



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA

CIVIL APPEAL NO. 49B OF 2019

(FORMERLY KAKAMEGA ELCA NO. 54A OF 2017

AND KAKAMEGA HCCA NO. 79 OF 2017)

(Being an appeal from the original judgment and decree of Hon. B Khapoya,

Senior Resident Magistrate, of 27th June 2017 in Kakamega CMCCC No. 4 of 2016)

MOLYN CREDIT LIMITED.....APPELLANT

VERSUS

CAROLYNE MUTAMBI LUSALA.....1ST RESPONDENT

NAPOLEAN W. MURENDE.....2ND RESPONDENT

JEREMIAH KAMALAKANI.....3RD RESPONDENT

RULING

1. The appeal herein originated from a decision of the trial court made on 27th June 2017. A memorandum of appeal was then lodged in Kakamega HCCA No. 79 of 2017. An order was made on 14th November 2017, transferring the matter from the High Court to the Environment and Land Court, where it became Kakamega ELCA No. 54A of 2017. Subsequently, it was transferred to High Court, vide an order made on 25th April 2014, hence its current number.

2. On 4th January 2018 a date was fixed at the registry for mention of the matter on 6th February 2018, presumably for directions on the disposal of the matter. Come 6th February 2018, the appellant asked for more time to file a record of appeal. The court granted a final adjournment to the appellant, and fixed the matter for directions on 9th May 2018. On 9th May 2018, the appellant had not yet filed the record of appeal, and asked for a last adjournment. The court noted that a final adjournment had been granted on 6th February 2018, and dismissed the appeal.

3. The application that I am called upon to determine, dated 22nd May 2018, arose from the orders of 9th May 2018. The appellant seeks review and setting aside of the orders made by the court on 9th May 2018. It is stated that the appeal was dismissed prematurely, as the lower court file was yet to be filed, hence the appeal had not been admitted and directions were yet to be taken. It is argued that it would be unjust for the appeal to be dismissed due to mistakes of the trial court. In the affidavit sworn in support of the appeal, the advocate for the appellant avers that he had been making a follow up of on the file with the registry of the trial court, and had been advised that the file was pending typing. He says that he was unable to prepare a record of appeal for that reason, hence the matter was never admitted nor fixed for directions. He argues that it was not yet a year since the filing of the appeal, and the timeframe given for dismissal of the appeal had not been complied with.

4. I have ploughed through the file of papers before me, and I have come across grounds of opposition, dated 8th May 2019, filed herein on 13th May 2019, by a party who described herself as the plaintiff, but who I presume is the 1st respondent for the purpose of the appeal. The principal grounds raised are that the appellant had not bothered to file record of appeal despite being allowed time to by the court, and that although the matter came up several times for directions the appellant failed to move the court appropriately. The appellant was accused of being indolent.

5. Directions were given on 16th January 2020, for disposal of the application by way of written submissions. The appellant and the 1st respondent filed written submissions. I have read through them and noted the arguments made in there.
6. The appellant relies on the rules of procedure to argue that the matter was not yet ripe for dismissal for want of prosecution. I agree with it, that under Order 42 Rule 35 of the Civil Procedure Rules, an appeal may be dismissed for want of prosecution, where directions have been given, and notices issued and served on the parties. It argues that since directions had not yet been taken, and no notice had been served since a year had not yet lapsed for such notice to issue. It blames the delay on the trial court, for failing to forward its file to the appellate court.
7. The 1st respondent, on her part, points at Order 42 Rule 11 of the Civil Procedure Rules, which requires that upon the filing of an appeal the appellant has thirty days to cause the matter to be listed before a Judge for directions. She argues that the appellant did not move the court for directions under Section 79B of the Civil Procedure Act, Cap 21, Laws of Kenya and Order 45 Rule 11 of the Civil Procedure Rules. It is submitted that the duty was on the appellant to move the court to ensure that the appeal was admitted in good time. It is submitted that directions had been given before the appeal was dismissed. The 1st respondent points at the mentions on 6th February 2018 and 9th May 2018. It is submitted that the appellant was given time to file a record of appeal, but none was filed, and no explanations were given. It is further submitted that there was no evidence that the proceedings were applied and paid for. The court was urged to deal with the matter under Order 42 Rule 35.
8. The memorandum of appeal herein was lodged at the registry on 25th July 2017. A notice issued the following day, 26th July 2017, calling for the original trial records. A reminder was sent on 29th April 2019. However, the issue is not availability of the lower court file, but the filing of the record of appeal. Availability of the trial records is a matter for the court, but the filing of a record of appeal is the responsibility of the appellant.
9. The record is clear that the appeal was filed on 25th July 2017. The appellant had thirty days from then to have the matter mentioned before a Judge for directions, as required by Order 42 rule 11, but it took no such a step. Instead, it was the court, on its own motion, that had a date allocated on 4th January 2018, for mention of the matter on 6th February 2018 for directions. On 6th February 2018, a record of appeal had not been filed, and the appellant was given thirty days to file one, and a mention was given for 9th May 2018. Again by that date no record of appeal had been filed.
10. The appellant blames the trial court for the delay. Yet it has not sought to provide any evidence that it sought for typed copies of the proceedings and a certified copy of the judgment. No documents are attached to the affidavit in support of the application to facilitate preparation of the record, to support the allegation that the trial court was to blame. No letter was placed on record addressed to the trial court asking for the typed proceedings, or following up on the typing, nor correspondence from that court on that issue. The lower court trial records have been availed. I have perused the file. I note that the appellant was represented at the delivery of the impugned ruling on 29th June 2017, yet the advocate in attendance did not apply for typed proceedings. There is no correspondence in that file requesting for the typed proceedings, and there is no evidence that the appellant ever paid for the typing and certification process. Consequently, I do not see any basis for blaming the trial court registry for delay when the appellant did not even apply for the typed record and pay for it. Even after the mention before the Judge on 6th February 2018, no letter was addressed to the trial court to ask for the records.
11. I am persuaded that the appellant filed its memorandum of appeal and went to sleep. It took no step after filing the memorandum of appeal to facilitate preparation of the record of appeal. The fact that the trial court file was not timeously transferred to the High Court is a mere excuse, for the typing of the proceedings had nothing to do with the movement of the file. The appellant simply did not move to set the matter in motion in readiness for hearing. It is hanging on technicalities of procedure to buy time, when all indications are that it did not do enough. The appeal belongs to the appellant, and it would be the duty of the appellant to move it forward. It should not be allowed to hang on technical rules to buy itself time when it has been lethargic. Consequently, I am not persuaded that the court ought to exercise discretion to review and set aside the orders made on 25th April 2018.
12. In the end, the Motion dated 22nd May 2018 is without merit, and I hereby dismiss it, with costs.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 19th DAY OF March 2021

W. MUSYOKA

JUDGE