



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

ELRC APPEAL NO. 7 OF 2020

RILEY FALCON SECURITY SERVICES LIMITED.....APPELLANT

VERSUS

CORNELIUOS ATEYA MOGERE.....RESPONDENT

RULING

1. This ruling relates to a Notice of Motion Application dated 11th August, 2021, expressed to be brought pursuant to Order 42 Rule 35(1) and Section 3A of the Civil Procedure Act. The Applicant seeks orders that:

i. This this appeal be listed before a judge and that it be dismissed for want of prosecution.

ii. The costs of this application and of the appeal be awarded to the Respondent.

2. The application is premised on the grounds on the face of the application and the Supporting affidavit of Mr. Maurice Ouma, Counsel on record for the Respondent. The basis of the application is that since the Memorandum of Appeal was filed on 24th June, 2020, the Appellant has not taken any steps to prosecute the appeal by setting it down for hearing. It is the Respondent's assertion that by not setting the appeal down for hearing, the Appellant has lost interest in his appeal and should be struck out.

3. Parties canvassed the application by way of written submissions.

The Respondent's Submissions

4. The Respondent/Applicant submitted that there has been inordinate delay in setting the appeal down for hearing, which in his opinion translates to the Appellant having lost interest in their appeal and for this reason the appeal should be struck out.

5. The Respondent submitted that the pendency of the appeal in court for over a year, has prejudiced the Respondent by preventing him from enjoying the fruits of his judgment delivered in *Kisumu ELRC No. 18 of 2019*.

6. It is submitted for the Applicant/Respondent that Order 42 Rule 35 of the Civil Procedure Rules, envisages two scenarios for dismissal of an appeal for want of prosecution. One being where an Appellant fails to cause the matter to be listed for directions per Section 79B of the Civil Procedure Act and two, is where directions have been given under Order 42 Rule 13, of the Civil Procedure Rules, and the Appellant fails to fix the appeal for hearing, the Respondent may fix the appeal for hearing and/or seek its dismissal for want of prosecution.

7. The Applicant/Respondent submits that the Appellant/Respondent has failed to meet the requirement of Order 42 Rule 35(1) and (2). That since filing Memorandum of appeal there has not been a positive step to prosecute their appeal which has been pending for over a year. The Applicant contend that the delay in prosecuting this appeal, is gross misuse of the court process.

The Appellant's Submissions

8. The Appellant submitted that the application herein is premised on the wrong provisions of the law and should be dismissed. They sought to rely on the holding in the case of *In Re Paul Odera Oguna (2006) eKLR* to support this position.

9. The Respondent submitted that the application herein is without merit for reason that the failure to set the appeal down for directions is attributed to the delay in the court's registry to provide typed proceedings that would enable the Appellant to file a record of appeal.

10. The Respondent submitted that this appeal has not been listed before a Judge for directions per Order 42 Rule 35.

Determination

11. Dismissal of appeals for want of prosecution is governed by Order 42 rule 35 of the Civil Procedure Rules, which states as follows:

“35. (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.”

12. Arising from these provisions of the law, it is clear that the law contemplates two scenarios as the Respondent rightly submitted, where an appeal can be dismissed for want of prosecution. The first one being, where three months after the court has given directions on the appeal and the Appellant has not set the appeal down for hearing. No directions have been given in relation to the appeal subject of this application and as the court held in the case of *Njai Stephen vs Christine Khatiala Andika [2019] eKLR*, an appeal could not be dismissed if directions had not been given. (See *Kirinyaga General Machinery vs Hezekiah Mureithi Ireri [2007] eKLR*). It follows then, that this appeal cannot be dismissed under this provision, as no directions have been given in relation to the appeal.

13. The second scenario per Order 42 Rule 35(2), is where after one year upon service of the Memorandum of appeal, the appeal has not been set down for hearing. The law requires that the Registrar shall on notice to the parties, list the appeal before a Judge in chambers for dismissal. The question then is whether the listing by the Applicant/Respondent is within the law.

14. My reading of Order 42 Rule 35(2), is that an application to dismiss an appeal where directions have not been given, can only be listed by the Registrar before a Judge in chambers for dismissal. Order 42 Rule 35(2) is couched in mandatory terms and for this reason, I return that the Respondent lacks *locus standi* to bring this application. (See *Rosarie (EPZ) Limited v Stanlex Mbithi James (2015) eKLR.*) Moreover, nothing shows that the Applicant/Respondent moved the Registrar to dismiss this appeal and that the Registrar declined to list the appeal for dismissal to warrant the intervention of this court.

15. The upshot is that the court concludes that the application dated 11th August, 2021, is premature, lacks merit and is hereby dismissed.

16. The costs of the application shall be costs in the cause.

17. To progress this matter, the Appellant is directed to set this appeal down for directions within 30 days from the date of this ruling.

18. The Deputy Registrar is directed to facilitate the issuance of typed proceedings to the Appellant.

19. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 2ND DAY OF DECEMBER, 2021.

CHRISTINE N. BAARI

JUDGE

Appearance:

N/A for the Applicant/Respondent

Mr. Okoth h/b for Mr. Onsongo for the Appellant

Ms. Christine Omollo – C/A