



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CIVIL APPEAL NO. 12 OF 2019

(CORAM: F.M. GIKONYO J.)

(Appeal from the Judgment of Hon W. Juma (C.M) delivered on 19.3.2019 in Narok CMCC No. 13 of 2016)

TOBIKO OLE LEPURE.....1ST APPELLANT

TIPAPA OLE NAIMODU.....2ND APPELLANT

TOBIKO OLE LENGUS.....3RD APPELLANT

VERSUS

SAMUEL SEKEROT OLE MPETTI.....RESPONDENT

RULING

[1] Other than costs, the significant order sought in in the Notice of Motion filed by Samuel Sekerot Ole Mpetti is:

a. That the appeal herein be dismissed for want of prosecution.

[2] The Notice of Motion is expressed to be brought under Order 43 Rule 35 sub-rule (1) and (3) of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act. The application is premised on the grounds set out in the Motion and the supporting affidavit, to wit: -

a) THAT the appellants filed the memorandum of appeal way back on 18.04.2019 but have since failed to prosecute the appeal within one year as required by law.

b) THAT the appellants did not ensure that the appeal was listed for directions before the judge within 21 days as per the Order 42 rule 13 (1) of the Civil Procedure Rules.

c) THAT the provisions of order 42 rule 35 (2) of the Civil Procedure Rules has informed the applicant's decision to approach this court to seek for the dismissal of the said appeal.

d) THAT the blame for the delay herein squarely lies on the appellant.

[3] The Respondent opposed the application through the replying affidavit. The respondent set out reasons which made it impossible to set the appeal down for hearing. First, he stated that he has not been able to obtain typed proceedings despite applying and paying for them. According to the replying affidavit the delay has been occasioned by failure by the court to supply proceedings. It was also averred that the 3rd appellant is deceased. And, finally, that the relevant period of the one year fell within the COVIC-19 pandemic period i.e. March 2020.

[4] The application was canvassed through written submissions

ANALYSIS AND DETERMINATION:

Of loathed delay

[5] William Shakespeare, in *Hamlet Act III*, lamented:

“The Law’s delay’ is one of whips and scorns of time.”

[6] Likewise in the *Bar Review Journal Ireland Vol. 13 issue No.4 of 4.7.2008*, a contributor, Thomson in an article on delay, informed consents/employment injunctions observed thus:

“The prolonged nature of modern litigation continues to be a source of torment; indeed, lengthy delays may make it impossible for a defendant to receive a fair trial”.

[7] Our own Constitution of Kenya, 2010 in Article 159(2)(b) provides as a principle of justice that:

“Justice shall not be delayed.”

[8] Needless to state that expeditious disposal of cases is now a principle of justice. Parties now bear statutory obligation under the principle of Overriding Objective under the Civil Procedure Act and Civil Procedure Rules to assist the court to dispose of cases expeditiously. Thus, provision for dismissal of cases for want of prosecution should be seen within this philosophy of expeditious disposal of case as a tenet of justice.

[9] The relevant provision on dismissal of an appeal for want of prosecution is under Order 42 Rule 35(1) which states:

“Unless within three months, after granting 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.”

[10] Notably, the procedure for rejection and/or admission of appeal and of giving of directions in the Civil Procedure Rules is driven by the court. The Registrar’s notice is required in some of the steps. Of significance is that admission or rejection of or directions on the appeal is possible after the High Court has received the trial court’s file and proceedings. See also Order 42 Rule 13 (4) of the Civil Procedure Rules, that the hearing of the appeal shall not proceed for hearing unless the record of Appeal is duly filed.

[11] Subject to the foregoing, the appellant bears the responsibility of ensuring his appeal is heard expeditiously. I do note also that under Order 42 Rule 13 of Civil Procedure Rules, where the appellant fails to fix the appeal for hearing, the respondent may fix the same for hearing and/or seek dismissal of the same for want of prosecution under Order 42 Rule 35 (1) of the Civil Procedure Rules or the registrar lists the appeal before a judge for dismissal under Order 42 Rule 35 (2) of Civil Procedure Rules.

[12] In this case; (a) the court has not given directions on the appeal; (b) there is no indication that Registrar has issued a notice under Order 42 Rule 12 of Civil Procedure Rules; and (c) the original trial court’s file and typed proceedings have not been forwarded to this Court. In such scenario, care should be taken not to be quick in dismissing such appeal for want of prosecution- it is only just to first establish the status of the appeal in so far as the requirements in law are concerned before condemning the appeal to the abyss.

[13] In saying so, I appreciate the quest by the respondent to have this appeal disposed of expeditiously. I also do not take for granted arguments by learned counsel for the respondent that, since filing of memorandum of appeal no positive significant step the appellants have taken to prosecute the appeal. I do note, however, that Mr. Ombati attributed the delay herein to the failure in obtaining proceedings of court.

[14] In light of court’s observations above, the applicable test was aptly put in the case of *Ivuta v Kyumbu [1984] KLR 441: -*

“The test to be applied in application for dismissal for want of prosecution is whether the delay is prolonged and inexcusable, and if it is whether justice can still be done despite the delay.

Thus, even 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 of the discretion of the court.”

[15] Courts should always strive to serve substantive justice by hearing cases on merit rather than dismissing them summarily. The latter deprives a party the right to be heard on the merits of his case. The discretion to dismiss suit should therefore be exercised sparingly and in clear cases. This principle recognizes the fundamental rights, and obligation of court of law to do substantive justice between the parties.

[16] Although the memorandum of appeal was filed on 18/4/2019- over one year- no directions have been taken before a judge in chambers under section 79B of the Civil Procedure Act, and no proceedings have been supplied despite the appellant having applied and paid for them. See letter by the appellant to court as well as payment receipt for proceedings. Ordinarily, an appeal will not be dismissed if the court is satisfied that the failure to set the appeal down for hearing within the prescribed time has been caused by the inability of the appellant or his advocate to obtain a copy of the judgment or order appealed against, and a copy of the record, or proceedings within a reasonable time of applying to the court therefor. In the circumstances, I will spare the appeal the hangman’s noose. I dismiss the application dated 29th July 2020. Costs shall be in the cause. However, I give the following directions: -

a) The Deputy Registrar shall; (i) forward to this court, the original trial court’s record together with typed proceedings; and (ii)

supply the appellant with certified proceedings within 21 days of today.

b) Upon receipt of proceedings, the Appellants shall file and serve the Record of Appeal within thirty (30) days thereof.

c) In the event of default by the appellant, the Appeal herein will stand automatically dismissed

DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 26TH DAY OF APRIL 2021.

F. GIKONYO

JUDGE

In the Presence of:

1. Kiptoo for the Respondent
2. Ombati for the Appellants
3. Mr. Kasaso – Court Assistant

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F. GIKONYO

JUDGE