



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**FAMILY DIVISION**

**CIVIL APPEAL NO. 43 OF 2018**

**HAMISI HAMISI MWAKURYA.....1<sup>ST</sup> APPELLANT**

**MWANAKOMBO HAMISI MWACHANGU.....2<sup>ND</sup> APPELLANT**

**-VERSUS-**

**NIMALI MOHAMED MWANVYOMBO.....1<sup>ST</sup> RESPONDENT**

**RAMA HAMISI MWAMADZENGO.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The application before Court is a Notice of Motion filed in Court on 11<sup>th</sup> March, 2020 pursuant to the provisions of Section 1A, 1B (a) & 3A of the Civil Procedure Act, Order 42(2) and Order 51 rule 1 of the Civil Procedure Rules Cap 21 Laws of Kenya and all other enabling provisions of the law. The appellant seeks the following orders from this Court-

**1) The Court be pleased to dismiss the appeal for want of prosecution.**

**2) Costs be in the cause.**

2. The application is based on the grounds stated on the face of it and averments contained in an affidavit sworn on 10<sup>th</sup> March, 2020 by Nimali Mohamed Mwayyombo (*the 1<sup>st</sup> respondent/applicant herein*).

3. It was deposed that the appellants filed this appeal out of time and sought leave of Court to extend time which application was allowed on the 8<sup>th</sup> February, 2019. That the appellants were also directed to file their record of appeal within 21 days from the date of the said ruling.

4. The 1<sup>st</sup> respondent/applicant further deposed that in violation of the ruling and order of the Court delivered on the 8<sup>th</sup> February, 2019, the appellants filed their record of appeal outside of the 21 days directed by the Court. He averred that even if the record is deemed to have been filed within time the same is not complete.

5. The 1<sup>st</sup> respondent/applicant stated that the appellants ought to have fixed the appeal for hearing before the lapse of one calendar year. That it is now over one year and the appellants have never taken steps to set this appeal for hearing. In his view, it would be fair and just that the present application be allowed.

6. The 1<sup>st</sup> appellant/ respondent filed a replying affidavit sworn on 8<sup>th</sup> April, 2020 in opposition to the said notice of motion.

7. He averred that dismissal of an appeal for want of prosecution can only be done after an appeal has been admitted and directions given. That since the appeal is yet to be admitted and no directions have been given, the prayer for dismissal for want of prosecution is premature and therefore lacks legal basis.

8. It was stated that he has not been able to cause the appeal be admitted nor had the same fixed for hearing since the filed record of appeal is incomplete as it lacks proceedings of the trial Court. The 1<sup>st</sup> appellant also stated that failure to cause the appeal to be admitted or fix the same for hearing and/or file a complete record of appeal was caused by his advocates inability to trace the trial Court file.

9. He demonstrated his interest in the appeal by annexing letters dated 11<sup>th</sup>, 21<sup>st</sup> & 28<sup>th</sup> February, 2019, which were addressed to the

executive officer Kwale Law Courts seeking certified copies of the proceedings to enable him file the record of appeal. He averred that on visiting Kwale Law Courts together with his Advocate on record, they were informed that the file could not be traced. That his Advocate wrote further letters to the executive officer dated 17<sup>th</sup> March, 2019 and 14<sup>th</sup> October, 2019 both of which elicited no response thus necessitating the filing of an application dated 21<sup>st</sup> January, 2021 seeking to summon the executive officer, Kwale Law Courts to either produce the file or explain its whereabouts.

10. It was further stated by the 1<sup>st</sup> appellant that either the proceedings before the trial Court are non-existent or the file is hidden deliberately to defeat the cause of justice by barring him from prosecuting his appeal.

11. That on 8<sup>th</sup> March, 2021 directions were taken that the application dated 11<sup>th</sup> March, 2020 shall be heard on 14<sup>th</sup> April, 2021. The matter proceeded on 14<sup>th</sup> April, 2021 with the parties' respective Counsel making oral submissions.

#### **Analysis and determination.**

12. I have considered the application herein, affidavits in support, response thereto, and oral submissions by parties' respective Counsel. The main issue for determination therefore is whether the application herein has any merit.

13. It is noteworthy that every person is entitled as envisaged under Article 50 of the Constitution of Kenya to have a fair trial. Article 50 of Constitution of Kenya provides as hereunder: -

**“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”**

14. It is trite that each and every person ought not to be shut out from accessing court or having his day in court. It goes without saying that, the right of a party to enjoy the fruits of his judgment must be weighed against the right of a party to access court to have his dispute heard and determined by a court or tribunal of competent jurisdiction.

