



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NUMBER 315 OF 2013

STANLEY KARIUKI. 1ST APPELLANT

ANTHONY MACHARIA NJERI. 2ND APPELLANT

VERSUS

HOTENSIA NJERI MWAURA.RESPONDENT

R U L I N G

The Respondent/Applicant has moved this court by way of a Notice of Motion dated 13th April, 2016 under Article 165 and 159 (2) of the Constitution Sections 1A, 1B, 3 and 3A of the Civil Procedure Act and has sought the following orders: -

1. That the honourable court be pleased to dismiss the appeal herein for want of prosecution occasioned by Appellant's neglect and refusal to complete the record of appeal.
2. That cost of this application be granted.

The application is supported by the affidavit of Beth Mushi sworn on the 13th April, 2016 and it's premised on the grounds set out on the body of the application. It is contended that the accident the subject matter of the lower court matter occurred on in the year 2011 and the suit was filed the same year. The appeal herein was lodged on the 6th June, 2013, three years ago.

That since the appeal was filed, the Appellant has not taken any steps to prosecute the appeal let alone filing the record of appeal. The Respondents, have averred that, though their advocate on record, several letters have been written to the counsel for the Appellant requesting her to follow up the appeal to no avail.

That the Respondent suffered serious injuries following the accident following which she is unable to work, to tend for her family and the damages awarded herein would go a long way in helping her. She has urged the court to dismiss the appeal.

The Respondent filed grounds of opposition on the 26th July 2016 on the following grounds: -

1. The application is an after thought, abuse of the court process and has no merits.
2. The application is incompetent, frivolous, vexatious and a delaying tactic.

3. Prayer 2 of the application is intended to delay the Respondent from obtaining the balance of the judgment sum awarded to her by the lower.

When the application came up for hearing on the 13th September, 2016, the same proceeded ex parte as counsel for the Appellant did not attend court though she had been served with a hearing notice on 25th July, 2016.

The court has considered the application herein, the supporting affidavit and the submissions by the counsel for the Applicant. The court has also perused the record and it confirms that the Memorandum of Appeal was filed on the 6th June 2013. Contrary to submissions by the Applicant, the record of appeal was filed on the 12th day of November, 2014 after which no other action has been taken in the appeal.

Under Order 42 Rule Of the Civil Procedure Rules, the only time a party can apply for the dismissal of Appeal for want of prosecution is after directions have been given but with revision of the Civil Procedure Act in year 2010, the Appellants are expected to be pro-active and follow-up their appeals to ensure that they are listed for directions. The Appellant did not attend court to defend the application with a view to explaining to the court what steps she has taken to move the appeal forward.

The application proceeded ex parte despite the fact that counsel for the Appellant has been served. This could mean that the Appellant has lost interest in the appeal since the application has been brought under Sections 1A, 1B, 3 and 3A. I will invoke the inherent jurisdiction of the court and dismiss the appeal with costs to the Respondent.

Dated, signed and delivered at Nairobi this 3rd day of November, 2016.

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L NJUGUNA

JUDGE

In the presence

..... ***For the Appellants***

..... ***for the Respondent.***