



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
COMMERCIAL & ADMIRALTY DIVISION
CIVIL APPEAL NO.197 OF 2017

LEAH ALASA OMOLLO.....APPELLANT

-VERSUS-

**LYDIA NKATHA MBAYA & PURITY KANANU(suing on behalf of the estate of RICHARD
MWACHARI MWAKULOMBA.....RESPONDENTS**

RULING

1. The **Ruling** herein relates to a **Notice of Motion** dated **17th December, 2020**, brought under the provisions of; **Article 159** of the **Constitution**, **Section 67(2)** of the **Evidence Act**, **Sections 1A, 1B, 3, 3A**, and **79B** all of the **Civil Procedure Act**, **Order 42 Rule 11**, **Order 42 Rule 13** and **35(2)** all of the **Civil Procedure Rules, 2010** and all other enabling provisions of the law.
2. The Applicant seeks the following orders:-
 1. **THAT this Honourable Court be pleased to strike out the Memorandum of Appeal dated 9th October, 2017 filed in this Court on 9th October, 2017 and with it the entire Appeal with costs to the Respondent/Plaintiff now the Applicant herein in terms of the consent orders entered into on 6.11.2017 before the trial Court.**
 2. **That in the alternative, this Honourable Court do exercise its inherent discretion and dismiss this Appeal for want of prosecution with costs to the Respondent/Plaintiff now the Applicant herein.**
 3. **That an Order be made that the sum of Kshs.3,000,000/= deposited in a fixed deposit account at NIC Bank (Now NCBA Bank) in the name of Njoroge Mwangi & Company Advocate and Kairu & McCourt Advocate (Now Kimondo Gachoka & Company Advocates) as security in this case be released to the firm of Njoroge Mwangi & Company advocate and the Plaintiff /Respondent/Applicant be at liberty to pursue the balance of Kshs.295,465.20 as at 11th September, 2017 plus costs and interest.**
 4. **That the costs of this Application and Appeal be awarded to the Respondent/Plaintiff now the Applicant herein.**

3. The application is premised on the grounds on its face and the affidavit of **Lydia Nkatha Mbaya** who is the Plaintiff's widow sworn on even date. She deposed that vide an application dated **6th October, 2017**, the Appellant sought for stay, and in order to fast track the appeal, a consent was entered into by the parties to the effect that Kshs.3,000,000/= was to be deposited in a joint account in the name of advocates for the parties and that a **Record of Appeal** was to be filed within 60 days from **6th November, 2017**.

4. The deponent avers that what was filed on **8th January, 2018** was an incompetent Record of Appeal, which lacked an extracted decree and typed proceedings. Consequently, no competent record of appeal was filed within 60 days as had been consented to by the parties and therefore, the applicant's right to execute against the Appellant crystalized.

5. The deponent further avers that she moved the court vide an application dated **31st August, 2018** and the court gave further timelines. Again, the Appellant never complied and has even not attempted to have the lower court proceedings typed, or the decree extracted, hence the appeal is yet to be fixed for directions.

THE RESPONSE

6. The application was opposed vide the Respondent's **Replying Affidavit** sworn on **19th January, 2021** by **Kelvin Ngure**, who is the **Claims Manager** at **Directline Assurance Company Limited**. The deponent avers that the appeal was instituted vide a **Memorandum of Appeal** dated **9th October, 2017** against the whole **Judgment** of Hon. J Nangea, CM delivered at Mombasa on **11th September, 2017** in **Mombasa CMCC No.1131 of 2015**. **That** thereafter, the Appellant sought and was granted a Stay of Execution. Subsequently, and immediately, the Appellant wrote to the Executive Officer at Mombasa Law courts requesting for the certified copies of the decree, Judgment and typed proceedings to enable them prepare and file the Record of Appeal. However, the same never elicited any response. Consequently, the Appellant states that they prepared and filed an **incomplete Record of Appeal** on **8th January, 2018**, and it intends to prosecute the same contrary to the allegations by the Applicant herein.

7. The deponent avers that the Appellant is keen on prosecuting the appeal. However, it has been impossible for the appellant to compile and file a Record of Appeal in the absence of critical documents. Further, the deponent avers that the delay has been occasioned by the lower court, which has failed to furnish them with certified copies of judgment, typed proceedings and decree.

8. The deponent avers that under **Order 42 rule 35** of the **Civil Procedure Rules**, since directions have not been given, the orders sought by the respondent should not be entertained. Further, the deponent avers that under **Order 42 rule 35(2)**, it is only the Deputy Registrar who can list an appeal before a Judge in chambers for dismissal if directions under **Section 79B** of the **Civil Procedure Act** have not been issued.

SUBMISSIONS

9. The Applicant/Respondent filed submissions on **22nd March, 2021**, while the Respondent/Appellant filed submissions on **26th April, 2021**.

