Kinara & 3 others v Kirabo (Civil Appeal 142 of 2018)
[2023] KEHC 3610 (KLR) (26 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3610 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 142 OF 2018

OA SEWE, J

APRIL 26, 2023

BETWEEN

DICKSON KINARA ..... 1ST APPELLANT

SAMUEL KATANA ..... 2ND APPELLANT

GEOFFREY MWANGI ..... 3RD APPELLANT

KENNETH MURITHI ..... 4TH APPELLANT

AND

FLORENCE KIRABO ..... RESPONDENT

RULING

[1] Before the Court for determination is the respondent's Notice of Motion dated 1st July 2020. It was filed herein on 10th July 2020 under Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya and Order 42 Rules 11, 13 and 35(2), as well as Order 51 Rule 1 of the *Civil Procedure Rules*, 2010, for orders that this appeal be dismissed for want of prosecution; and that the costs thereof be paid to the respondent by the appellant. The application was predicated on the grounds that the Memorandum of Appeal herein was filed and served on 13th August 2018, and that since then the appellants have never taken any step to prosecute the appeal; and yet they are enjoying an order of stay of execution granted by the trial court.

[2] The grounds aforestated were reiterated in the Supporting Affidavit sworn on 1st July 2020 by Joseph Karanja Kanyi, Advocate. He averred that, since 13th August 2018 when the Memorandum of Appeal was filed and served, the appellants have not taken any step to prosecute the appeal. He annexed a copy of the lower court's ruling to buttress his assertion that, having obtained an order of stay of execution from the lower court, the appellants have lost interest in the appeal. He added that the continued pendency of the appeal against the respondent is totally unjust; and therefore that the appeal ought to be dismissed as prayed by the respondent.

[3] In response to the application, the appellants filed Grounds of Opposition on 9th April 2020, contending that:

(a) The application offends the express provisions of the law, and in particular Article 159(2)(a) of the *Constitution*, which requires that substantive justice be dispensed to all irrespective of status;

(b) The granting of the orders sought will be prejudicial to the interests of the appellant and shall run contrary to the express provisions of Section 1A and 3A and 3B of the *Civil Procedure Act* in failing to ensure that the duty of the court of meeting a just, proportionate and affordable judgment in favour of the appellant is achieved;

(c) The orders sought offend Article 50(1) of *Constitution* which provides for fair hearing with regard to any dispute that has to be resolved in accordance with the law;

(d) The application is incompetent and an abuse of the court process.

[4] The appellant also filed a Replying Affidavit, sworn by Mr. Nyabero, Advocate. He conceded that the appellant filed the Memorandum of Appeal on 13th August 2018 through the firm of Kairu & McCourt Advocates; having been instructed by the appellant's insurers, Directline Assurance Limited. He added that Directline Assurance Ltd thereafter changed advocates and instructed the firm of Kimondo Gachoka Advocates to come on record in place of Kairu & McCourt Advocates.Mr. Nyabero further averred that failure to prosecute the matter with due dispatch cannot be blamed on the appellant alone. He pointed out, for instance, that they were served with the current application only on 22nd January 2021; a period of about 7 months after the application was filed.

[5] At paragraphs 9 and 10 of the Replying Affidavit, Mr. Nyabero averred that striking out of an appeal is a drastic move, which has the effect of denying a party his constitutional right to a fair hearing. He added that the appellants are very much interested in having the appeal heard and determined on merit. He therefore prayed that they be given a chance to prosecute the appeal to its logical conclusion.

[6] Although directions were given herein on 8th March 2021 that the application be canvassed by way of written submissions, the appellants were yet to file their written submissions by 14th March 2022 when today's ruling date was taken. They were then granted 7 more days for compliance. A perusal of the record shows that no submissions were filed by or on behalf of the appellants.

[7] On behalf of the respondent Mr. Maundu filed his written submissions on 2nd June 2021 in which he urged the Court to find that the firm of Kimondo Gachoka & Company Advocates are improperly on record, there being no Notice of Change of Advocates filed and served by the said firm pursuant to Order 9 Rule 9 of the *Civil Procedure Rules*. Mr. Maundu further submitted that the Court has inherent power to dismiss appeals for want of prosecution despite the provisions of Order 42 Rule 35(1) and (2) of the *Civil Procedure Rules*, particularly where no action has been taken in the appeal for an inordinately long period of time. He relied on *Abraham Mukhola Asitsa v Silver Style Investment Company Ltd* [2020] eKLR and *Peter Kipkurui Chemoiwo v Richard Chepsergon* [2021] eKLR in support of his submission.

