



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 49 OF 2004

SAMUEL MWANGI NJOROGEAPPELLANT/RESPONDENT

VERSUS

GRACE WANGUI NJOROGE RESPONDENT/APPLICANT

R U L I N G

1. The Respondent/Applicant filed this notice of motion dated 18/4/2013 under Order 42 rule 35(2) Civil Procedure Rules and section 3A Civil Procedure Act seeking the following orders;
 - a. THAT this appeal be listed before a Judge and that it be dismissed for want of prosecution.
 - b. THAT the costs of this application and of the appeal be awarded to the respondent.
2. The application is based on the following grounds;
 - i. THAT this appeal was filed on 3/11/2004.
 - ii. THAT this appeal has never been set down for hearing.
 - iii. THAT there has been inordinate delay in setting appeal down for hearing.
3. When the application came up for hearing, both Counsels agreed to dispose of the said application by way of written submissions. M/s kibunja for the respondent/applicant submitted that the appeal had been pending hearing for over nine (9) years and he blamed this delay on the appellant/respondent.
4. On the other hand Mr. Mutahi for the Appellant/Respondent submitted that the appellant/respondent forgot about the appeal after undergoing a lot of distress which caused him to suffer a mental lapse. He therefore urged the Court to be persuaded by Article 159(2) of the Constitution and not dismiss the appeal on technicalities.
5. I have considered all the submissions by both parties and the material before me.
6. Order 42 rule 35(1) Civil Procedure Rules, the appeal shall be set down for hearing by the appellant. The respondent is however at liberty to either set down the appeal for hearing or to apply for its dismissal for want of prosecution.
7. Order 42 rule 35(2) Civil Procedure Rules provides that if within one year of 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.
8. The appeal herein was filed on 3/11/2004. Records were forwarded on 12/7/2005 from Senior Principal Magistrate's Court Murang'a. The appeal was admitted by the High Court on 18/8/2005. Thereafter the appellant/respondent went to sleep. He was only woken up when the present application was filed.
9. It is clear that the respondent/applicant has no power under order 45 rule 35(2) Civil Procedure Code to bring the present application. Under this said Order and Rule it is only the Registrar who

- can move the Court by way of Notice to the parties.
10. Order 42 Rule 35(1) Civil Procedure Rules is also not applicable since no directions have ever been given in this appeal.
11. The respondent/applicant applied for dismissal under Order 42 rule 35(2) Civil Procedure Rules **AND** section 3A Civil Procedure Act. Section 3A Civil Procedure Act provides as follows;

“Nothing in this Act shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court”.

It was held by SERGON - JUDGE in **ANNAH WANJIKU KAGENYA –VS- CECILIA ACHIENG NYAYIEKA KERICHO HCCA NO.14/12** that section 3A Civil Procedure Act would be most appropriate provision to apply in such circumstance. I wholly agree with my brother Judge.

12. In the instant case, the appeal was admitted on 18th August 2005. Under Order 42 rule 13 it's the duty of the appellant to cause the appeal to be listed for directions twenty one (21) days after admission. As I have stated above the appellant/respondent herein has not taken action in this matter since the appeal was admitted.
13. Even if the appellant/respondent had a problem, he was well represented by Counsel. His Counsel should have taken up the necessary steps. He did not. He has kept the respondent/applicant anxiously waiting for almost ten (10) years for the hearing of this appeal. This is not a matter that can be covered by article 159(2) (d) of the Constitution that talks of technicalities. It is clear that the appellant/respondent has been indolent in having this matter prosecuted and no valid reason for not setting down the appeal for hearing has been advanced. He cannot therefore rely on Article 159(2) (d) of the Constitution to justify his indolence. This is a clear case of abuse of the Court process.

I therefore find the application dated 18th April 2013 to have merit. I allow it with costs.

DATED SIGNED, AND DELIVERED IN OPEN COURT AT EMBU THIS 11TH DAY OF JULY 2014.

H.I. ONG'UDI

J U D G E

In the presence of:-

M/s Ndorongo for Mutahi for applicant

Kirong – C/c