ANALYSIS AND DETERMINATION

10. Having considered the application, the response thereof and the submissions filed by the parties it is clear that the application raises three issues which are:-

- a) Whether or not the Memorandum of Appeal dated 9th October, 2017 should be struck out.*
- b) Whether or not the Record of Appeal filed on 8th January, 2018 should be struck out; and*
- c) Whether an order should be made for the release of Kshs.3,000,000/= deposited in the fixed*

account as security to this appeal.

11. It goes without saying that this is not the first time those key issues have been sought before this Court as in the **Ruling** delivered on **15th July, 2019**, the issues were clearly articulated and addressed by this court. In that **Ruling**, the Respondent had advanced similar issues as herein. That is he has been unable to file a complete Record of Appeal owing to failure by the court registry to supply the certified copies of the proceedings and Judgment. The delay was then attributed to the court registry and the court was persuaded that the conditions were beyond the control of the Respondents. It is on this strength, that the court declined to grant the prayers for dismissal of the appeal and release of the monies deposited as security in the joint account. The Respondent was then directed to file the complete Record of Appeal within 21 days thereof and further mention of the file before the Deputy Registrar to confirm compliance. Thereafter, the file was to be placed before this Court within three months of the **Ruling of 25th January, 2019** for directions.

12. None of those directions were complied with but the Respondent has annexed **two letters** dated **12th April, 2019** and **27th February, 2020** addressed to the Executive Officer in which it is seeking for the typed proceedings in the matter. Thereafter, the Respondent went to slumber only to be awakened by this instant application. He never made efforts to fix the matter before the Deputy Registrar to confirm the status of the typed proceedings for purposes of compiling the Record of Appeal.

13. In the circumstances as the one at hand, the court looks at the conduct of a party. If it is appalling as the one exhibited in this particular case, this court will then rightly refuse to exercise its discretion in favour of such a party.

14. As indicated in the paragraphs above, the Appellant/Respondent has never taken any step to prosecute the appeal as directed in the **Ruling** delivered on **25th July, 2019**. As a litigant, he ought to have caused the matter to be listed before the Deputy Registrar as directed in this court's Ruling and address any difficulties it was experiencing obtaining the typed proceedings. Better still, the Respondent/appellant should have fixed a mention date before this court within 3 months of the delivery of the **Ruling** dated **25th July, 2019** and update the court on the difficulties it had faced in compiling the record of appeal. Infact it is the Respondent/Applicant who caused the mention of this appeal on **19th August, 2020** after lapse of one year.

15. The Appellant has failed to sufficiently demonstrate the appetite to prosecute the appeal. After the court delivered its **Ruling** on **25th July, 2019** directing the Deputy Registrar to supply the record of the trial court within 21 days, the Appellant has only produce a single letter dated **7th February, 2020** addressed to the Executive Officer and received in court on the **20th February, 2020**. The letter does not even mention the orders the court issued to the Deputy Registrar on the **25th July, 2019**. There is no cogent evidence such as correspondence exchanged between the appellant and the Deputy Registrar, regarding the delay in availing the proceedings as directed by this court on **25th July, 2019** so as to buttress the appellant's contention that the filing and prosecution of the appeal was hampered by the non-availability of the typed proceedings. Any diligent litigant would have bombarded the Deputy Registrar with correspondence over the issue, failing which he would have escalated the matter to another level. This not the case here.

16. It is my considerate view that the Appellant sat back under the pretext that they were waiting for typed proceedings. **Sections 1A, 1B and 3A** of the **Civil Procedure Act**, which the Respondent/Applicant pins her hopes on are explicitly intended to ensure that the courts are not clogged with cases that cannot be disposed of due to the indolence or deliberate actions of litigants. The Appellant's delay in filing a **Supplementary Record of Appeal** in time and the lackadaisical manner in which the Appellant has pursued the typed proceedings and certified copy of Judgment of the trial Court, clearly falls foul of the overriding objective and amount to the very mischief that the rules were intended to prevent.

17. For these reasons, I am satisfied that the Appellant's conduct is undeserving of the court's mercy and

is deliberately calculated to deny the Respondent the enjoyment of the fruits of victory over the Appellant.

18. For the above stated reasons, I find that the Respondent is right that the Appellant has no intention of prosecuting its Appeal and proceed to dismiss the entire Appeal with costs to the Respondent. Needless to say, the **Notice of Motion** application dated **17th December, 2020** be and is hereby allowed in its entirety.

It is so ordered.

Dated, Signed and delivered Virtually this 24th day of June 2021

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Kazungu counsel holding brief for Mr. Njoroge for Respondent/Applicant

No appearance for and by Appellant/Respondent

Court Assistant - Bancy