15. The applicable law on the process of appeals is regulated by the Civil Procedure Act and the Civil Procedure Rules. Order 42 Rule 35 of the Civil Procedure Rules, 2010, provides for dismissal of an appeal for want of prosecution as hereunder:

***(1) “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.”***

16. In the instant application, the 1<sup>st</sup> respondent/applicant contended that it is now over one year since the record of appeal was lodged and the appellant has never taken steps to set this appeal for hearing. The 1<sup>st</sup> appellant/respondent stated that the issue is not negligence but the failure of the trial court to supply certified typed proceedings in accordance to Section 79G of the Civil Procedure Act. He further stated that they have on several occasions tried to get certified typed proceedings of the trial Court file from the executive officer Kwale Law Courts but their efforts were fruitless. In fact, the executive officer Kwale Law Courts informed them that the Court file cannot be traced which information led them to file an incomplete record of appeal.

17. Order 42 Rule 10 & 11 of the Civil Procedure Rules, 2010 provide that the appeal is deemed to be brought and filed before the appellate court. Once filed and entered in the register, the appellant shall within thirty days cause the matter to be listed before a judge for directions under Section 79B of the Act. In accordance with the provisions of Section 79B, the judge is to peruse the memorandum of appeal and the lower court record to infer whether sufficient grounds exist to interfere with the decree. In the event the judge is satisfied that no plausible grounds exist, the appeal is to be summarily dismissed.

18. In view of what is stated above, it is not in dispute that the appellant has not fixed the appeal for hearing since the filing and serving of the incomplete record of appeal. In the case of *Eastern Province Kenya Ltd v Rongai Workshop & Transporters Ltd & Another [2014] eKLR* the court dealt with the issue of delay by laying down the test to be applied.

***“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 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 of the discretion of the court.”***

19. I concur with the decision in the case of *Jurgen Paul Flach vs Jane Akoth Flach [2014] eKLR* where Kasango J held that before an appeal can be set down for dismissal for want of prosecution directions ought to have been given.

20. Similarly, in the case of *Allan Otieno Ofula vs Gurdev Engineering & Construction Ltd [2015] eKLR* Aburili J observed that **the right of appeal is a constitutional right and in as much as there has been delay which has not been satisfactorily explained by the appellant, the court has to weigh the cost and prejudice a respondent is to suffer if the appeal was struck out before it was heard on merits.**

21. The appellant filed the memorandum of appeal on 31<sup>st</sup> October, 2018 and the incomplete record of appeal on 1<sup>st</sup> March, 2019. It is over one year and no directions have been taken before a judge in chambers under section 79B of the Civil Procedure Act. The 1<sup>st</sup> appellant contended that the delay to obtain a copy of certified typed proceedings, judgement and or decree is the main reason behind the delay in fixing the appeal for hearing. This court was presented with various correspondences to supply the 1<sup>st</sup> appellant with the entire trial court record for purposes of pursuing the appeal. It is abundantly clear that the trial court has not even corresponded nor acknowledged the 1<sup>st</sup> appellant's letter on the issue since there is no record of the same.

22. Accordingly, I find that the delay for the court not to supply the proceedings to the 1<sup>st</sup> appellant in this case is inexcusable in view of the fact that the registrar and/or executive officer of the trial court has not even attempted or otherwise furnished any reasons contributing to the said delay. In view of the above, it can easily be deduced that there is no doubt that the 1<sup>st</sup> appellant is guilty of a procedure default to adjudicate his appeal. However, I am convinced from the explanations given by the 1<sup>st</sup> appellant that the concerns raised are legitimate and beyond his control.

23. From the foregoing, it is evident that Order 42 Rule 35 of the Civil Procedure Rules, 2010 envisages two (2) scenarios for the dismissal of an appeal for want of prosecution as follows; when an appellant fails to cause the matter to be listed for directions under Section 79B of the Civil Procedure Act as is envisaged in Order 42 Rule 11 of the Civil Procedure Rules and; if after service of Memorandum of Appeal the appeal would not have been set down for hearing, the registrar shall on notice to the parties list the appeal before the judge for dismissal.

24. It is trite that directions must have been given before an appeal can be dismissed for want of prosecution. The law does not provide any penalty and/or consequences to be suffered where an appellant fails to proceed as per Order 42 Rule 11 and Order 42 Rule 13 of the Civil Procedure Rules, 2010.

25. I therefore find that an appeal cannot be dismissed before directions have been given. In the present case before me, it is evident that directions have not yet been given, the Registrar had also not issued a notice under Order 42 Rule 12 of Civil Procedure Rules and, the lower court file and proceedings are yet to be forwarded to the High Court for the Registrar to proceed as required.

26. I accordingly dismiss the notice of motion dated 11<sup>th</sup> March, 2020 and hereby order as follows:

**(1) That the Executive Officer Kwale Law Court supplies the trial court record to the appellant within 21 days from today's date.**

**(2) That the record of appeal be served upon the applicants within 14 days from the 21 days allowed for its preparation.**

**(3) That the parties to appear before the Deputy Registrar Mombasa High Court on 15<sup>th</sup> July 2021 to confirm compliance with the order.**

**(4) That the costs of this application to abide the outcome of the appeal.**

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 20TH DAY OF MAY, 2021**

**HON. JUSTICE J.N. ONYIEGO**

**JUDGE**