



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CIVIL APPEAL CASE NO. 7 OF 2020

GRACE NJERI THEURI.....APPELLANT

-VERSUS-

JOHN MBURU WAINAINA.....RESPONDENT

RULING

1. By an application dated 16th July, 2021, the Applicant seeks the dismissal of instant appeal for want of prosecution and/or failure to comply with court order also court is asked to vary orders of 7th May, 2020 in *CMCC 25 of 2014 Nyahururu* of stay of execution and KShs.189,880/- in Equity Bank be released to Applicant plus costs.

2. The same is supported by affidavit of K. Mwangi Advocate sworn on 16th July, 2021 and the grounds on the application namely:

i. That the Appellant has not filed record of appeal within six (6) months as ordered by Court.

ii. That the Appellant has not sought extension of time to file record of appeal after expiry of 6 months.

iii. That the Respondent's right to enjoy the fruits of the judgment in the lower court has been unduly delayed.

iv. That the Applicant will be greatly prejudiced if this application is not certificate as urgent, heard and determine on a priority basis.

3. The application is opposed via affidavit of Njuguna Kamanga sworn on 13th August, 2021.

4. The parties were directed to canvass application via submissions which they filed.

RESPONDENT'S/APPLICANT WRITTEN SUBMISSIONS:

5. It is submitted that, the Appellant filed the appeal on 14th May, 2020 and served it on 21st May, 2020 which was within time granted by court. The Appellant however failed to cause the appeal to be listed for directions. The record of appeal was filed on 27th July, 2021 after the Respondent filed this present application to dismiss the appeal.

6. The Respondent submits that the Appellant has refused and/or failed to comply with procedural requirements and order made on 7th May, 2021.

7. In the ruling delivered on 7th May, 2020, the court specifically ordered as follows:

“To avoid delay, the Applicant to ensure the record of appeal is ready and served within 6 months hereof.”

8. The order was very specific as to the time period in which record of appeal was to have been filed. The Appellant did not comply with the order. This is an issue should be determined by the court since six (6) months have already lapsed and the Appellant has not sought extension of time to file record of appeal.

9. The effect of failure to seek extension of time is that the record of appeal filed on 27th July, 2021 is not properly on record. Reliance is made on the case of *Shadrack Cheserk v Kipserem Mengichi & Another [2016] eKLR*, the Court cited with authority the case of *in Mbogo & Another v Shah 1968 EA 93* where the court stated as follows:

“that while the court would exercise its discretion to avoid injustice or hardship resulting from inadvertence or excusable mistake or error, it would not assist a person who has deliberately sought to obstruct or delay the court of justice.”

10. The Respondent submits that the record of appeal filed on 27th July, 2021 long after lapse of six months is incompetent and should be struck out and the appeal be dismissed for want of prosecution and failure to comply with clear orders of this court.

11. The Respondent has suffered loss and inconvenience by reason of inability to execute the decree and his hands are tied by the inaction on the part of the Appellant.

12. The Appellant’s inaction was calculated to ensure that the Respondent is denied his right to enjoy the fruits of the judgment delivered in his favour. The Respondent’s right to enjoy the fruits of the judgment in the lower court has been unduly delayed. Reliance is made on the case of ***Kenya Power & Lighting Company Limited v Andy International [2020] eKLR.***

13. The Appellant has led to undue delay in determination of this appeal by reason of his inaction to ensure the appeal is fixed for directions.

APPELLANT /RESPONDENT’S IN APPLICATION

SUBMISSIONS:

14. The appellant submits that, she has since complied and filed the record of appeal which has subsequently been served upon the Respondent’s counsel.

15. The Appellant has explained the delay in filing the record of appeal was occasioned by failing to get the proceedings in time. A copy of the Appellant’s application to the lower court for the proceedings dated 13th May, 2020 is annexed as **NK1**.

16. Further annexed a copy of the certificate of delay dated 3rd August, 2021 as annexure **NK2** which clearly shows and proves the Appellant’s contention that she was unable to file and compile the record of appeal on time as the typed and certified proceedings were only supplied to her on 30th June, 2021.

17. The Appellant has thus demonstrated that her delay in filling the record of appeal which is a prerequisite to fixing the appeal for directions and hearing thereto was occasioned by the delay in obtaining the typed proceedings.

18. The delay in prosecuting the appeal was thus not deliberate but occasioned by the long time it took to obtain the proceedings. The said delay which is not inordinate has been explained and evidence furnished. The Appellant is not to blame for the long period it took the lower court to type and supply her with the proceedings.

