



REPUBLIC OF KENYA

High Court of Kisii

Civil Appeal 198 of 2007

ROSELINE ADHIAMBO APPELLANT

AND

JOSEPHINE MORAA BUNDI (suing as personal

representative of the estate of the

late **ZEBEDEO BUNDI OGANDA (DECEASED)..... RESPONDENT**

(Being an appeal from judgment and decree of Mr. S.M. Soita, PM, in

Kisii CMCC No.1046 of 2005 dated and delivered on 27th September, 2007).

RULING

1. By the notice of motion dated 27th May 2010, the respondent in the appeal seeks an order of this honourable court dismissing the appellant's appeal for being an abuse of court process and/or for want of prosecution. In addition the applicant prays that once the dismissal order is granted, the firm of M/s Okongo & Company advocates should be ordered to remit the sum of Kshs.1,147,370/= unilaterally deposited by the said firm into a non-existent joint interest earning account to the applicant's counsel within 14 days of this ruling failing which execution to issue. The application is brought under **sections 1A, 1B and 79 G of the CPA and Orders XXI, XLI and L of the CPR** made thereunder.
2. The application is supported by the grounds that are set out on the face of the application and by the affidavit sworn by Don Z. Ogweni, counsel for the applicant. The main complaint by the applicant is that the appellant has completely failed to take such action as would move this appeal forward to its logical conclusion particularly considering the fact that the appellant has to date not caused the appeal to be admitted, neither has he extracted a decree from the subordinate court. Worse still, the applicant avers that the appellant has not even applied to the subordinate court to either extract a decree or to have the proceedings typed. The applicant further avers that this appeal is malafides as it purports to appeal against liability when the issue of liability was settled by consent of the parties in the ratio of 70% to 30% in favour of the respondent.
3. The application is opposed vide the nine (9) Grounds of Opposition dated 16th July 2010 and filed in court on 19th July 2010.
4. In the main, the appellant contends that she still has interest in her appeal, the only problem being that she is yet to receive copies of the typed proceedings of the lower court which are necessary to prepare

the record of appeal. The court notes there is now duly filed in court the Record of Appeal dated 20th August 2010 and filed in court on 23rd August 2010. The proceedings and decree which were said to have been unavailable appear in the Record of Appeal at pages 27-35 and 39 respectively.

5. I have read the written submissions filed by parties to this appeal. From these submissions, and especially the submissions filed on behalf of the appellant, the application now before me was allowed by consent on 22nd July 2010. It is to be pointed out that the original court file went missing and subsequently, there was a reconstruction of the file in July 2011. The appellant argues that there is nothing left of the application dated 27th May 2010 for a decision to be made on by this court. In any event, it was argued that even if this application had not been settled, this court has no inherent power under the law to grant the orders sought.

6. I have read the whole Record of Appeal and the authorities cited by the appellant/respondent. With the Record of Appeal being on record, I am persuaded that the appellant is intent on proceeding with this appeal. I also note that there is a chance there was a consent order recorded in court concerning the application that is now before me. The same having been withdrawn and orders made by a court of concurrent jurisdiction, I cannot now try to issue any fresh orders in the matter, which in my view is res judicata. The same is struck out. The appeal was filed within the period stipulated by the consent order of 22nd July 2010.

7. What the appellant should now do is to expedite the process of setting down this appeal for hearing; in any event the appeal should be set down for taking of directions within sixty (60) days from the date of this ruling failing which the appeal shall stand dismissed with costs. There shall be no orders as to costs save as ordered by consent on 22nd July 2010.

8. It is so ordered.

Dated and delivered at Kisii this 12th day of September, 2012

RUTH NEKOYE SITATI

JUDGE

In the presence of:

Mr. G.S. Okoth for Okong'o for Appellant

Mr. Oguttu-Mboya for Ogweno for Respondent

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.