



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 5 OF 2019

BELL ATLANTIC COMMUNICATIONS LIMITED.....APPELLANT

VERSUS

EPHRAIM MAINA RWINGO.....RESPONDENT

RULING

1. Before the court for determination is a **Notice of Motion** application dated **27th February, 2020** and filed by the Respondent. The application is brought under **Sections 1A, 1B & 79B** all of the **Civil Procedure Act** and **Order 2 Rule 15(1)** and **Order 42 Rule 13**, both of the **Civil Procedure Rules**. In this Application the Appellant/Applicants is seeking the following orders: -

a. This Honourable court be pleased to strike out the Memorandum of Appeal dated 10th January, 2019.

b. The costs of this application and appeal be borne by the Respondent.

2. The application is premised on the grounds that: -

a. Contrary to Order 42 Rule 13, the Respondent has failed to cause the appeal to be listed for giving of directions within 21 days from 11th January, 2019, when he served the Memorandum of Appeal.

b. The Respondent has not applied for leave to extend the time.

c. The pendency of the appeal continues to cause unnecessary anxiety and legal costs to the Applicant.

3. The Application is further supported by an **Affidavit** sworn on **27th February, 2020** by **Ephraim Maina Rwingo**, the Respondent/Applicant herein.

4. The Appellant/Respondent is opposed to the Application and in so doing has filed a **Replying Affidavit** sworn by **Godfrey Mutubia**, the Appellant/Respondent's Counsel on the **19th January, 2021**.

5. Directions were taken that the application be canvassed by way of written submissions and all parties indicated that they will be relying on the said written submissions. The Respondent/Applicant's submissions were filed on **4th February, 2021** while those of the Appellant/Respondent were filed on **2nd March, 2021**.

The Respondent/Applicants' Case

6. The Respondent/Applicant is seeking that the Appellant/Respondent's **Memorandum of Appeal** be struck out for non-compliance with mandatory provision of **Order 42 Rule 13** of the **Civil Procedure Rules**, as the Appellant/Respondent has failed to cause the appeal to be listed for directions within 21 days from **11th January, 2019**.

7. It has been 2 years since the filing of the Appeal and the Appellant/ Respondent has not set the instant appeal for direction as required by law. According to the Applicant, it is the duty of the Appellant to cause the Appeal be placed before a Judge for directions.

8. The Respondent/Applicant states that placing the appeal for directions before a Judge would have dealt with the issues as raised by the Appellant such as the lack of typed and certified copies of the proceedings.

9. The attempt by the Appellant/Respondent to attribute the delays in filing of the Record of Appeal to the alleged lack of typed proceedings is an averment that the Respondent/Applicant has urged this court not to consider.

10. The Respondent/Applicant has stated he has suffered prejudice and continues to suffer prejudice as he pendency of the appeal continues to cause unnecessary anxiety and legal costs. The Respondent/Applicant has thus urged the Court to strike out the Memorandum of Appeal dated **10th January, 2019** and filed on **11th January, 2019** with costs.

The Appellant/Respondent's case

11. The Respondent's case is that the Applicant's application dated **27th February, 2020** seeks harsh and drastic orders and is calculated to deny the Appellant/Respondent the right to a fair hearing.

12. The delay Appellant/Respondent has blamed the delay to filing his Record of Appeal on the Court for not providing him with typed proceedings and the scaling down of the Court operations for the better part of 2020 due to the Covid -19 pandemic.

13. The Respondent claims there have been several attempts to acquire the typed proceedings from Court, and the same is evidenced by letters dated the **26th March, 2019** and **13th January, 2021** respectively.

14. Further, the Appellant/Respondent states that the Registrar and not the Appellant is tasked with ensuring that a Memorandum of Appeal is listed for directions before a judge as per **Order 42 Rule 13** of the **Civil Procedure Rules as amended vide Legal Notice No.22 of 2020**. That no directions have been given pursuant to **Section 79B** of the **Civil Procedure Act** and **Order 42 Rule 11** of the **Civil Procedure Rules** and neither has the registrar caused the Appeal to be listed down for hearing.

