



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 133 OF 2019

REHEMA ACADEMY AND COMPUTER SCHOOL.....APPELLANT

VERSUS

EUNICE WANJIRU MBUGUA.....1ST RESPONDENT

KENYA BUS SERVICES MANAGEMENT LIMITED.....2ND RESPONDENT

PAUL NYANDUMO ONTERE.....3RD RESPONDENT

(Being an Appeal from the Ruling of Hon. Ofisi, Resident Magistrate at the

Chief Magistrate's court Milimani, Nairobi in Milimani

CMCC No. 7481 of 2015 on 3rd May, 2019)

RULING

The Notice of Motion dated 27th May, 2021 seeks the following orders:-

- 1. THAT this appeal is hereby dismissed for want of prosecution.**
- 2. That subsequently, the trial court file CMCC 7481 of 2015 be transferred back to the Magistrate's court for determination.**
- 3. THAT cost of this application be borne by the appellant.**

The application is supported by the affidavit of Anyango Bwire advocate sworn on the 27th May, 2021 and a further affidavit of the same advocate sworn on 2nd July, 2021. The respondent filed a replying affidavit sworn by Mohamed Mukwana on 12th June, 2021. The application was determined by way of written submissions.

Counsel for the appellant relies on the two affidavits in support of the application and submissions dated 21st July 2021. It is contended in the affidavits that the case involves an accident which occurred on 2nd August, 2016. There are three other similar cases pending before the Chief Magistrate's Court. The primary suit has been fully heard and is pending judgment which cannot be delivered in view of the pending appeal. The appeal has been pending for over two years now and the appellant is yet to file the record of appeal and has failed to set it down for hearing. According to counsel for the applicant, the appellant is not interested in pursuing this appeal. The delay in prosecuting this appeal is also delaying justice. It is the duty of the appellant to follow up with the registry the typed proceedings and to cause the appeal to be placed before a judge for directions. Nothing has happened since the appeal was lodged on 28th March 2019. Apart from a letter dated 1st March 2019 requesting for typed proceedings, no other action has been taken by the appellant. Counsel referred to the case of **ABRAH MUKHOLA ASITSA -V- SILVER STYLE INVESTMENT COMPANY LIMITED (2020) eKLR** where Justice Musyoka stated:-

“However, I am not persuaded that there is any justification, for the party to file appeal, and thereafter go to sleep. An appeal is not filed for the sake of it. It should not be left parked at the appeals registry for times on end, without any action being taken. I believe a party who files appeal and goes to sleep and takes no action on it for a long time, cannot hide order above the provisions and argue that since directions had not been taken then the appeal cannot be dismissed. An appeal should not be left to hang over the head of a respondent endlessly, where the appellant is unwilling to take action on it.

Justice demands that the same be resolved one way or the other. I believe dismissal of such stale appeals is one of the resolutions. There is no point of populating appeals registries with appeals that are not being prosecuted, yet the courts are being told they cannot dismiss them before directions are taken. This creates unnecessary backlog. If parties are not moving their cases, the courts should dismiss them. There is no reason for them to clog the system. It is an untenable position. I believe there is inherent power to dismiss such appeals.

In this case, no action was taken by the appellant, after his appeal was filed, for over two years, indeed for nearly three years. He did not explain why that was so. I am persuaded that this is a proper case for dismissal of the appeal, and I hereby dismiss the appeal with costs. The order herein shall apply equally to Kakamega HCCA No. 105 of 2017.”

Counsel for the respondent relies on the replying affidavit. It is also submitted that this matter was in court on 22nd June, 2021 and the applicant was directed to file and serve a supplementary affidavit but failed to do so. The replying affidavit states that the appeal was filed on time and that a request for typed copies of proceedings was made. The record of appeal could not be filed due to lack of typed copies of proceedings.

The application is brought under Articles 165 and 159(2) of the Constitution and Order 42 rule 35 of the Civil Procedure Rules. Order 42 rule 35(1) & (2) states as follows:-

“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”

The Civil Procedure Rules under Order 42 provide for the requisite procedures relating to the filing and determination of appeals. Order 42 Rules 11,12 and 13 state as follows:-

“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.

(2) Any objection to the jurisdiction of the appellate court shall be raised before the judge before he gives directions under this rule.

(3) The judge in chambers may give directions concerning the appeal generally and in particular directions as to the manner in which the evidence and exhibits presented to the court below shall be put before the appellate court and as to the typing of any record or part thereof and any exhibits or other necessary documents and the payment of the costs of such typing whether in advance or otherwise.

(4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say:

(a) the memorandum of appeal;

(b) the pleadings;

(c) the notes of the trial magistrate made at the hearing;

(d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;

(e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;

(f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:

Provided that—

(i) a translation into English shall be provided of any document not in that language;

(ii) the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).”