19. The record of appeal has been compiled, filed and served thus urges court to exercise its discretion and allow appeal to be heard on its merit rather than dismissing it for want of prosecution.

20. The Appellant is ready and willing to have the appeal disposed off by way of written submissions which can be done within 7 days of the court giving such directions.

21. The Respondent does not stand to suffer any loss noting that part of the decretal sum is already secured by some of it being deposited in a joint account of both counsels and will in the event that the appeal fails to be entitled to interest on the decretal sum for whatever period that the money has remained unpaid.

ISSUES ANALYSIS AND DETERMINATION:

22. After going through the material on record and the submissions by parties, I find the issues are **whether the application is meritorious and what is the order as to costs?**

23. The Lower Court delivered judgment in ***Nyahururu CMCC No. 25 of 2014*** in favour of the Respondent on 29th January, 2019 and a decree and certificate of costs, both dated 4th June, 2021 were issued. However, being dissatisfied with the said judgment and decree, the Appellant in an application dated 4th July, 2019 prayed for stay of execution of the decree and for leave to appeal out of time. This court delivered

24. By a ruling dated 7th May, 2021 the court granted appellant orders for stay of execution, leave to file appeal out of time and ordered the Appellant to ensure the record of appeal was ready and served within 6 months from that date. This is reflected on record. The Appellant had not filed record of appeal at the end of six months granted by this Court.

25. This prompted the advocates for the Respondent then filed this application on 16th July, 2021 for dismissal of appeal for want of prosecution and/or failure to comply with court orders.

26. The Appellant was ordered to file and serve the appeal within 21 days and to ensure the record of appeal was filed and served within six months from 7th May, 2020. Thus the Appellant filed the appeal on 14th May, 2020 and served it on 21st May, 2020 which was within time granted by court.

27. The Appellant however failed to cause the appeal to be listed for directions. The record of appeal was filed on 27th July, 2021 after the Respondent filed this present application to dismiss the appeal. In the case of *Peter Kipkurui Chemoiwo v Richard Chepsergon [2021] eKLR*, the Court of Appeal held that:

“From our own assessment of the matter, the learned Judge did not err. The Appellant filed his memorandum of appeal on 15th September, 2021, filed an application for stay of execution on 2nd October, 2012, obtained interim orders maintaining status quo on 3rd October, 2012 pending hearing and determination of the application and filed the record of appeal on 5th July, 2013. Thereafter, the Appellant made no effort to prosecute his appeal and was only roused from slumber when the Respondent filed his application to dismiss the appeal for want for prosecution.” (underlining ours)

28. However, the steps leading to dismissal of an appeal for want of prosecution are demonstrated hereunder.

29. In the case of *Stephen vs Christine Khatiala Andika [2019] eKLR, Kirinyaga General Machinery v Hezekiah Mureithi Ireri [2007] eKLR* amongst other cases where the common holding was that an appeal could not be dismissed if directions had not been given.

30. **Order 42 Rule 35 of the Civil Procedure Rules, 2010** envisages two (2) scenarios for the dismissal of an appeal for want of prosecution. The first scenario is when an appellant fail to cause the matter to be listed for directions under **Section 79B of the Civil Procedure Act** as is envisaged in **Order 42 Rule 11 of the Civil Procedure Rules**. The second scenario is that if after service of Memorandum of Appeal, the appeal would not have been set down for hearing, the registrar shall on notice to the parties list the appeal before the judge for dismissal.

31. **Section 79B of the Civil Procedure Act** provides as follows:

“Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against he may, notwithstanding section 79C, reject the appeal summarily”.

32. **Order 42 Rule 13 of Civil Procedure Rules** provides as follows: -

“1) On notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of appeal the appellant shall cause the appeal to be listed for the giving of directions by a judge in chambers.

2) Any objection to the jurisdiction of the appellate court shall be raised before the judge before he gives directions under this rule.

3) The judge in chambers may give directions concerning the appeal generally and in particular directions as to the manner in which the evidence and exhibits presented to the court below shall be put before the appellate court and as to the typing of any record or part thereof and any exhibits or other necessary documents and the payment of the costs of such typing whether in advance or otherwise.

4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—

a) the memorandum of appeal;

b) the pleadings;

c) the notes of the trial magistrate made at the hearing;

d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;

e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;

f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:

Provided that—

i. a translation into English shall be provided of any document not in that language;

ii. the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).”

33. It is evident from the provisions of **Section 79B of Civil Procedure Act** that a judge has to peruse the appeal before he can summarily reject the same. These are the directions contemplated in **Order 42 Rule 11 of the Civil Procedure Rules** that states as follows:

“Upon filing of the appeal the appellant shall within thirty days, cause the matter to be listed before a judge for directions under

section 79B of the Act”.

34. If the appeal is not summarily dismissed, then the registrar shall notify the appellant who shall then serve the Memorandum of Appeal upon all the respondents within seven (7) days of receipt of the notice from the Registrar in accordance with **Order 42 Rule 12 of the Civil Procedure Rules**.

35. After service of the Memorandum of Appeal, on notice to the parties delivered not less than twenty-one (21) days, the appellant shall again cause the appeal to be listed before the judge for directions as seen in **Order 42 Rule 13 of the Civil Procedure Rules**.

36. Notably, the procedure for rejection and/or admission of appeal and giving of directions is very well set out in the **Civil Procedure Rules**. However, this procedure does not seem to be strictly followed and differs from one court to another.

37. In the Civil Division Milimani Law Courts, the Registrar issues the notice for admission and directions of appeal after the High Court receives the file and lower court proceedings.

38. The appellant does not seem to have any role in fixing the appeal for directions as contemplated under **Order 42 Rule 11 of Civil Procedure Rules and Order 42 Rule 13 (1) of the Civil Procedure Rules**. It is important to point out that under **Order 42 Rule 13 (4) of the Civil Procedure Rules**, the judge shall not allow a matter to proceed for hearing unless the record of Appeal is duly filed.

39. Once directions are given under **Order 42 Rule 13 of Civil Procedure Rules** and the appellant fails to fix the appeal for hearing, the respondent may fix the same for hearing and/or seek dismissal of the same for want of prosecution under **Order 42 Rule 35 (1) of the Civil Procedure Rules** or the registrar lists the appeal before a judge for dismissal under **Order 42 Rule 35 (2) of Civil Procedure Rules**.

40. **Order 42 Rule 35 (1) of the Civil Procedure Rules** 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”.

41. **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”

42. 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 fail to proceed as per **Order 42 Rule 11 and Order 42 Rule 13 of the Civil Procedure Rules, 2010**.

43. 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.

44. Notably, every person is entitled as envisaged under **Article 50(1) of the Constitution of Kenya, 2010** to have a fair trial. The said **Article 50(1) of Constitution of Kenya** provides as follows:

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

45. It therefore follows that every person ought not to be shut out from accessing court or having his day in court. Indeed, the right of a party to enjoy the fruits of his judgment must be weighed against the right of a party to access court to have his dispute heard and determined by a court or tribunal of competent jurisdiction.

46. From the court file, it is clear that the record of appeal was filed on 27th July, 2021 thus the Appellant has since complied and filed the record of appeal which has subsequently been served upon the Respondent’s counsel.

47. The Appellant has explained the delay in filing the record of appeal as was occasioned by failing to get the proceedings in time. A copy of the Appellant’s application to the lower court for the proceedings dated 13th May, 2020 is annexed as **NK1**.

48. Further annexed a copy of the certificate of delay dated 3rd August, 2021 as annexure **NK2** which clearly shows and proves the Appellant’s contention that she was unable to file and compile the record of appeal on time as the typed and certified proceedings were only supplied to her on 30th June, 2021.

49. The Appellant has thus demonstrated that her delay in filling the record of appeal which is a prerequisite to fixing the appeal for directions and hearing thereto was occasioned by the delay in obtaining the typed proceedings.

50. The delay in prosecuting the appeal was thus not deliberate but occasioned by the long time it took to obtain the proceedings. The said delay is not inordinate and has been explained and evidence furnished. The Appellant is not to blame for the long period it took the lower court to type and supply her with the proceedings.

51. The record of appeal has been compiled, filed and served thus the court is inclined to exercise its discretion and allow appeal to be heard on its merit rather than dismissing it for want of prosecution.

52. The Appellant is ready and willing to have the appeal disposed of by way of written submissions which can be done within 7 days of the court giving such directions.

53. The court notes that, the Respondent does not stand to suffer any loss noting that part of the decretal sum is already secured by some of it being deposited in a joint account of both counsels and will in the event that the appeal fails to be entitled to interest on the decretal sum for whatever period that the money has remained unpaid.

54. Thus the court makes the following orders;

i. The application is dismissed costs in the main cause.

DATED AND SIGNED AT NYAHURURU THIS 17TH DAY OF FEBRUARY, 2022.

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CHARLES KARIUKI

JUDGE