Nzomo & another v Osero (Civil Appeal 587 of 2018)
[2022] KEHC 11514 (KLR) (Civ) (25 July 2022) (Ruling)

Neutral citation: [2022] KEHC 11514 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 587 OF 2018

DO CHEPKWONY, J

JULY 25, 2022

BETWEEN

TITUS MUTUA NZOMO ..... 1ST APPELLANT

DANIEL THUO ..... 2ND APPELLANT

AND

EVANS ONDIEKI OSERO ..... RESPONDENT

(Being appeal from the Judgment and orders of the Honourable B. J. Ofisi Resident Magistrate at Nairobi Civil Case No.3664 of 2016 delivered on 19 th November, 2018)

RULING

1. The Appellants filed this appeal vide a Memorandum of Appeal dated 13th December, 2018 challenging the Judgment of Honourable B. J Ofisi (RM) delivered on 19th November, 2018 vide Nairobi Civil Case No.3664 of 2016, in which the trial Magistrate awarded the Respondent damages amounting to Kshs. 1,833,496/=.

2. In the Memorandum of Appeal, the Appellants set forth the following grounds of appeal;

    a. That the learned trial magistrate erred in law and in fact in finding that the Defendants were wholly to blame for the accident without any evidence.

    b. That the learned magistrate in law and in fact in failing to analyze and consider the evidence presented by the defendants.

    c. That the learned magistrate erred in law by applying the wrong principles in arriving at the award of general damages of Kshs.1,700,000/= which we find excessive regard being to the evidence adduced in the submissions and therefore erroneous in that.

d. That the learned trial magistrate erred in law and in fact in failing to find that the particulars of the claim by the plaintiff did not warrant an award of kshs. 1,700,000/= in general damages.

e. That the learned magistrate proceeded on wrong principles in awarding Kshs.133,496.00/= in special damages without proper and strict proof of the same.

f. That the learned trial magistrate erred in failing to scrutinize/evaluate the evidence tendered and to correctly relate them to case law cited to her and thereby failed to arrive at a fair and reasonable compensation.

g. That the learned trial magistrate erred in law and in fact give her reasons for finding that the total sum of Kshs.1,833,496/= in damages to the Respondent was reasonable and/or adequate compensation.

h. That the learned Magistrate erred in law in failing to uphold the doctrine of precedent.

i. That the learned trial Magistrate erred in awarding such an inordinately high and excessive award of damages and the said award can only be adjudged to be an entirely erroneous estimate of the correct damages awardable to the Respondent.

3. The Appellants filed the Record of Appeal dated 1st July, 2021 and by March, 2022 no steps had been taken to set down the appeal for hearing.

4. This Honourable Court then listed the appeal for Notice to Show Cause why the appeal should not be dismissed for want of prosecution, which Notice to Show Cause was scheduled for 24th March, 2022.

5. In opposing the listing of the appeal for Notice to Show Cause, why the same should not be dismissed for want of prosecution, the Appellants through their advocate on record filed a Replying Affidavit sworn on 22nd March, 2022 by Naomi Wandai Njenga the advocate in conduct of the matter.

6. Through their said advocate, the Appellants deposed that they lodged the appeal vide a Memorandum of Appeal dated 13th December, 2018 filed on 14th December, 2018 and the Appellants aver that they applied for certified copies of the proceedings and Judgment for purposes of the appeal on 17th December, 2018 vide a letter which was received in the lower court registry on 19th December, 2018.

7. The Appellants, through their advocate also swore that they received an email communication from the court on 25th May, 2021 notifying them that the proceedings were ready for collection. The Appellants collected the proceedings and proceeded to prepare the Record of Appeal dated 1st July, 2021.

8. The Appellants aver that they kept checking on the position of the appeal and were informed by the registry that the appeal was pending admission and the court would issue a notice for directions which notice was never issued.

9. The Appellants further state that they sought a mention date on 18th March, 2022 and were shocked to learn that the matter had been listed for Notice to Show Cause why the appeal should not be dismissed on 24th March,2022 and yet they had not received any notice to that effect.

10. The Appellants informed the court in their affidavit that the appeal has high chances of success and this court should allow the appeal to proceed for hearing so as to accord justice to both parties.

11. On 24th March, 2022, when the matter came up for Notice to Show Cause both parties made their oral submissions in support and in opposition to the dismissal of the appeal.

12. Upon perusal of the court record and upon considering the oral submissions by Counsel for both parties, the issue for determination before this Honourable Court is whether this court can proceed to dismiss this appeal for want of prosecution.

Analysis and Determination

13. The relevant provision of the law governing dismissal of appeals for want of prosecution is provided for under Order 42 Rule 35 of the *Civil Procedure Rules*, 2010.

14. Order 42 Rule 35(1) provides 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."

15. Order 42 Rule 35(2) provides 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 the judge in chambers for dismissal."

