



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 22 OF 2009

SHAMCHULIN A. GOTHEYAPPELLANT

VERSUS

JOSEPH NG'ANG'A KURIARESPONDENT

RULING

By way of a Notice of motion application dated 4th April, 2013 and expressed to be brought under order 17 rule 2(3) order 42 rule 11, 13 and 35 of the Civil Procedure Rules Section 1A, 1B and 3A of the Civil Procedure Act, the applicant seeks an order for dismissal of this suit for want of prosecution.

The application is supported by the affidavit of Joseph Ng'ang'a Kuria.

The grounds are that the applicant has failed to take steps in prosecuting the appeal herein since 20th February, 2009 when the appeal was lodged.

That the delay is inordinate.

That the appellant does not seem interested in prosecuting the appeal to the detriment of the applicant who is entitled to the fruits of his Judgment.

The application is opposed on the grounds that order 42 rule 35 gives the appellant three months within which to set down the appeal for hearing after directions have been given by the Judge.

It is contended that the appellant cannot move to prosecute the appeal without the same having been admitted and directions given by the Judge.

That when the appeal is admitted, the appellant will move the court for directions after which the appellant will move with speed to prosecute the appeal.

Counsel for the applicant submits that order 42 rule eleven states that,

“Upon filing of the appeal the appellant shall within thirty days cause the matter to be listed before a Judge for directions under section 79 B of the Act”.

He further submits that rule 13(1) of the same order further provides that,

“On notice to the parties delivered not less than twenty one days after the date of service of the memorandum of appeal, the appellant shall cause the appeal to be listed for the giving of directions by a Judge in chambers”.

Further that the delay in listing the matter for directions by the appellant has been inordinate hence the appeal should be dismissed for want of prosecution.

On the argument that the application offends the provisions of order 42 rule 35 of the Civil Procedure Rules as the appeal is yet to be admitted for hearing and directions are yet to be issued, it is submitted that an indolent appellant cannot hide under the provisions of order 42 rule 35(2) by arguing that these provisions are only inviolable by the Registrar rather than the Respondent who should move the Court under Sub rule 1 of the same rule.

Counsel for the applicant relies on the case of Laban Onono & Anor. -Vs- Dan Owiti 2006 KLR where it was held that,

“an indolent appellant cannot use sub rule (1) of rule 35 in defence against an application for dismissal of the appeal on the basis that the Respondent should invoke sub rule (1) not (2) where that sub rule (1) is unavailable to the Respondent and all because of the fault by the appellant in whose control the process prior to directions by the Court referred to in Sub rules (1) lie entirely on the appellant not the Respondent”.

It is common ground that the appeal was filed on 20th February, 2009. Since that time the appellant has not taken any steps to have the matter listed before a Judge for directions as per the provisions of order 42 rule eleven.

The appellant has not also complied with the provisions of order 42 rule 13(1) which requires the listing of the appeal for the giving of directions by a judge in chambers.

As to whether the application offends the provisions of order 42 rule 35 of the Civil Procedure Rules I agree and concur with the holding in the cited case of Laban Onono & Anor. Vs Dan Owiti 2006 eKLR and the finding of J.B. Ojwang, Judge in the case of Hussein Abdalla Vs Ahmed Abdalla.

I am satisfied that the delay is inordinate. I have also perused the memo of appeal and the records of the lower court, the appeal does have high chances of success.

I accordingly dismiss the appeal for want of prosecution .

Costs to the applicant.

Ruling delivered dated and signed this **2nd** day of **October, 2013**.

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M. MU YA

JUDGE

2ND OCTOBER, 2013

In the presence of:-

Learned Counsel for the applicant Mr. Mburu Kariuki

Learned Counsel for the Respondent

Court clerk Mr. Musundi