



438/2014

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CIVIL APPEAL NO. 42 OF 2012
ALPHARAMA LIMITED.....APPELLANT
VERSUS
JOHN MURIGI WAIREGI.....RESPONDENT

R U L I N G

1. Judgment was entered in **CMCC NO. 720 of 2009** by **Mungai, Senior Principal Magistrate** on the **18th day of April 2012**. **Alpharama Limited** being dissatisfied with the judgment and decree thereof appealed against the whole judgment and quantum thereto. **John Murigi Wairegi** the decree holder filed a cross memorandum of appeal, having been aggrieved by the fact that he was denied some of the relief sought.

2. By a **Notice of Motion** dated the **5th October 2012**, **John Murigi Wairegi** (Applicant) seeks dismissal of the appeal with costs on grounds that:

- i. The memorandum of appeal is a sham, frivolous and merely filed with an intention to subvert the cause of justice.
- ii. The appeal is oppressive and unjustified.
- iii. The memorandum of appeal was filed with a sole intention of using it as a basis to stay the primary suit.
- iv. The appellant has not applied for proceedings, ruling and decree in the primary suit; documents that form the basis of the record of appeal.
- v. It will be in the interest of justice to have the appeal dismissed.

3. In an affidavit in support of the application, the applicant reiterates what is stated in the grounds of the application.

4. The Respondent did not file any replying affidavit to the application. Both parties agreed to canvass the application by way of written submission. I have duly considered rival submissions of both counsels for the applicant and respondent.

5. Basically the applicant argues that failure to pursue the appeal by the appellant is an intended action to make the Respondent continue suffering having been denied fruits of his judgment by virtue of the existence of the stay order.

6. The Respondent on the other part argues that it deposited the entire decretal sum of **Ksh. 921,750/=** in a joint interest earning account hence demonstrating seriousness of an intention to prosecute the appeal on its part. Further it was submitted that they had already applied for proceedings.

7. The appellant herein having lodged an appeal was expected to take all necessary steps to ensure a record of appeal was prepared and served upon the Respondent. The appellant had a duty of ensuring the matter was listed before the Judge for directions within **30 days** of filing the appeal. The instant application was filed on the **19th October 2012**, some **six (6)** months after the appeal was lodged. The ruling date in the matter was taken on the **21st July 2014**. Upto that point in time there was no indication of any step having been taken by the Respondent as provided by the law. This would suggest non-seriousness on the part of the appellant.

8. However, dismissal of an appeal for want of prosecution is provided for by **Order 42 rule 35** that stipulates:

“(1) 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 to apply by summons for its dismissal for want of prosecution.

(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.”

9. In this case no directions had been taken. It is also important to note that there is a cross appeal – Had directions been taken, instead of the appellant seeking dismissal of the appeal he could have moved the court to set the case down for hearing.

10. It would not be right to have the case dismissed under **Order 42 rule 35(2)** because no notice has been issued by the Registrar.

11. In the premises I find the application having been instituted prematurely. Accordingly, the same is dismissed.

12. Since the appellant is guilty of laches there will be no orders as to costs.

13. It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 13TH day of NOVEMBER, 2014.

L.N. MUTENDE

JUDGE