



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT GARISSA

CIVIL APPEAL 13 OF 2013

MOHAMED ADAN

ABDULLAHI MOHAMED.....APPELLANTS/RESPONDENTS

NOOR ALI OSMAN

VERSUS

1. HADIJA HASSANMOHAMED

2. ADAN IBRAHIM KARU

3. AHMED HASSAN KARU

(Suing as the Legal Representative of the Estate of ALI

NOOR IBRAHIM KARU (DECEASED)..RESPONDENTS/APPLICANTS

RULING

Before me is an application brought by way of Notice of Motion dated 25th July 2014. The applicants are the respondents Hadija Hassan Mohamed, Adan Ibrahim Karu and Ahmed Hassan Karu whom I shall call the applicants. The respondents are the appellants, whom I shall call appellants.

The application was brought under Order 42 rule 35 of the Civil Procedure Rules 2010 and Section 3A of the Civil Procedure Act (Cap 21 of the Laws of Kenya). The prayers are as follows:-

1. That this appeal be dismissed for want of prosecution.
2. That the costs of this application be awarded to the respondent (applicants).

The application has grounds on the face of the Notice of Motion. The grounds are that the appeal had already been admitted to hearing four months ago. Secondly, that the appellants were reluctant to prosecute the appeal. Thirdly, that the failure to prosecute the appeal was a delay of justice to the applicants.

The application was filed with an affidavit sworn by Ahmed Hassan Karu, one of the applicants on 25th July 2014. It was deponed interalia that the appeal was admitted to hearing on 28th March 2014. That it was over 4 months since, and the appellants had not taken any steps to prosecute the appeal. That the

prolonged delay in hearing the appeal was a delay of justice to the applicants.

In response, a replying affidavit sworn by Fredrick Mwiha advocate for the appellants on 13th October 2014 was filed. It was deponed therein interalia that the application was bad in law, frivolous, vexatious and an abuse of the process of the court. It was also deponed that it was not true that the appeal had been admitted on 28th March 2014, as no notice had been served upon the appellants as required by law. It was further deponed that the application was brought in bad faith and in contravention of Order 42 Rule 35(1) of the Civil Procedure Rules, as directions in the appeal had not been taken by the parties.

The applicants' counsel Magare Musundi & Co filed written submissions. The appellants' counsel Ms. Kairu & Mccourt, also filed written submissions. Counsel relied on the written submissions filed.

I have considered the application documents filed and the submissions.

This is an application for dismissal of an appeal for want of prosecution.

The appellants' counsel has opposed the application on the ground that the appeal has not been admitted to hearing. Counsel argued that the application herein was filed prematurely. My perusal of the court record reveals that on 28th March 2014, the appeal was actually admitted by the court to hearing. Therefore that objection by the appellants' counsel does not hold water.

Further, though I agree with the court decisions in the cases of *Jurgen Paul Flach Vs. Jane Akoth Flach Nakuru Civil Appeal No. 119 of 2012 and Mudakha Shimini Musa & Anor Vs. David Lugala - Kakamega Civil Appeal No. 53 of 2001*, that where directions had not been issued dismissal of an appeal for want of prosecution cannot be granted, since our present case the court has already admitted the appeal to hearing, that argument has been overtaken by events. It cannot thus be said that the application was filed prematurely. I dismiss the objection.

Coming to the substance of the application, I will still dismiss the same. Indeed, the appellants' counsel have delayed in pursuing the appeal since its admission to hearing. However since the appeal was admitted to hearing by the judge this year, in my view the applicants should have attempted to set it down for hearing first. They have instead filed the present application. They had a right to file the present application. However, in my view the application for dismissal of the appeal for want of prosecution doesn't serve adequately the substantive legal rights of the parties involved herein.

Under Provisions of Article 159 of the Constitution of Kenya 2010, this court is required to be more concerned with administering substance justice where possible, instead of giving undue regard to technicalities. In the circumstances of this matter, I am of the view that the short delay of a few months in prosecuting the appeal by the appellants cannot justify the dismissal of the entire appeal for want of prosecution. Such an action will in my view, deny the appellants the benefit of substantive justice. I will thus not allow the application.

However it is obvious to me that the counsel for the appellants went to sleep after filing the appeal. They are not even aware that the appeal has already been admitted by the court to hearing. As such, though I will dismiss the application herein, I will award costs of the application to the applicants. I will also issue relevant orders to facilitate expeditious disposal of the appeal.

In the result this application is dismissed. I also order that the appellants' counsel will take appropriate steps to compile and serve the record of appeal, within 60 days from today. If they fail to do so then this application will stand allowed and the appeal will be deemed as dismissed. I award the costs of this application to the applicants.

Dated and delivered at Garissa this 9th day of December 2014.

GEORGE DULU

JUDGE