iii. In case the Honourable court is inclined to admit the appeal, this Honourable court be pleased to order the appellant to list this appeal for directions under order 42 rule 13 of the Civil Procedure Rules within 21 days from the date the appeal is admitted; and
- iv. The costs of this application be borne by the appellant.

2. The application is supported by the affidavit of Amir Shazaad dated 11th July, 2016 and the grounds on the face of the application. It has been brought under sections 1A, 1B, 3A and 79B of the Civil Procedure Act and order 42 rule 11 of the Civil Procedure Rules and other enabling provisions of the law.

3. Mr. Hassan, Learned Counsel for the applicant submitted that the appeal on record was instituted on 26th February, 2013 and that the only action taken since then by the appellant/respondent was the filing of an application that was dismissed on 11th October, 2010. He further submitted that the appeal has not been listed for directions or hearing for 2 years and 11 months. He prayed that the application be allowed with costs.

ANALYSIS AND DETERMINATION

The issue for consideration is if the applicant has made out a case for dismissal of the appeal for want of prosecution.

4. The applicant's deponent in paragraphs 5, 6 and 7 of the affidavit deposes that the law mandates the appellant to list the appeal for directions within 30 (thirty) days upon filing the appeal and the appellant in this matter failed to do so. The undue delay in the hearing of the appeal, states the applicant, is against the interest of justice, the spirit of law and equity and it is clear that the appellant is no longer interested in

pursuing his appeal since his application for stay was dismissed.

5. The appellant was not represented at the hearing of the application as Mr. Njenga who held brief for Mr. Asige Kaverenge and Anyanzwa informed the court that the said law firm had no instructions in the matter.

6. Order 42 rule 11 of the Civil Procedure Rules provides as follows:-

“upon the filing of the appeal, an appellant shall within thirty days, cause the matter to be listed before a judge for directions under section 79B of the Act.”

7. Section 79B of the Civil Procedure Act provides that:-

“ 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.”

8. Order 42 rules 12 and 13 of the Civil Procedure Rules provide the processes to be followed before an appeal is heard. Order 42 rule 35 (1) provides for dismissal of an appeal for want of prosecution in the following words:-

“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 appellant 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 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 the a Judge in chambers for dismissal.”

9. In the case of **Kirinyaga General Machinery vs Hezekiah Mureithi Ireri**, HCCC No. 98 of 2008, Kasango Judge held:-

“It is clearly seen from that rule that before the respondent can move the court either to set down the appeal down for hearing or to apply for dismissal for want of prosecution, directions ought to have been given as provided under section 78B. Directions have never been given in this matter. The directions having not being given the orders sought by the respondent cannot be entertained.”

10. A plain reading of the foregoing provisions clearly indicates that an appeal can only be dismissed under order 42 rule 35(1) of the Civil Procedure Rules after directions have been given by a Judge. In the instant appeal, directions have not been issued to date. That being a pre-requisite to the dismissal of an appeal under the provisions of order 42 rule 35(1), this court cannot grant the orders sought. The application dated 11th July, 2016 is therefore dismissed with no order as to costs.

DELIVERED, DATED and SIGNED in open court at Mombasa on this 5th day of **October, 2016**.

NJOKI MWANGI

JUDGE

In the presence of

No appearance for the appellant/respondent

Mr. Hassan for the respondent/applicant

Mr. Oliver Musundi Court Assistant