Kodieny v Kananu (Civil Appeal 164 of 2019)
[2023] KEHC 27596 (KLR) (24 November 2023) (Ruling)

Neutral citation: [2023] KEHC 27596 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 164 OF 2019

F WANGARI, J

NOVEMBER 24, 2023

BETWEEN

JAMES KODIENY ..... APPELLANT

AND

EVERLYNE KANANU ..... RESPONDENT

RULING

1. This is a Ruling on an Application dated 27th September 2022 seeking to dismiss the Appeal herein suit for want of prosecution.

2. The Application is brought under the provisions of Order 17 Rule 2 of the *Civil Procedure Rules* and is supported by the Affidavit of Mwanaida Saida Shariff, Advocate and materially based on the following grounds:

    a. Since filing the Appeal on 5th August 2018, the Appellant has taken no further step to prosecute it.

    b. More than one year has lapsed without the Plaintiff making a step to prosecute the suit.

    c. The pendency of the suit s prejudicial to the Applicant.

    d. The security funds in the deposit account are at the risk of being lost as the bank threatened to close the account and transmit the funds to the Assets Recovery Authority.

3. The Applicant filed written submissions and reiterated the contents of the Application and the supporting affidavit.

4. The Respondent on the other hand appear to base her response on the ground that the trial court is yet to avail the necessary copies of documents required to compile the record of Appeal.

5. I have considered the law and authorities cited by the parties.

Analysis

6. The single issue for my determination is whether the Appeal herein should be dismissed for want of prosecution.

7. The test on dismissal of suits for want of prosecution was laid in *Mwangi S. Kimenyi v Attorney General and Another*, [2014] eKLR, when the court restated the test as follows: -

    1. When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties- the plaintiff, the defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties.

    2. Invariably, what should matter to the court is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues; 1) whether the delay has been intentional and contumelious; 2) whether the delay or the conduct of the Plaintiff amounts to an abuse of the court; 3) whether the delay is inordinate and inexcusable; 4) whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the Defendant; and 5) what prejudice will the dismissal cause to the Plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties."

8. The issue before this court entails a balance between driving the Appellant out of the seat of justice and the prejudice of the pendency of the Appeal to the Respondent.

9. I note that the security for the Appeal was deposited to the joint interest earning account. This Appeal was filed on 5th August 2019. This Application was subsequently filed on 27th September 2022. This is about 3 years after filing the Appeal. I also note from the court's record that the directions on the hearing of this Appeal have not been issued. It appears that after the Respondent filed this Application, the attention of the parties shifted to dispensation of the Application and nothing has since been done towards expediting the Appeal.

10. The argument that the Lower Court is yet to avail necessary documents for the preparation of the Record of Appeal is not plausible. The Record of Appeal is a creature of the Court of Appeal for the Court of Appeal. The Record of Appeal in the High Court is a matter of practice. The High Court is a Court of record. It is bound to refer to the Trial Court's notes and pleadings. Section 79G of the *Civil Procedure Act* provides as follows: -

    " Every appeal from a subordinate court to the High Court shall be filed within a period of 30 days from the date of the decree or order appealed against excluding from such period anytime which the lower court may certify as having been requisite for preparation and delivery to the appellant of a copy of the decree or order:

    Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal."

11. In other words, once a decree is filed, then the Appeal is ready for hearing. Most appeals delay because of delays in the preparation of the Record, which is unnecessary and undesirable.

12. The Record of Appeal is filed in the Court of Appeal. That is why the Court of Appeal does not call for the original court file. It relies on the competency of the Record from the High Court, since the High Court, is a Court of record as opposed to the Subordinate Court.

13. Therefore, it is a waste of judicial time to argue on the completeness of the Record of Appeal. The documents that must be complete are the Trial Court file. I shall therefore disregard complaints on the Record of Appeal, in absence of a Rule of practice making the record mandatory.

14. The dismissal of an Appeal is provided for under Order 42 Rule 35 of the *Civil Procedure Rules*. This Application herein is however erroneously brought under the provisions of Order 17 of the *Civil Procedure Rules*.

15. Order 42 Rule 35(1) of the *Civil Procedure Rul*es stipulates as follows: -

> " 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.".