15. The Appellant/Respondent maintains that they are eager and ready to pursue the appeal on merit and should not be condemned for a delay that was occasioned by the Court.

Analysis and determination

16. I have considered all the pleadings and issues raised by the parties. In my view the issue for determination is whether the **Memorandum of Appeal** should be struck out.

17. The **Memorandum of Appeal** was filed on **11th January, 2019**, and nothing transpired in the file until the Respondent filed the present application seeking to strike out the said Memorandum of Appeal.

18. **Order 42 rules, 11, 12 and 13(1)** of the **Civil Procedure Rules** before they were amended by **Legal Notice No.22 of 2020** set out the processes to be followed by an appellant and the court after the filing of an appeal, in the following terms: -

“[11]. 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.

[12]. After the refusal of a judge to reject the appeal under section 79B of the Act, the registrar shall notify the appellant who shall serve the memorandum of appeal on every respondent within seven days of receipt of the notice from the registrar.

[13]. 1) On notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of appeal the appellant shall cause the appeal to be listed for the giving of directions by a Judge in chambers.”

19. It is worth noting that the **Memorandum of Appeal** herein was filed in **January 2019** and that the Respondent's reasons for delay is that the Court Registry never supplied them with copies of the typed and certified proceedings and Judgment for purposes of preparation of the Record of Appeal.

20. The procedure before the amendment of the **Civil Procedure Rules** under **Order 42 rules, 11, 12 and 13(1)** required that the appellant set down the Appeal before the Judge for directions.

21. **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”.

22. It is evident from the provisions of **Section 79B** of the **Civil Procedure Act** that a Judge has to peruse the appeal before he can summarily reject the same.

23. My understanding of **Order 42 Rule 11, 12 and 13(1)** is that before an Appeal can be dismissed or struck out, the said Appeal must be perused by a Judge and directions given. In the Appeal herein, no such directions have been given.

24. It is also important to point out that under **Order 42 Rule 13 (4)** of the **Civil Procedure Rules**, the judge shall not allow a matter to

proceed for hearing unless the record of Appeal is duly filed. The Appellant herein had not filed the Record of Appeal as at **28th February, 2020** when the instant application was filed by the Respondent/Applicant.

25. **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.

26. Under **Order 42 Rule 35** of the **Civil Procedure Rules** no such directions have been given for the Appeal herein and thus the orders as sought in the application dated **27th February, 2020** are not available to the Respondent/Applicant. The **Memorandum of Appeal** thus cannot be struck out before any directions have been given.

27. The Court is aware that as at when the Respondent/Applicant filed their Application dated **27th February, 2020** the provisions of the **Order 42 Rules 11, 12 and 13(1)** were amended vide **Civil Procedure (Amendment) Rules, 2020, Legal Notice No.22 of 2020** and provides: -

[11]. A judge of the High Court shall, within thirty days of the filing of an appeal under section 79B of the Act, peruse the appeal and give directions in accordance with the provisions of section 79B of the Act.

[12]. Where the judge admits the appeal under section 79B of the Act, the registrar shall notify the appellant who shall serve the memorandum of appeal on every respondent within seven days of receipt of the notice from the Registrar.

[13](1) Upon notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of appeal the registrar shall cause the appeal to be listed for the giving of directions by a Judge in Chambers.

28. Under the amendment **Order 42 Rules 11, 12 and 13(1)** the requirement to list the matter for directions is no longer a duty of the Appellant but a duty of the Deputy Registrar.

29. However, having found that no directions have been given in the instant appeal as provided under **Order 42 Rule 35 (1)** of the **Civil Procedure Rules**, the **Memorandum of Appeal** herein cannot be struck out.

30. The upshot is that the application dated **27TH February, 2020** lacks merit and is hereby dismissed

31. Cost to be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 29TH DAY OF APRIL, 2021.

D. O. CHEPKWONY

JUDGE