



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APEAL NO73 OF 2008

THE CO-OPERATIVE BANK OF KENYA LTD.....APPELLANT

VERSUS

MARY WAMBUI.....RESPONDENT

(Appeal from the decision of Honourable Mr. Were, Resident Magistrate delivered on 4th February 2012 in Milimani CMCC No6817 of 2006).

RULING

This is an application by the Respondent under Section 3A of the Civil Procedure Act (the **Act**) and **Order 42, rule 35(2)** of the **Civil Procedure Rules, 2010** (the **Rules**) for dismissal of the Appellant's appeal for want of prosecution. The sub-rule states -

“(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 of the parties list the appeal before a judge in chambers for dismissal.”

There is seemingly nothing wrong with a respondent applying under this sub-rule as his/her application will achieve the same purpose; that of placing the appeal before a judge *interpartes* for dismissal.

The learned counsel for the respondent filed the supporting affidavit. It is the Respondent's case in this application that the memorandum of appeal was filed on 19th February 2008, and the lower court file forwarded to this court on 26th November 2009. The deponent has further pointed out that the Respondent applied to the Registrar to have the appeal dismissed vide a letter dated 3rd August 2009 which prayer was not granted.

Further, it is the Respondent's case that on 24th March 2012, the Deputy Registrar wrote to the Appellant's Advocates advising them to take measures to have their appeal set down for hearing. Despite this, by the time the application was filed on 15th May 2012, a period of two years afterwards, the appeal had not been set down for hearing. The Respondent has further pointed out that the Appellant has not filed his record of appeal and thus she cannot set the same for hearing. That it is clear that the Appellant is no longer interested in the appeal and the application should be allowed as it cannot be held in abeyance indefinitely.

The Appellant has opposed the application by grounds of opposition filed on 22nd May 2012 and a replying affidavit sworn by his advocate, one **Willis Echessa**. He has explained his side of the story *inter*

alia as follows,–

- (i) That it has been difficult to extract the decree and certificate of costs from the Resident Magistrate’s Court as the file was forwarded to this Court bearing in mind it is necessary to have the file at the registry.
- (ii) That there has been no deliberate delay on the Appellant’s side as it risks losing the decretal sum, interest and costs if the appeal were to be dismissed.
- (iii) That the appellant is ready to proceed with the appeal considering the full record of proceedings is in place; it should be heard on merit to avert any prejudice being suffered by either of the parties.
- (iv) That substantive justice ought to be done thus the appeal should be set down for hearing so as not to occasion any party the disadvantage of not being heard.
- (v) That Order 42 rule 35 (2) provides that it is the Registrar of the High Court who lists the appeal for dismissal and not the parties.

Rule 35(1) of Order 42 of the Rules provides for a respondent to either set down the appeal for hearing or apply for its dismissal for want of prosecution if within three months after the giving of directions under rule 13 of the same Order, the Appellant shall not have set the appeal down for hearing. Such directions have not been given in this appeal. Indeed, the appeal has not even been admitted to hearing. So, the Respondent cannot avail himself of the remedy provided by Rule 35(1).

The court however, has inherent jurisdiction to order dismissal of an appeal for want of prosecution even when directions under Rule 13 have not been given. The court has inherent power which may be exercised as may be necessary to prevent abuse of the process of the court. An appeal which is lodged without the intention of ever prosecuting it, but with the intention of delaying or obstructing the cause of justice, is an abuse of the process of the court.

Nevertheless, before a Respondent can invoke the inherent jurisdiction of the court to dismiss an appeal for want of prosecution before directions under Rule 13 are given, he must exhaust the remedies provided under the Rules. In this case, for example the Respondent wrote to the registrar of the court to request that the appeal be placed before a judge in chambers under Rule 35 (2) for dismissal in the letter dated 3rd August 2009. On 24th March 2010, the Registrar wrote to the Appellant requesting them to take appropriate measures to have the appeal set down for hearing.

There is justification in the Respondent’s plea that there has been unexplained delay in prosecuting the appeal. The application was filed 4 years 2 months after filing the memorandum of appeal which is more than the time prescribed under rule 35(1). The Respondent has even written to the Registrar to have the matter listed before a Judge for dismissal. She should be permitted at this stage to invoke the inherent power of the court to dismiss the appeal for want of prosecution.

The end result is that the application succeeds. The appeal is hereby dismissed for want of prosecution.

The respondent shall have the costs of this application.

Dated and delivered at Nairobi this 4th Day of March, 2015.

A.MBOGHOLI MSAGHA

JUDGE