[8] In the premises, the issues for determination in the instant application are as follows: -

(a) Whether the M/s. Kimondo Gachoka & Co. Advocates are properly on record; and,

(b) whether the appeal herein ought to be dismissed for want of prosecution.

[9] A perusal of the record herein confirms that the Memorandum of Appeal was filed by M/s. Kairu & McCourt Advocates on 13th August 2018; yet the responses to the instant application by way of a Replying Affidavit sworn on 8th March, 2021 as well as Grounds of Opposition of an even date, have been prepared by the firm of M/s Kimondo Gachoka & Co. Advocates. There is no indication that the firm of Kimondo Gachoka & Co. Advocates, in replacing the firm of M/s Kairu & McCourtAdvocates, complied with the requirements of Order 9 Rule 9 of the *Civil Procedure Rules*, which stipulates that:

> Where there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—
>
> a. Upon an application with notice to all the parties; or
>
> b. Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

[10] In the premises, it is plain that the firm of advocates that is properly on record is that of M/s Kairu & McCourt Advocates; for Order 9 Rule 5 of the *Civil Procedure Rules* is explicit that: -

> A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.

[11] It is therefore my finding that the firm of M/s Kimondo Gachoka & Co. Advocates are strangers to these proceedings. I am fortified in this posturing by the position taken in *Kenya Commercial Bank Ltd. v John Benjamin Wanyama* [2007] eKLR that:

> There is no provision in the Rules for two firms of Advocates to be on record contemporaneously or concurrently. And this is for good reason. It would be chaotic if there was on record more than one firm. From which firm would pleadings be expected; who would be served; who would take responsibility, or be held responsible for actions or omissions of the party represented by such firms" ...The rationale for requiring an Advocate, or one firm of Advocates to act for a party and sign pleadings and receive service on behalf of such party is designed to ensure that such Advocate or firm, does take responsibility for the matter and is accountable to Court and the client he or it represents. The law does not bar a party utilizing the services of more than one Advocate or more than one firm of Advocates in a matter but where this is done, it is the Advocate or firm of Advocates on record who engage a senior counsel to lead. The rules of practice recognize that in complex matters a senior counsel may be hired to lead, and it is for this reason that costs are sometimes enhanced, and a certificate for two counsel given by Court."

[12] It is plain therefore that the Grounds of Opposition as well as the Replying Affidavit sworn on 8th March, 2021 and filed by the said firm of Kimondo Gachoka & Company Advocates were irregularly filed. That being my view, it would follow that the same must be expunged from the record. Indeed, in

Joshua Nyamache T Omasire v Charles Kinanga Maena [2008] eKLR, Hon. Musinga, J. (as he then was) took the view thus in respect of Order III of the *Civil Procedures Rules* (now Order 9):

> ... Order III rule 1 of the Civil Procedure Rules permits advocates who are duly appointed by a party to file any application or take such action as by law authorized. Under Order III rule 6, a party is at liberty to change his advocate and when he so decides, an appropriate notice of change of advocates must be filed. An advocate who is not duly appointed to act for a party cannot be allowed to purport to file applications or documents on behalf of a party. An application filed by an advocate who is not duly appointed is an affront to the court process and is a nullity. The court can strike it out *ex debito justiciae*. When an advocate who is on record in a matter realizes that there is a strange application in the file, filed by an advocate who is not duly appointed by his client, the right thing to do is to ask the court to expunge the strange document out of the record"

[13] It is on that account that I hereby expunge from the record the Grounds of Opposition and Replying Affidavit filed on behalf of the appellant by Kimondo Gachoka & Company Advocates; with the effect that the averments of the respondent in respect of the application dated 1st July, 2020 stand unrebutted.

[14] On whether appeal should be dismissed for want of prosecution, the record confirms that, by the time the application was filed on 10th July 2020, no action had been taken by the appellant to prosecute the appeal which they filed on 13th August 2018. It is also evident from the record that directions have not been given by the Court as contemplated by Order 42 Rule 11 of the Civil Procedure Rules, which states:

> A judge of the High Court shall, within thirty days of the filing of an appeal under section 79B of the Act, peruse the appeal and give directions in accordance with the provisions of section 79B of the Act.

