

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 266 OF 2015

DAVID AUGUSTINE & ANOTHER.....APPELLANTS

- V E R S U S -

PATRICIAH KWAMBOKA MOKAYA.....RESPONDENT

RULING

1. The applicant brought the application dated 20th June 2016 where he sought for the following orders:

1. THAT the appellants appeal be dismissed for want of prosecution.

2. THAT in the alternative the appeal be deemed to have abated.

3. THAT the appellants do bear the costs of this application.

2. The respondents in response, deponed a replying affidavit to the effect that upon institution of the current appeal vide memorandum of appeal dated 26th May 2015, the respondents wrote to the executive officer of the lower court requesting for certified copies of the decree, judgment and typed proceedings to enable them file a record of appeal but the letter elicited no response. That in furtherance to that letter, the deputy registrar wrote to the executive officer vide a letter dated 3rd June 2015 requesting for the original record of the lower court, copies of decree judgment and typed proceedings, but the same did not elicit any response. They argued that the appeal is not ripe for dismissal since the delay to prosecute the appeal was caused by the lower court in failing to furnish the High Court with the necessary documents. They deponed further that directions have not been given under Section 79B of the Civil Procedure Act and that dismissal for want of prosecution under Order 42 Rule 5 of the Civil Procedure Rules can only be sought after such directions have been issued. The respondents further argued that it is only the registrar who can list an appeal before a judge in chambers and even then the appellant must obtain typed and certified copies of proceedings.

3. I have considered the grounds stated on the face of the motion plus the facts deponed in the affidavits filed in support and against the application.

4. It is important to discover whether or not there were concerted efforts on the part of the appellants/respondents in prosecuting this appeal. According to Order 42 Rule 35(1) of the Civil Procedure Rules as invoked by the appellant, requires the appellant to cause the matter to be listed before a judge for directions under Section 79B of the Civil Procedure Act within 30 days from the date of filing the appeal. Under this provision, the judge perusing the record is barred from rejecting the appeal summarily until a certified copy of the decree is filed.

5. The appellants have explained that they had some difficulty in obtaining the proceedings and decree from the trial court. Moreover, even the deputy registrar tried vide his letter dated 3rd June 2015 to obtain the original record, certified copies of the judgment/ruling and a certified copy of the extracted decree or order appealed against without success. The appellants had vide their letters dated 16th June 2015 and 7th May 2014 tried to obtain the proceedings and judgment.

6. In the end, I find the motion to be premature. It is ordered struck out with costs abiding the outcome of appeal.

Dated, Signed and Delivered in open court this 11th day of November, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent