



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 88 OF 2019

THE BOARD OF MANAGEMENT SHIVEYE

SECONDARY SCHOOL.....APPELLANT

VERSUS

BONVENTURE MATISIO T/A BULIAA CONSTRUCTORS.....RESPONDENT

(An appeal arising from the judgment of Hon. Noelyne Akee, Resident Magistrate, in Kakamega

CMCCC No. 118 of 2018, delivered on 7th August, 2019)

RULING

1. The Motion, dated 11th August 2021, seeks the setting aside of orders that were made on 27th May 2021, dismissing the appeal herein for want of prosecution. In the affidavit sworn in support, the appellant, avers that there was no notice of the court appearance for the 27th May 2021, and that the dismissal order was made despite directions not having been taken on the disposal of the appeal.
2. In reply, the respondent argues that the appellant was not keen on obtaining the typed proceedings of the trial court, which it says is the cause for the delay in prosecuting the appeal, for after writing the letter requesting for period proceedings on 19th August 2019, it did nothing until 6th August 2021, after appeal had been dismissed. He explains that he had the matter mentioned after the appellant took too long to have it disposed of. He asserts that the appellant went to sleep after filing its appeal.
3. Directions were given on 20th September 2021, for disposal of the appeal, by way of written submissions. Both orders have filed written submissions, which I have read through and noted the arguments made. I will address the several issues raised, each in turn.
4. I will start with the issue of service. The mention date was obtained by the Advocate for the respondent, whether the record indicates that it was a date given to the appellant is neither here nor there. The minute, in the court file, of who obtained the date at the registry, is made by a court registry official, and there can be no telling, on the face of it whether there was any impersonation or giving of false information on who obtained the date. What should be critical is whether, after the date was obtained, notice was served on the party who was absent at the event of the giving of the date.
5. Was the mention notice date served? The respondent avers that he served, the appellant insists that there was no service. The respondent has filed an affidavit of service, of his process server, Joseph Kundu, sworn on 12th April 2021. It gives a long and detailed chronology of the events. He visited two buildings, both of which are indicated as addresses for service for the Advocate for the appellant. At Paulina House, he was informed that the Advocate for the appellant had moved to Church House. He was given a telephone number for the Advocate. He telephoned him, and the Advocate said he was in Kisii, but advised that the process server could place the mention notice at the door to the Advocate's office. He went to Church House, found the office closed, and he pushed a copy of the notice under the door, and thereafter sent another copy to the postal address of the Advocate. On the face of it, it would appear that all that was necessary was done to effect service.
6. The appellant contests that narrative, saying it was false. The usual way of contesting service of court process is by having the process server summoned to court for cross-examination on the contents of his affidavit. In this case, the appellant did not take advantage of that, for that would have been the surest way of impeaching the process server, and discrediting his narrative. As it is, his narrative on oath still stands, and the contest to it amounts to mere denial that there was service. I am satisfied, therefore, that the appellant was properly served with the notice, was aware that the matter was coming up in court on the appointed date, but he chose to stay away.
7. The second issue is whether the court could properly dismiss an appeal for want of prosecution where no directions have been given as prescribed in Order 42 rule 35(1) of the Civil Procedure Rules, and that dismissal could only happen under Order 42 Rule 35(2) after directions had been taken, and no step had been taken for over one year. Case management is the responsibility of the court. Parties file

matters in court, ostensibly, with a view that the same be heard and disposed of. Once a matter is filed, the journey to its hearing commences. It should be the duty of the person filing the matter to drive the process, by taking all the necessary steps to ensure the requisite documentation is in place, and thereafter, the file is placed before the judge, for disposal. A matter should not be filed at the registry and parked there. A party should not be allowed to file papers in court and thereafter to go sleep.

8. The record before me indicates that the memorandum of appeal herein, dated 6th September 2019, was filed herein on even date. A Motion, dated 8th October 2019, was separately filed on even date, for stay of execution of the decree. It was placed before the Judge on 8th October 2019, and interim relief was granted. Directions were given for disposal of the Motion by way of written submissions. The said Motion was placed before me, and I delivered a ruling therein on 24th January 2020, allowing the stay, on condition that the decretal amount was deposited in court. Since 6th September 2019, when the appeal was filed, the appellant has not filed a record of appeal, and had not done so at 27th May 2021, when the appeal was dismissed. The matter could not progress to directions without the record of appeal.

9. Was there any good reason for the delay? The appellant argues that it had sought certified copies of proceedings from the trial court, but the same had not been supplied by the trial court. It has attached letters dated 19th August 2019 and 26th January 2021. None of the copies of the letters attached bear the receiving stamp of the trial court, and I cannot vouch for their authenticity. Either way, I am not persuaded that any serious follow up was done on the proceedings. The initial letter was done in August 2019, the next letter came in January 2021, one year and five months later.

10. I go back to Order 42 Rule 35(1), that an appeal can only be dismissed after directions have been taken. There is inherent power, and, where a court is persuaded that a party is not doing enough to prosecute its case, it may dismiss it, where no steps are being taken to advance it. A party should not be allowed to hide behind Order 42 Rule 35(1) where it is guilty of inaction.

11. Article 50 of the Constitution, on fair hearing, has also been cited, about every person having a right to have its dispute heard. That is what the Article says, however, it does not give a license to party, who has filed some matter in court, to go to sleep. The court, in this case, did not decline or refuse to hear the appellant, it is the appellant who failed to ready himself for hearing, by filing the requisite documentation that would have enabled the court to hear him. The right to fair hearing does not absolve a party of its duty to act with due diligence.

12. Article 159 of the Constitution is also cited. I will say the same thing. It is true that the court should concern itself with determining the real issues. That, however, is not to say that parties are allowed to file papers in court, and then get away with failing to take steps to have their cases heard. The parties who file cases in court should be the drivers of those cases, the cases are not driven by court. Where the parties fail to do the proper thing, to advance their cases, the court will be entitled to dismiss their cases, to unplug the system, of cases where the parties are not keen on prosecuting.

13. I think I have said enough to demonstrate that I find no merit whatsoever in the Motion, dated 11th August 2021. I hereby dismiss the same with costs.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 30th DAY OF March, 2022

W MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Mr. Timothy Omwando Mbaka, instructed by Messrs. Omwando Mbaka & Co. Advocates, for the appellant.

Mr. Were, instructed by Messrs. Were Lukoko & Co. Advocates, for the respondent.