



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NUMBER 82 OF 2013

RIFT VALLEY RAILWAYS LIMITED.APPELLANT

VERSUS

JEREMIAH KYALO MWANTHI. RESPONDENT

R U L I N G

The Applicant/Respondent filed a Motion dated 19th September, 2014 seeking dismissal of the Appeal herein for want of prosecution. The Application is supported by the Affidavit of Jeremiah Kyalo Mwanthi.

The Appeal herein was lodged by the Appellant on the 1st day of February, 2013. It is an Appeal against a judgment delivered by Hon. Obulutsa on the 29th January, 2012.

Briefly, the history of this matter is that it was filed in the lower court (Chief Magistrate's Case Number 7761 of 2009 at Milimani) on the 10th November, 2009 wherein the Plaintiff sought damages for malicious prosecution and wrongful termination of employment. The matter proceeded until 2012 when a judgment was delivered as herein above stated against the Respondent, Rift Valley Railways Limited who being dissatisfied with the said judgment filed the Appeal herein.

On the 11th March, 2013 the Appellant filed an Application under certificate of urgency which came before Justice Waweru who declined to grant ex parte orders of stay of execution which the Appellant was seeking.

The matter was again in court on 13th March, 2013 for hearing of the Application dated 8th March, 2013 when parties recorded a consent for that Application in the following terms: -

- a. Stay is granted pending the final determination of the Appeal.
- b. Appellant/applicant to grant an additional Equity Bank guarantee of Ksh.100,000/- within 14 days.
- c. Directions on 26th April, 2013.

Before the consent was recorded on 13th March, 2013 Mr. Kuyo for the Appellant/Applicant informed the court that there was an Equity Bank guarantee of Ksh.600,000/- which the Applicant was willing to provide as security and the extra Ksh.100,000/- was to be provided within 14 days from the date thereof.

Thereafter the matter came up in court on several occasions for directions but I note that eventually directions were not given.

On the 21st September, 2015 when the Application herein came up for hearing, counsel for the Appellant was not present though a hearing notice had been served upon the firm of Ochieng, Onyango, Kibet and Ohange & Co. Advocates which was received on the 9th July, 2015 and there was Affidavit of service to that effect.

Mr. Ongwae holding brief for Mr. Ondieki for the Respondent/Applicant urged the court to grant the Application and entirely relied on the Affidavit of Jeremiah Kyalo Mwanthi annexed to the said Application. In a nutshell, the deponent avers that the Appellant has not taken any steps to prosecute the Appeal for a year. He further avers that the Appellant is not desirous of prosecuting the Appeal and that litigation must come to an end.

He avers that the Respondent should be allowed to enjoy the fruits of his judgment and that the Appellant is guilty of inexcusable and inordinate delay in prosecuting the Appeal and for that reason it should be dismissed.

The Application is brought under Order 42 Rule 35 and Order 17 Rule 2(1) and (3) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.

Order 17 Rules 2(1) provides: -

“In any suit in which no Application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed and if cause is not shown to its satisfaction, may dismiss the suit.”

While 2(3) provides: -

“Any party to the suit may apply for its dismissal as provided in sub-rule 1”

Order 42 Rule 35(1) provides: -

“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 Respondent shall be at liberty either to set down the Appeal for hearing or apply by summons for its dismissal for want of prosecution.”

Rule 35(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 Judge in chambers for dismissal.”

My understanding of Order 17(1) and (3) is that, it is purely within the discretion of the court to give notice to parties to show cause why the suit should not be dismissed if no step is taken by either of the parties for one year. The provision in my view, does not give any party to the case the option to move the court for dismissal. This is because in Order 17 (3) of any party to the suit may apply for its dismissal as provided in sub-rule 1 and sub-rule 1 gives the discretion to the court and not to any party. This, therefore, means a party cannot move to court under Order 17(3) alone because it is subject to sub-rule 1 of the same and in any event Order 17 refers to a suit and not an Appeal.

On the other hand, Order 42 Rule 35(1) refers to an Appeal. This order gives the Respondent an option to apply by way of summons for dismissal of an Appeal for want of prosecution but such a Respondent can only do so 3 months after directions have been given under Rule 13 if the Appeal shall not have been set down for hearing.

Before directions have been given, the Respondent cannot successfully move the court for dismissal of an Appeal under this rule.

In the case of **Kirinyaga General Machinery Vs Hezekiel Mureithi Ireri** HCCC No. 98 of 2008 the Judge observed: -

“It is clearly seen from that rule that before the Respondent can move the court either to set the Appeal down for hearing or to apply for dismissal for want of prosecution, directions ought to have been given.”

In the instant case, directions are yet to be given but the court can still exercise discretion and invoke Order 42, Rule 35(2) had the Respondent persuaded this court to exercise its discretion which he failed to do.

The upshot of the foregoing is that the Application is dismissed and the following orders given.

- a. **The Appeal be heard at Nairobi by a single Judge.**
- b. **The Appeal to be fixed for hearing within the next 30 days failing which it shall stand dismissed.**

Dated and delivered at Nairobi this 15th day October, 2015.

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LUCY NJUGUNA

JUDGE

In the presence of

..... for the Appellant.

..... for the Respondent.