



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA

CIVIL APPEAL 12 OF 2013

MOHAMED ADAN

ABDULLAHI MOHAMED

NOOR ALI OSMANAPPELLANTS/RESPONDENT

VERSUS

OSMAN MUHAMUD ALIO (Suing as the Legal Representative

of the Estate of KHADIJA ABDIRASHID (DECEASED)..... RESPONDENT/APPLICANT

RULING

Before me is an application brought by way of Notice of Motion dated 25th July 2014. The applicant is the respondent Osman Mohamud Alio whom I shall call the applicant. 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 (applicant).

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 applicant.

The application was filed with an affidavit sworn by the applicant on 25th July 2014. It was deponed inter alia 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 applicant.

In response, a replying affidavit sworn by Fredrick Mwhia advocate for the appellants on 13th October 2014 was filed. It was deponed therein inter alia 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 applicant's 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 has argued that the present application is premature. My perusal of the court record reveals that on 10th February 2014, the appeal was actually admitted by the court to hearing. Therefore that objection by the appellants' counsel does not hold water.

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 have not been given by the court an application for dismissal of an appeal will not succeed, as the court has already admitted the appeal herein to hearing, the objection by counsel in my view, has been overtaken by events. It cannot thus be said that the application herein 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. However since the appeal was admitted to hearing by the judge this year, in my view the applicant should have attempted to set it down for hearing first. He has instead filed the present application. Though he had a right to file the present application, in my view the application doesn't serve adequately the substantive justice interests of the parties involved.

Under 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 some months in prosecuting the appeal by the appellants cannot justify the dismissal of the entire appeal. I will thus not allow the application.

However it is obvious that the counsel for the appellants went to sleep after filing the appeal. They are not even aware that the appeal has been admitted by the court to hearing. As such, though I will dismiss the application, however, I will award costs of this application to the applicant. I will also give an order for service of the record of appeal as same has not been served.

In the result this application is dismissed. I also order that the appellants' counsel takes 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 applicant.

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

GEORGE DULU

JUDGE