The procedure under order 42 is that once the Memorandum of Appeal is filed, the appellant is required to have the appeal listed before a Judge for directions under Section 79B of the Civil Procedure Act. Section 79B of the said Act mainly deals with summary rejection of an appeal by a Judge. Order 42 Rule 12 deals with a situation where a Judge allows the appeal to proceed for hearing. That is, if the appeal is not summarily rejected. Once the appeal is given the greenlight to proceed, the Deputy Registrar is supposed to notify the appellant who is expected to serve the respondents with the Memorandum of Appeal. Order 42 Rule 13 provides for directions before the appeal is fixed for hearing.

One aspect of the record of appeal is certified copies of the proceedings. Order 42 Rule 13(4) makes reference to the Memorandum of Appeal and the proceedings. The practical aspects of an appeal is that the Judge cannot summarily reject an appeal under Section 79B of the Civil Procedure Act without reading the record of the trial court. A summary rejection of an appeal has to be based on an understanding of the dispute. Section 79B calls for a Judge to peruse the appeal before it is heard or summarily rejected. This aspect of perusal entails reading of the proceedings and the entire record of the trial court.

The above process is mainly the court’s own administrative procedures. The appellant plays no role in the typing and certification of the proceedings. However, it is expected of an appellant to make a follow up of the proceedings and at times the response that the appellant was yet to be supplied with the proceedings may be found not convincing especially where the same have been processed and lying idle in the court file for quite some time.

There are two versions on the issue of dismissal of appeals for want of prosecution. The first version is that an appeal cannot be dismissed for want of prosecution before directions are given under Order 42 rule 13. The second version is that the court’s power to dismiss an appeal which is deemed to have not been prosecuted for quite some time cannot be limited and therefore the court can dismiss an appeal for want of prosecution even when directions have not been given.

In my view, all of the two versions are correct. We cannot have an appeal filed and parked in court for ten (10) years simply because the appellant is yet to be supplied with certified copies of the proceedings. Where it can be shown that the proceedings were readily available soon after the filing of the appeal, there is no excuse for a case to be parked in court for a long period without the party who has brought it taking any action. On the other hand, where there has been no considerable period of delay by the appellant but the respondent is curious to terminate the appeal for want of prosecution, the court can easily consider the fact that no directions have been given under Section 79B and Order 42 Rule 13 of the Civil Procedure Act and dismiss such a request by the respondent for being premature. Whatever direction the court will take, it all depends on the circumstances of the case. Sometimes reference is made to Order 17 Rule 2(3) which deals with dismissal of normal suit. Section 2 of the Civil Procedure Act defines suit as **“all civil proceedings commenced in any manner prescribed”**. Section 3 of the Interpretation and General Provisions Act (Cap 2) defines an action as **“any civil proceedings in a court and includes any suit as defined in Section 2 of the Civil Procedure Act”**. In my view, an appeal can equally be classified as an “action” and can fall under the provisions of Order 17 of the Civil Procedure Rules. It therefore follows that where no action is taken by the appellant, the respondent shall be at liberty to apply for the dismissal of the appeal for want of prosecution. In the case of **ARGAN WEKESA OKUMU –V- DIMA COLLEGE LIMITED & 2 OTHERS (2015) eKLR** the court stated as follows:-

“The principles governing applications for dismissal for want of prosecution are well settled and have been established by a long line of authorities. The Applicant must show that the delay complained of is inordinate, that the inordinate delay is inexcusable and that the Defendant is likely to be prejudiced by such delay. As such the 3rd Defendant in this case must meet the burden of proof in seeking the dismissal of the Plaintiff’s case for want of prosecution see the case of Ivita –vs-Kyumbu (1984) KLR 441. Further to this, the decision of whether or not to dismiss a suit is discretionary and this Court must exercise such discretion judiciously. Additionally, each case must be decided on its own facts keeping in mind that a court should strive to sustain a suit where possible rather than prematurely terminating the same.”

The appeal is against the trial court’s refusal to set aside an interlocutory judgment. The applicant contends that the appeal has affected other files which are still pending before the trial court. The proceedings of the trial court have been typed and the appeal can be heard and determined in good time. The applicant’s interest to have the cases resolved in good time has to be balanced with the appellant’s right to have the appeal resolved on merit.

The proceedings are available and the appeal can be heard, I do find that the interest of justice will be served if the appeal is determined on its own merit. This is the line taken by the court in case of **VICTORY CONSTRUCTION CO. –V- A.N. DUGGAL (1962) E.A. 697** where the court held:-

“(ii) where parties to an action are called upon to show cause why an action should not be dismissed for want of prosecution, the court should be slow to make an order if satisfied that the suit can be heard without further delay, that the defendant will suffer no hardship and that there has been no flagrant and culpable inactivity on the part of the plaintiff.”

The upshot is that the application dated 27th May, 2021 lacks merit and the same is hereby dismissed. Costs shall follow the outcome of the appeal. I do further order that the appellant to prepare and serve the record of appeal within thirty (30) days hereof.

DATED AND SIGNED AT NAIROBI THIS 29TH DAY OF SEPTEMBER, 2021

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S. CHITEMBWE

JUDGE