



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

(CORAM: R. MWONGO, J.)

CIVIL APPEAL NO. 30 OF 2019

FREDRICK NJOROGHE.....1ST APPELLANT/RESPONDENT

GATERI JAMES.....2ND APPELLANT/RESPONDENT

VERSUS

ANN MUGURE CHEGE alias HANNAH MUGURE CHEGE.....RESPONDENT/APPLICANT

(Being an Appeal from the Judgment of Hon K. Bidali, CM delivered on 26th March, 2019

in Naivasha CMCC No 577 of 2015)

RULING

1. This motion seeks that the appeal herein be dismissed with costs for want of prosecution. The applicant's case is that the appeal was filed on 15th July, 2019, and no steps have since been taken to prosecute it. This, according to the applicant is an inordinate delay in setting the appeal down for hearing.
2. The applicant also states that she has been greatly prejudiced by the delay since she cannot enjoy the fruits of the judgment debt. She asserts that there is no sufficient reason for the appeal not to be dismissed.
3. The application is opposed by the Respondent/Appellant. Other than alleging that the application is defective, unmerited, and filed with misrepresentation of facts, the respondent asserts that the Record of appeal was filed on 24th February, 2020. However the court has not confirmed admission of the appeal. After filing of the record, the Covid regulations disputed progression of matters in court.
4. The application is filed under **Order 17 Rules 2 (1) and (3)** and **Order 42 Rule 35 (1)** of the **Civil Procedure Rules**. **Order 17** of the **Civil Procedure Rules** concerns the procedures for dismissal of suits, whilst **Order 42** of the **Civil Procedure Rules** relates, more aptly, to the procedures for appeals.
5. **Order 42 Rule 11** of the **Civil Procedure Rules** requires that upon filing an appeal, the appellant shall within thirty days cause the appeal to be listed before a judge for directions under **Section 79B** of the **Civil Procedure Act**. That Section enables the judge to admit or summarily reject the appeal. In this case, there is no evidence on file that the matter was brought before the judge for admission.
6. **Order 42 Rule 12** of the **Civil Procedure Rules** then requires that if the appeal is not rejected, the Registrar should notify the appellant who shall serve the memorandum of appeal on the respondents. **Rule 13** of that Order makes the requirement that twenty one day's notice is given of the service of the memorandum of appeal, so as to enable the appeal to be listed before the judge in chambers for giving of directions.
7. It is after giving of directions that **Order 42 Rule 35** of the **Civil Procedure Rules** kicks in. If within three months after giving directions under **Rule 13** the appeal has not been set down for hearing, summons for *dismissal* for want of prosecution may then issue. **Order 42 Rule 35** of the **Civil Procedure Rules** provides:

“(1) 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. (Emphasis added)

8. A perusal of the file shows that the memorandum of appeal was filed on 15th July, 2019. On 24th September, 2019, the Deputy Registrar wrote to the Magistrate's Court seeking the original record and copies of judgment, proceedings, pleadings and exhibits to enable production of a record of appeal. It is not clear when these were availed.

9. As the appeal has not undergone the process of admission or summary rejection in terms of **Section 79B** of the **Civil Procedure Act**, there is no leeway for the appellant to serve the memorandum of appeal on the respondent under **Order 42 Rule 12** of the **Civil Procedure Act** or list the appeal for directions under **Order 42 Rule 13** of the **Civil Procedure Act**. This is a dismissal under **Order 42 Rule 35** of the **Civil Procedure Rules** is untenable.

10. Accordingly, no fault can be placed at the feet of the appellant for the delay in admission, service or the giving of directions on the appeal. For the court to punish the appellant with dismissal for no fault of his own would result in prejudice to the appellant and would amount, potentially, to a breach of the appellant's constitutional right to be heard.

11. Whilst I am empathetic to the frustration of the Respondent who is unable to receive the benefit of the litigation in the trial court, the fault for the delay lies in the court not having admitted or rejected the appeal.

12. I therefore dismiss the motion with no order as to costs.

13. In light of the foregoing, the proper directions to give are as follows:

1) The Deputy Registrar to forthwith and not later than 7 days from the date hereof place the file and lower court file before the Judge in terms of **Section 79B** of the **Civil Procedure Act** for purposes of admission.

2) Within 7 days of the Judge admitting or refusing to admit the appeal, the Deputy Registrar shall notify the parties of the court's consequent directions.

3) No orders as to costs.

Administrative directions

14. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

15. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

16. Orders accordingly.

DATED AND DELIVERED IN NAIVASHA BY TELECONFERENCE THIS 25TH DAY OF FEBRUARY, 2021.

R. MWONGO

JUDGE

Attendance list at video/teleconference:

1. Chelangat for the Appellants/Respondents
2. Munga for the Respondent/Applicant
3. Court Clerk – Quinter Ogutu