



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL DIVISION

CIVIL APPEAL NO. 708 OF 2017

BOSCO WAMBUA KIOKO.....APPLICANT

-VERSUS-

DON BOSCO BOYS TOWN.....RESPONDENT

RULING

1. Before the court is the motion dated 26th January, 2020 by **Bosco Wambua Kioko** (hereinafter Applicant) seeking that the appeal herein be dismissed for want of prosecution. The motion is expressed to be brought *inter alia* under Section 1A and 1B of the Civil Procedure Act (CPA) and Order 42 Rule 35(2) of the Civil Procedure Rules (CPR). On grounds *inter alia* that it has been more than one (1) year since the filing of the appeal and the Respondent has not taken any steps to prosecute it.
2. The motion is supported by the affidavit of a deponent named **Peter Githendi**, while the jurat indicates the deponent to be **Bosco Wambua Kioko** (the Respondent herein). The affidavit amplifies the grounds on the face of the motion namely, that the judgment appealed from was delivered on 14th November, 2017 and the Appeal filed a month later; that the Respondent has never applied and or paid for court proceedings and that it has been over two years since filing of the appeal and the Respondent has taken no steps to prosecute the appeal and it ought to be dismissed for want of prosecution.
3. The motion was opposed by way of a replying affidavit dated 13th February, 2021, sworn by **Eric Achoki**, counsel for the Respondent who states *inter alia* that the motion is fatally defective and ought to be dismissed and that on 24th May, 2019 his firm applied for proceedings, which are now ready and he is in the process of preparing the record of appeal.
4. The motion was canvassed by way of written submissions. For the Applicant it was submitted that the Respondent is currently enjoying indefinite stay orders to the detriment of the Applicant by failing to prosecute the appeal for over three (3) years. Finally, counsel submitted delay in prosecuting the appeal is inordinate and inexcusable on the part of the Respondent.
5. As a preliminary issue counsel for the Respondent submitted that the supporting affidavit was sworn by a stranger to the proceedings, rendering the motion incompetent and defective. Counsel further reiterated that he had applied and paid for typed proceedings. He took the view that the motion is an abuse of the court process, is fatally defective and ought to be dismissed.
6. The court has considered the material canvassed in respect of the motion. As a preliminary point the Court must determine whether the motion before it is fatally defective as argued by the Respondent. The Respondent raised objection to the fact that the motion was supported by an affidavit sworn by a stranger to the proceedings. The matter was further raised in their written submissions. On its part, the Applicant failed to address the objection raised by the Respondent.
7. The Court has reviewed the Respondent's submissions and the affidavit supporting the motion. On the face of the motion, it is indicated that the motion is supported by the affidavit of **Bosco Wambua Kioko**, who is the Respondent. However, the actual affidavit in support of the motion bears the name **Peter Githendi** in the body and that of the Respondent in the jurat. Although the issue was not addressed by the Respondent, it is evident that the former name is an error. Thus, the court would not read too much into the error since the jurat contains the Respondent's name as the deponent.
8. The Appellant while making heavy weather of this error is equally guilty in that the replying affidavit which contains somewhat contentious matters is sworn, not by the Appellant but by his counsel, contrary to the provisions of Order 19 Rule 3 (1) CPR and Rule 9 of the Advocates (Practice) Rules the latter which states:

“No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear:

Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears.”

9. Rule 9 of the Advocates (Practice) Rules and Order 19 Rule 3(1) of the Civil Procedure Rules limit counsel to deposing on non-contentious facts well within his knowledge, on behalf of his client. The rationale behind both Rules is to both bar and shield the advocate from entering the fray between his client and adverse parties. See **Nyamogo & Nyamogo Advocates v Kogo (2001) EA 174 and Simon Isaac Ngugi v Overseas Courier Services (K) Ltd (1998) eKLR.**

10. The defect in the Respondent’s affidavit is merely a typo that is cured by the provisions of Order 19 Rule 7 CPR which states:

“The court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality”.

11. On the merits of the motion itself, there is no dispute that the Appellant has since filing the appeal on 14th December 2017 not taken steps to perfect it for hearing. The request for proceedings annexed to the replying affidavit as annexure **“EA 1”** is dated 24th May 2019. The letter is not accompanied by a copy of fees receipt to demonstrate that the Appellant paid for the proceedings, nor is there a reminder to the lower court. All in all, no good reasons have been shown for the Appellant’s delay in progressing its appeal. The delay is inordinate and indeed the Respondent cannot be faulted when he asserts that the Appellant is enjoying stay of execution orders to his detriment.

12. The Court, in the interest of justice will however grant the Appellant one more opportunity to progress the appeal but within strict timelines. While disallowing the Respondent’s motion the Court directs the Appellant to file the record of appeal within 30 days and to set down the appeal for directions within 60 days of today’s date. In default of any of these conditions by the Appellant, the appeal will stand automatically dismissed with costs to the Respondent. The costs of the instant motion are awarded to the Respondent in any event.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 30TH DAY OF SEPTEMBER 2021

C. MEOLI

JUDGE

In the presence of:

Mr Mutunga for the Respondent

Appellant- N/A

C/A: Carol