



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL CASE NO. 285 OF 2019

SCARCE COMMODITIES LIMITED.....1ST APPELLANT

JUSTUS MUOKI MWANGANGI.....2ND APPELLANT

VERSUS

MAURICE MULEI NTHAKYO.....DEFENDANT/APPLICANT

RULING

The application dated 12th May, 2021 is supported by the affidavit of Anyango Bwire Advocate sworn on the same date and it seeks the following orders:-

“1. THAT this appeal is hereby dismissed for want of prosecution.

2. THAT Subsequently, the decretal sum being Kshs 1,423,043/- deposited in the joint account at National Bank in the names of both the appellants and Respondent’s advocates be hereby released to the Respondent.

3. THAT Cost of this application be borne by the appellant.”

The respondent filed a replying affidavit sworn on 18th June, 2021 by Mr. Anthony Thuo Kanai Advocate. Parties agreed to determine the application by way of written submissions.

Counsel for the applicants **Anyango Bwire** argues that it is almost two years since the appellant filed the appeal and they are yet to file record of appeal and /or set down the appeal for directions. Counsel for the respondent maintains that it is the duty of the Appellant to cause the appeal to be placed before the judge for directions. The respondent submits that due to the delay he has been denied justice which is a violation of his rights under Article 159 (2) (b). To support his case, reference has been made to the case of **Abraham Mukhola Asitsa v Silver Style Investment Company Ltd [2020] eKLR** where Justice Musyoka dismissed an application where the appellant failed to prosecute his appeal for over nearly three years.

On the other hand, counsel for the appellants submit that the application lacks merit and is premature. The appellants/respondents applied for typed copies of the proceeding and judgment through a letter dated 29th May, 2019. The court is yet to supply the proceedings and judgment. Counsel referred to Order 42 Rule 13(4) of the Civil Procedure Rules which states: -

“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:

It is submitted that the appellants are victims of the delay caused by the trial court's processes of typing the proceedings and that this can be attributed to scarce resources. According to counsel for the appellant, where the delay is due to factors beyond the applicants' control, they are entitled to equal protection and benefit of the law as provided under Article 27 of the Constitution. The appeal cannot be listed for directions under Order 42 Rule 11 until the certified copies of proceedings/judgment are provided. Counsel further referred to Order 42 Rule 2 of the Civil Procedure Rules which states:-

“The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.”

Counsel further contend that under the practice and procedure obtaining at the Milimani High Court, Civil Division, the appellants do not have any role in fixing the appeal for direction. Reliance is placed in the case of **GRACE W. KANYUGI & ANOTHER –V- JACTONE AKUTO KODHE (2019) eKLR** where the court held:-

“In the Civil Division Milimani Law Courts, the Registrar issues the notice for admission and directions of appeal after the High Court receives the file and lower court proceedings. The appellant does not seem to have any role in fixing the appeal for directions as contemplated under Order 42 Rule 11 of Civil Procedure Rules and Order 42 Rule 13 (1) of the Civil Procedure Rules. It is important to point out that under Order 42 Rule 13 (4) of the Civil Procedure Rules, the judge shall not allow a matter to proceed for hearing unless the record of Appeal is duly filed.

The provisions of the law relating to dismissal cannot be read in isolation. The bottom line is that directions must have been given before an appeal can be dismissed for want of prosecution. Indeed, there does not appear to be any penalty where an appellant fails to proceed as per Order 42 Rule 11 and Order 42 Rule 13 of the Civil Procedure Rules, 2010. This court took the view that an appeal cannot be dismissed before directions had been given. As there was no indication that directions had been given herein, the Appeal herein could not be dismissed under Order 42 Rule 35 (1) of the Civil Procedure Rules. In any event, there was also no evidence that the Registrar had issued a notice under Order 42 Rule 12 of Civil Procedure Rules. There was also no indication that the lower court file and proceedings had been forwarded to the High Court for the Registrar to proceed as aforesaid.

Reference is also made to the case of **JURGEN PAUL FLACH –V- JANE AKOTH FLACH (2014) eKLR** where the court dismissed a similar application and stated:-

“Noting that no directions were issued in this appeal, and based on the provisions of Order 42 rule 35(1), I have no reason to deviate from the holding in Kirinyaga General Machinery v. Hezekiel Mureithi Ileri (supra).

