Mukindu v Miriti (Suing as the legal representative and/or administrator of the Estate of KMM) (Civil Appeal E058 of 2021) [2022] KEHC 15858 (KLR) (29 November 2022) (Ruling)

Neutral citation: [2022] KEHC 15858 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CIVIL APPEAL E058 OF 2021

EM MURIITHI, J

NOVEMBER 29, 2022

BETWEEN

THADEUS MUKINDU ..... APPELLANT

AND

FRANCIS MIRITI ..... RESPONDENT

SUING AS THE LEGAL REPRESENTATIVE AND/OR ADMINISTRATOR OF THE ESTATE OF KMM

RULING

1. By a chamber summons dated October 27, 2021 pursuant to order 42 rule 35 of the *Civil Procedure Rules* and all other enabling provisions of the law, where the respondent seeks dismissal of the appeal with costs for want of prosecution.

2. In his supporting affidavit sworn on even date, the respondent avers that after his son was involved in a road traffic accident on July 14, 2019, he filed Tigania PMCC No 2 of 2019 seeking general damages under the *Law Reform Act* and the *Fatal Accidents Act*. The matter was subsequently heard and judgment delivered in his favour for a total of Ksh 2,923,655 on April 8, 2021. Before he could execute the decree to realize the fruits of his judgment, the appellant filed this appeal on April 28, 2021. On August 5, 2021, the honourable Deputy Registrar of this court directed the appellant to file and serve the record of appeal within 30 days, which has never been done to date. The appellant's counsel failed to attend court when the matter was mentioned before the Deputy Registrar on August 5, 2021, September 9, 2021 and September 16, 2021, clearly showing that the appellant has lost interest in the appeal, which he now prays to be dismissed.

3. The appellant's counsel, Sharon Laboso swore a replying affidavit on January 11, 2022 in opposition to the application, and prays for its dismissal with costs for being misconceived, premature and premised on misapprehension of the law and facts. She attributes the delay in prosecuting the appeal to the court for failing to sit on numerous occasions. She further avers that they have been unable to compile the

record of appeal due to unavailability of typed proceedings and a certified copy of the judgment. She avers that since the appeal is yet to be admitted in accordance with section 79B of the *Civil Procedure Act*, no step can be undertaken by the appellant and neither can the appeal be dismissed as directions have not been given. She equates the filing of the application by the respondent to usurping the duties of the Deputy Registrar, and urges the court to indulge the appellant, because he has an arguable appeal which ought to be prosecuted and determined on its merits.

Submissions

4. The respondent cites the case of *Eastern Produce Kenya Ltd v Rongai Workshop & Transporters Limited & another* (2014) eKLR where it was held that the test to be applied in an application for dismissal for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. He urges that since the appellant has failed to explain why he has not filed the record of appeal and fixed the matter for directions. The delay herein is prolonged and inexcusable. He contends that disallowing the application will highly prejudice him, and urges the court to invoke its inherent powers and dismiss the appeal for want of prosecution. He relies on *Haron E Ogechi Nyaberi v British American Insurance Co Ltd* (2012) eKLR and *Abraham Mukhola Asitsa v Silver Style Investment Company Ltd* (2020) eKLR.

5. The appellant urges that he will suffer prejudice if he is denied an opportunity to prosecute his appeal to finalization. He urges that he is willing to pursue the appeal and he is ready to take direction on the conditions of stay pending appeal in order to secure the respondent's interests. He urges the court to adopt the interpretation of order 42 rule 35 of the *Civil Procedure Rules* as held in *Njai Stephen v Christine Khatiala Andika* (2019) eKLR, *Jurgen Paul Flach v Jane Akoth Flach* (2014) eKLR, *Kirinyaga General Machinery v Hezekiel Mureithi Ireri* (2007) eKLR, *Allan Otieno Osula v Gurdev Engineering & Construction Ltd* (2015) eKLR and *Elem Investment Limited v John Mokora Otwoma* (2015) eKLR. He urges the court to do substantive justice by dismissing the application to pave way for determination of the appeal on merits.

Analysis and Determination

6. For the respondent to succeed in his application for dismissal of the appellant's appeal for want of prosecution, he must meet the criteria as set out by the court (F Azangalala J) in *Lee Waigwa Waruingi v Housing Finance Co Ltd of Kenya Limited* (2005) eKLR as follows:

    (i). That there has been inordinate delay. It would be highly undesirable and indeed impossible to attempt to lay down a tariff so many years or more on one side of the line and a lesser period on the other. What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case but it should not be too difficult to recognize inordinate delay when it occurs.

