



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 659 OF 2006

1. CHRISTOPHER KENYATTA

2. OPINI EMILY AGNES.....APPELLANTS

VERSUS

SILAS MATHEKA MBINDYO.....RESPONDENT

RULING

1. The Respondent herein filed a suit against the Appellants seeking compensation following a road traffic accident which occurred on 31st July, 2005. The matter was heard by the trial court and judgment entered in favour of the Respondent at KShs. 150,000/= being general damages subject to liability which was apportioned at 75:25 between the Appellants and the Respondent.

2. The Appellants felt aggrieved by the award of damages and filed this appeal on 2nd October, 2006. The record of appeal was subsequently filed on 27th March, 2013. The Respondent's advocates vide a letter dated 10th October, 2014 wrote requesting the Deputy Registrar of this court, to dismiss this Appeal under Order 42 Rule 35 (2) for failure of the Appellants to set down the appeal for hearing. This appeal was thereafter set down for mention on 12th February, 2015 for purposes of dismissal and a notice to that effect was served upon Appellants' Advocates on record. When the matter came up for hearing on that day no Affidavit showing Cause had been filed and the Appellant was given more time to show cause.

3. Counsel for the Appellants Pramod Patel, swore an Affidavit on 19th February, 2015 to show cause why this appeal should not be dismissed. He averred that the record of appeal had not been admitted since he had not received a certified copy of the decree from the lower court to make the record complete. He stated that he made necessary steps to obtain the decree and annexed a letter dated 16th February, 2015 to the Executive Officer of the lower court to be supplied with a certified copy of the decree. He tried to explain away the delay in prosecuting this appeal as having been partly occasioned by failure by the lower court to extract the decree in time despite him making effort to follow up on the same. He stated he had obtained all the documents needed to file a supplementary record of appeal save for the decree which he said shall be ready in three (3) days from the date of the affidavit and he requested for fourteen (14) days within which to file a supplementary record of appeal.

4. I have read the record and considered the deposition by Mr. Pramod Patel. What falls for this court's determination is whether or not this appeal is ripe for dismissal. The applicable law is in Order 42 Rule 35 (2) of the Civil Procedure Rules. It provides as follows:-

"(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."

5. The Appellant's position is that the delay in prosecuting the appeal was occasioned by failure of the lower court to extract the decree. It was in fact alleged that attempts were made to obtain the decree in good time to no avail. I have seen the letter annexed to the Affidavit showing cause. The letter is dated 16th February, 2015. That was five (5) months after the Respondent's Advocates had requested for the dismissal of the appeal vide a letter dated 10th October, 2014 and presumably years after service of the memorandum of appeal. Although the Appellant's counsel stated that he made attempts to extract a decree only one letter which is dated four (4) days after the matter was adjourned to give the Appellant time to show cause. In my considered view, that is not sufficient evidence to prove the attempts made in extracting the decree.

6. Considering also the provisions of Order 42 Rule 2 which provides as follows:-

"Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject appeal summarily under Section 79B of the Act until such certified copy is filed."

It is my view that the Appellant was under duty to seek more time within which it could file the supplementary record of appeal soon after filing the record of appeal on 27th March, 2013.

7. In view of the foregoing, the Appellant has not established sufficient cause for the delay in prosecuting this appeal and it is hereby dismissed with costs to the Respondent.

DATE, SIGNED and DELIVERED at Nairobi this 6th day of March 2015

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A MABEYA

JUDGE