[15] This is significant, because Order 42 Rule 35 of the Civil Procedure Rules, provides: -

(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 to either set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.

(2) If within one year after 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.

[16] As a general rule therefore, an appeal ought not to be dismissed under Order 42 Rule 35 (1) unless directions have been given under Order 42 Rule 11 and 13 of the Civil Procedure Rules. This was the position taken in the case of Pinpoint Solutions Limited & another v Lucy Waithegeni Wanderi (as the Legal Administrator of the Estate of James Nyanga Muchangi) [2020] eKLR, where it was held: -

[17]. The provisions of the law relating to dismissal cannot be read in isolation. The bottom line is that directions must have been given before an appeal can be dismissed for want of prosecution. Indeed, there does not appear to be any penalty where an appellant fails to proceed as per Order 42 Rule 11 and Order 42 Rule 13 of the Civil Procedure Rules, 2010.

[18]. This court took the view that an appeal cannot be dismissed before directions had been given. As there was no indication that directions had been given herein, the Appeal herein could not be dismissed under Order 42 Rule 35 (1) of the Civil Procedure Rules. In any event, there was also no evidence that

the Registrar had issued a notice under Order 42 Rule 12 of Civil Procedure Rules. There was also no indication that the lower court file and proceedings had been forwarded to the High Court for the Registrar to proceed as aforesaid...”

[19] However, it cannot be gainsaid that the court is vested with inherent powers under the law to ensure the ends of justice are met; including to dismiss an appeal before directions are given, if the circumstances warrant such a measure. I therefore agree entirely with the position taken by Hon. Odunga, J. (as he then was) in the case of China Road & Bridge Corporation v John Kimenye Muteti [2019] eKLR, that: -

> ...an appellant who sits on his/her laurels and when confronted with an application to dismiss the suit contends that no directions have been given when he has not moved the court to give the said directions cannot but face censure from the court. To contend that an application for dismissal of an appeal is premature for failure to give directions when the appellant himself has not moved the court to give directions to my mind cannot be taken seriously where the delay is contumelious. Nothing bars the court from dismissing an appeal even where no directions have been given...”

[20] Similarly, in Abraham Mukhola Asitsa v Silver Style Investment Company Ltd [2020] eKLR, Hon. Musyoka, J. observed that:

> ...I am not persuaded that there is any justification, for the party to file appeal, and thereafter go to sleep. An appeal is not filed for the sake of it. It should not be left parked at the appeals registry for times on end, without any action being taken. I believe a party who files appeal and goes to sleep and takes no action on it for a long time cannot hide under the above provisions and argue that since directions had not been taken then the appeal cannot be dismissed. An appeal should not be left to hang over the head of a respondent endlessly, where the appellant is unwilling to take action on it. Justice demands that the same be resolved one way or the other. I believe dismissal of such stale appeals is one of the resolutions. There is no point of populating appeals registries with appeals that are not being prosecuted, yet the courts are being told they cannot dismiss them before directions are taken. This creates unnecessary backlog. If parties are not moving their cases, the courts should dismiss them. There is no reason for them to clog the system. It is an untenable position. I believe there is inherent power to dismiss such appeals. In this case, no action was taken by the appellant, after his appeal was filed, for over two years, indeed for nearly three years. He did not explain why that was so. I am persuaded that this is a proper case for dismissal of the appeal, and I hereby dismiss the appeal with costs...”

[21] I therefore have no hesitation in holding that the delay in prosecuting this appeal is prejudicial to the respondent. As was well elucidated by Lord Denning Mr in the case of Allen vs. Sir Alfred McAlpine [1968] All E.R 543 at 546, any delay in the administration of justice is to be deprecated. He stated thus:

> The delay of justice is a denial of justice...all through the years men have protested at the law's delay and counted it as a grievous wrong, hard to bear...To put right this wrong, we will in this court do all in our power to enforce expedition; and if need be, we will strike out actions when there has been excessive delay. This is a stern measure; but it is within the inherent jurisdiction of the court, and the rules of court expressly permit it."

[22] It is accordingly hereby ordered that this appeal be and is hereby dismissed with costs for want of prosecution pursuant to Order 42 Rule 35(1) of the Civil Procedure Rules.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 26TH DAY OF APRIL 2023

OLGA SEWE

JUDGE