    (ii) That this inordinate delay is inexcusable. As a rule until a credible excuse is made out the natural inference would be that it is inexcusable.

    (iii) That the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of issues between themselves and the plaintiff or between themselves and third parties or between each other. In addition to any inference that may properly be drawn from the delay itself prejudice, can sometimes be directly proved. As a rule the longer the delay the greater the likelihood of serious prejudice at the trial."

7. Similarly in *Ivita v Kyumbu* (1984) KLR 441, the court (Chesoni J (as he then was) held *inter alia* that:

> "The test to be applied by the courts in an application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable and if it is whether justice can be done despite the delay. Thus even if the delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay and that justice can still be done to the parties the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter in the discretion of the court."

8. The appellant filed the memorandum of appeal in this court on April 28, 2021. On June 10, 2021 in the absence of both counsels for the parties, the Deputy Registrar ordered that, "The lower court record be availed. Reminder to issue. Mention on August 5, 2021." The matter was mentioned on August 5, 2021 in the presence of Mr Nkunja for the respondent where the court stated, "The lower court record has been received. The appellant be notified to file and serve their record of appeal before the appeal can be admitted. Further mention on September 9, 2021." On October 28, 2021 when the matter was coming up for mention for directions in the presence of both counsels for the parties, the attention of the court was drawn to the existence of the instant application, which had been filed the previous day on October 27, 2021, and the appellant's counsel was granted 14 days to respond to that application.

9. The memorandum of appeal was lodged in this court on April 28, 2021 and the lower court record was called for in the absence of the parties on June 10, 2021. The lower court record was subsequently availed but before the record of appeal could be filed, the respondent filed the instant application which completely halted the process of appeal.

10. 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. (2) 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."

Dismissal for Want of Prosecution of Appeals

11. I do not accept the suggestion by the appellant that the court has no jurisdiction or power to dismiss an appeal for want of prosecution before the record of appeal has been filed and directions for hearing of the appeal given. Although rule 35 of order 42 of the *Civil Procedure Rules* refers to a period of three months default after the "giving of directions under rule 13" this provision for application for dismissal of an appeal for want of prosecution does not take away or affect the discretion of the court to dismiss an appeal for want of prosecution under the inherent discretion of the Court. See the discussion on the scope of this inherent jurisdiction in I. H. Jacob, *The Inherent Jurisdiction of The Court, Current Legal Problems*, Volume 23, Issue 1, 1970, pp 23–52.

12. Indeed, section 3A of the *Civil Procedure Act* saves the inherent jurisdiction of the court in clear terms:

> "3A. nothing in this act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

13. This court, however, finds that although the appellant has inexcusably delayed in compiling and filing the record of appeal in order to prosecute his appeal, justice can still be done to the parties if the appeal is allowed to proceed to its logical conclusion.

14. The appeal herein had neither been admitted nor set down for hearing as the record of appeal is yet to be compiled and filed. The court notes, however, that the lower court file has already been availed to this court and the proceedings therein are typed, and thus there is nothing barring the appellant from obtaining the same upon payment of the requisite fees.

15. The appellant cannot be heard to say that the appeal may not be dismissed because no record of appeal has been filed and directions for the hearing thereof given. Such a stance would allow such a party who is in default of filing the record of appeal to benefit from his own wrongdoing. See maxim of law nullus commodum capere potest de injuria sua propria, (no man can take advantage of his own wrong) in *Broom's Legal Maxims* by R H Kersley, 10th ed (1939) p 191.

16. However, in the interests of substantive justice and considering the not in-substantial decretal sum awarded by the trial court, this court declines to dismiss it for want of prosecution and will direct that the appeal be filed and heard on its merit. As regards the respondent, the appellant's default may be remedied by award of costs to the respondent.

Orders

17. Accordingly, for the reasons set out above, the court makes the following orders:

    1. The respondent's application dated October 27, 2021 is hereby dismissed.

    2. The appellant shall file and serve upon the respondent the record of appeal within thirty (30) days from the date hereof, in default of which the appeal shall stand dismissed.

    3. The appellant shall within the same period of thirty (30) days deposit with the court, if it has not already done so, a bankers guarantee for the satisfaction of such decree as they may become liable to satisfy upon hearing and determination of the appeal

18. The costs of this application shall be paid by the appellant to the respondent.

19. Order accordingly.

DATED AND DELIVERED ON THIS 29TH DAY OF NOVEMBER, 2022.

EDWARD M. MURIITHI

JUDGE

Appearances

M/S Nkunja & Co. Advocates for the Plaintiff/Applicant.

M/S Kimondo Gachoka & Co. Advocates for the Defendant.