The upshot of the foregoing is that the application is dismissed with no orders as to costs.”

The appellants have sought to rely on the case of **Mburu Bashir v Billy Lubanga Namayi [2021] eKLR** where the court in addressing the effects of Covid-19 pandemic on court operations held that:-

“With respect, I agree that the onset of Covid 19 pandemic destabilised many operations including the court process. Further, it was the Deputy Registrar of this court who was to facilitate the availability of the proceedings and there is no evidence that any compliance was met in that regard. The appellant must have been a victim of the systemic challenges that have affected the administration of justice in our courts.(

According to counsel for the appellant, no prejudice is being suffered by the respondent as the entire decretal sum is deposited in an interest earning joint account. The appellants are also losing value and use of their money which is being held in the joint account.

Analysis and Determination:

Article 50(1) of the Constitution of Kenya provides that:

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

(2) (a)...

(b)...

(c) ...

(e) to have the trial begin and concluded without unreasonable delay.”

Similarly, Order 42 Rule 35 of the Civil Procedure Rules provides that:

“(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.”

In the instant application, the learned counsel for the applicant submitted that the above Order should be read together with Order 42 Rule 11 which provides inter alia that a judge of the High Court shall, within thirty days of the filing of an appeal under section 79B of the Act, peruse the appeal and give directions in accordance with the provisions of section 79B of the Act and Order 42 Rule 13 (1) which provides that upon notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of appeal, the registrar shall cause the appeal to be listed for the giving of directions by a judge in chambers. The arguments by the applicant in view of the above is that it is the duty of the Appellant to cause the appeal to be listed before the judge for direction, which duty the respondent herein has failed to perform since lodging the Memorandum of Appeal on 29th May 2019.

Once directions are given under Order 42 Rule 13 of Civil Procedure Rules and 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.

Order 42 Rule 35 (1) of the Civil Procedure Rules stipulates as follows:-

“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”.

Order 42 Rule 35 (2) of the Civil Procedure Rules stipulates as follows:-

“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 provisions of the law relating to dismissal cannot be read in isolation. The bottom line is that directions must have been given before an appeal can be dismissed for want of prosecution. In the case of *Eastern Province Kenya Ltd v Rongai Workshop & Transporters Ltd & Another [2014] eKLR* the court laid down the test to be applied in dismissal of appeals;

“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.”

According to the applicant, apart from the letter dated 29th May 2019, addressed to the Executive Officer requesting for typed proceedings, the respondents have not made any positive significant step to prosecute the appeal. On their part, the respondents argue that they are victims of delay caused by the lower court in typing of the proceedings and judgment. The respondent has reiterated their intention and willingness to prosecute the appeal and highlighted that the court should take into account the effects of Covid-19 pandemic on the administration of justice.

It is not disputed that indeed the respondents have not taken any steps to have this appeal prosecuted almost two years after filing the Memorandum of Appeal. The respondents have been indolent and lacked diligence since even with the introduction of e-filing platform in the Judiciary, the respondents failed to follow up on the proceedings and have only been woken up by the present application. However I agree with the respondents that in the event the appeal is dismissed at this stage they will suffer prejudice and injustice as they have already deposited the entire decretal sum and they would be deprived of the right to have their day in court contrary to the provision of Article 50(1) of the Constitution of Kenya. The applicant’s interests are fully secured since the decretal sum is deposited in a joint account. No prejudice will be suffered.

I accordingly dismiss the notice of motion dated 12th May, 2021 and hereby order as follows:

- 1. That the Deputy Registrar of the High Court supplies the trial court record to the appellant within 30 days from today’s date.**
- 2. That the record of appeal be served upon the applicant/respondents within 14 days from the 30 days allowed for its preparation after which the file be placed before the judge in chambers for directions.**
- 3. That the costs of this applicant to abide the outcome of the appeal.**

Dated Delivered and Signed at Nairobi this 29th day of **September, 2021**

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S. CHITEMBWE

JUDGE