16. Order 42 Rule 35(2) of the *Civil Procedure Rules* stipulates as follows: -

> " 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".

17. I note from the court record that this court issued a request for the original records of the lower court file on 16th August 2019. As directions are yet to be issued on the determination of this Appeal and the Lower Court file is yet to be forwarded to this Court, I am not persuaded that this Appeal should be dismissed for want of prosecution at this point. I say so because it is not clear to me based on the available material whether the delay was occasioned by the lower court or by the Respondent.

18. The legal position in respect of dismissal of appeals was well articulated by Hon. Justice J. Kamau in *Pinpoint Solutions Limited and Another v Lucy Waithegeni Wanderi (as the Legal Administrator of the Estate of James Nyanga Muchangi)* [2020] eKLR and which decision I am fully in agreement with. The Learned Judge held that: -

> " ... The provisions of the law relating to dismissal cannot be read in isolation. The
> 20. 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.
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> 21. 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 the *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. Therefore, my object is the achieve justice for both parties. In *Kamlesh Mansukhalal Damki Patni v Director of Public Prosecution & 3 Others* [2015] eKLR, the Court of Appeal articulated that:

> "It must be realized that courts exist for the purpose of dispensing justice. Judicial officers derive their judicial power from the people, or as we are wont to say in Kenya, from Wanjiku, by dint of Article 159 (1) of {the *Constitution* which succinctly states that "judicial authority is derived from the people and vests in, and shall be exercised by the courts and tribunals established by or under this Constitution." Judicial officers are also state officers, and consequently, are enjoined by Article 10 of the *Constitution* to adhere to national values and principles of governance which require them whenever applying or interpreting the *Constitution* or interpreting the law to ensure, inter alia, that the rule of law, human dignity and human rights and equity, are upheld.
>
> For these reasons, decisions of the courts must be redolent of fairness and reflect the best interests of the people whom the law is intended to serve. Such decisions may involve only parties inter se (and hence only parties' interests) and while others may transcend the interest of the litigants and encompass public interest. In all these decisions, it is incumbent upon the court in exercising its judicial authority to ensure dispensation of justice as this is what lives up to the constitutional expectation and enhances public confidence in the system of justice." (emphasis added).

The Court of Appeal proceeded:

> "It suffices to comment that a court of law should be hesitant at closing the door to the corridors of justice prior to a litigant being heard on his complaint. So far the applicant did not have a chance to file a defence. He sought to set aside that default judgment and that application was dismissed on a date he contents the same was not due for hearing and when he had no notice..."

20. The purpose of the existence this Court is this to do justice. I would rather direct for expeditious hearing of the Appeal than drive the Appellant from the seat of justice. The prejudice to the Appellant in dismissing the Appeal is in my view more than the prejudice to the Respondent in directing for its expeditious disposal.

21. Given the circumstances of the case, I have also to consider both parties. The Respondent is entitled to the fruits of the judgment. The injustice to the Respondent if the Application were to be allowed exceeds the prejudice to the Applicant is the Application is disallowed. In *Harris Horn Senior, Harris Horn Junior v. Vijay Morjaria* Nyeri Civil Appeal No. 223 of 2007 when confronted with similar arguments, the Court made observations therein inter alia as follows:

> (32) As for the need to do justice to the parties before it, we have no doubt that this is the core business of the Court. However, a court of law cannot ignore principles of substantive law or case law governing the particular aspect of justice sought from its seat. Its primary role is to ensure that the justice handed out is kept anchored on both the law and the facts of each case."

22. In the circumstances, I am inclined to disallow the Application. It is prematurely made before me. Instead I prefer to direct for expeditious hearing of the Appeal.

Determination

23. In the upshot, I make the following Orders:

a. The Notice of Motion dated 27th September 2022 is hereby dismissed.

b. The Appeal shall be placed before the Honourable Deputy Registrar for directions on the availability of the Lower Court file on 14th December 2023.

c. Costs shall be in the cause.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 24TH DAY OF NOVEMBER 2023.

F. WANGARI

JUDGE

In the presence of:

Wanyama Advocate for the Appellant

M/S Ng'ang'a Advocate for the Respondent.

Barile, Court Assistant