16. The provisions of Order 42 Rule 35 of the Civil Procedure Rules, 2010 envisages two instances for dismissal of an appeal for want prosecution. The first instance is where it is provided that if within three months after the giving of directions on the appeal and the Appellant fails to set down the appeal for hearing, the Respondent should either set the same for hearing or apply for it to be dismissed for want of prosecution. The second instance is when, if after one year of service of the Memorandum of Appeal, the appeal has not been set down for hearing, the Registrar shall on notice to the parties cause the appeal to be listed before the judge for dismissal for want of prosecution.

17. 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".

18. In the case of *Jurgen Paul Flach –vs- Jane Akoth Flach* (2014) eKLR the court held that before an appeal can be set down for dismissal for want of prosecution directions ought to have been given.

19. Therefore then, if the parties failed to comply with Order 42 Rule 35 (1) and (2), this Court has the power to proceed and list the appeal for notice to show cause why it should not be dismissed for want of prosecution. This court issued the notice in line with the provisions of Order 42 Rule 35(2) of the Civil Procedure Rules, which requires the Deputy Registrar to set down an appeal for dismissal after one year of the service of the memorandum of appeal.

20. It is clear from the provisions of Section 79B of *Civil Procedure Act*, a Judge is required to peruse the appeal before he can summarily reject or admit the same. This is position as contemplated under 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".

21. It should be noted that once directions are given under Order 42 Rule 13 of the Civil Procedure Rules, 2010 and the Appellants fail to fix the same for hearing, the Respondent may proceed to fix the same for dismissal for want of prosecution under Order 42 Rule 35 (1) of the Civil Procedure Rules or the registrar sets it down for notice to show cause why it should not be dismissed for want of prosecution in line with the aforesaid provisions under Order 42 Rule 35 (2) of Civil Procedure Rules, 2010.

22. I have read through the record in the instant case and note that the appeal was never listed down for directions and no directions were issued regarding the hearing of the appeal. The court proceeded to list it for notice to show cause why it should not be dismissed for want of prosecution before issuing directions on the hearing of the appeal. The law in this regard is couched in mandatory terms and an appeal will only be dismissed for want of prosecution if it is ready for hearing and the Appellant is found not to have taken any steps to prosecute it.

23. Ordinarily, the law requires the Appellant to initiate the process of having the appeal listed for directions and heard. This position was stated in the case of *Haron E Ongechi Nyaberi –vs- British American Insurance Co. Ltd* HCCA No. 110 of 2001 eKLR where the court held that;

> " It will be the Appellant who shall really cause the appeal to be listed for directions before a judge by serving the memorandum of Appeal and serving the record of Appeal."

24. The Appellants having failed to set down the appeal for directions and eventually hearing, this court listed the same for notice to show cause why the same should not be dismissed for want of prosecution.

    The law requires the Deputy Registrar to notify the Appellant if the appeal is not summarily dismissed once its listed for directions. The Appellants are then required to serve the Memorandum of Appeal upon the Respondent within seven (7) days of receipt of the notice from the Registrar in accordance with Order 42 Rule 12 of the Civil Procedure Rules.

25. In the instant case the Appellants have submitted that they were not served with the notice to show cause and only came to learn of the same on 18th March, 2022 when they were trying to inquire about the appeal. In the absence of service on the Appellants the said notice to show cause is premature and contrary to Article 50 of *the Constitution* of Kenya, 2010 which 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."

    In the case of *Pinpoint Solutions Limited & Another vs Lucy Waithengeni (as the Legal Administrator of the estate of James Nyanga Muchangi)* (2020)eKLR the court stated that;

> " The provisions of the law relating to dismissal cannot be read in iolation. The bottom line is that directions must have been given before an appeal can be dismissed for want of prosecution."

26. I note that the Appellants do not have control in regards to the typing of court proceedings and it they have clearly stated that they received the email communication notifying them that the proceedings were ready on 25th May, 2021 as evidenced by "annexture MWN3." If there is anything that delayed the hearing of the appeal, then it is the lower court which is to be blamed for having delayed in providing the typed proceedings.

27. However, since the record of appeal is ready and already placed in the file, dismissing the appeal would be a draconian measure which this court should exercise judiciously. In view of this, in as much as the decree holder is supposed enjoy the fruits of his Judgment, I am also alive to the fact that a litigant should not be shut out from accessing the court and it would be contrary to the provisions of Article 50(1) of *the Constitution* of Kenya, 2010 which provides that;

> " 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."

Disposition

28. In the premises, I decline to dismiss the appeal for want of prosecution since the record of appeal is ready and on record. Thus, the application is allowed with directions that:-

a. The Appellants to serve the record of appeal upon the Respondent within 7 days.

b. The appeal to be listed down for directions within 21 days and the appeal to be heard within 60 days from the date directions shall be given.

c. Each party to bear their own costs.

d. Mention on 19th September, 2022 to confirm compliance and further directions.

It is so ordered.

DELIVERED DATED AND SIGNED IN NAIROBI THIS 25TH DAY OF JULY, 2022.

D. O. CHEPKWONY

JUDGE

In the presence of:

M/S Kahame counsel holding brief for Mr. Kaburu counsel for Respondent

No appearance for and by appellant

Court Assistant - Kevin