



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

CIVIL APPEAL NO.172 OF 2018

**BENARD NGANDA MUTI.....APPELLANT/RESPONDENT**

**VERSUS**

**FRANCIS MUTHAMA WAMBUA.....RESPONDENT/APPLICANT**

**RULING**

1. The Respondent filed an application dated 28/06/2021 seeking the following reliefs.

**1. That the Memorandum of Appeal dated 20/12/2018 and any consequential appeal be dismissed for want of prosecution.**

**2. That pursuant to the order dated 15/08/2019 the amount of Kshs.973,126/- together with interest therein and currently held at consolidated Bank Koinange Street Branch in the joint names of Kimanthi & Associates and Manthi Masika & Co. advocates be released to the Applicant's Advocates M/s Kimanthi & Associates Advocates.**

**3. That the Appellant be ordered to pay the costs of the application as well as the costs of the suit.**

2. The application is supported by the grounds set out on the body thereof and the affidavit of the applicant sworn on even date. The Applicants' case is that the appellant has failed to prosecute the appeal herein. According to the Applicant, the Appellant has lost interest in prosecution the appeal and hence the need to allow the Applicant access the decretal sums that had been deposited in a joint interest account. It is further the contention of the Applicant that the pendency of the suit is oppressive to him as he is unable to access the fruits of the judgement given in his favour.

3. The application is opposed. The Appellant filed a replying affidavit sworn on 27/07/2021 wherein he averred inter alia: *that he has deposited the decretal sums as ordered and has requested for copies of proceedings by depositing Kshs.1,200/- so as to prepare the record of appeal; that the lower court file has not been availed to court for directions to be taken; that the appeal has never been admitted by a judge for hearing; that the Applicant has never used the provision of Order 42 of the Civil Procedure Rules but instead has resorted to Order 17 of the said rules which is premature; that the prosecution of the appeal was delayed by the Covid -19 pandemic as the high court stopped fixing of dates between February – May, 2021; that the court has not provided proceedings and judgement to enable the Appellant prepare a record of appeal; that the application should be dismissed as the same seeks to waste court's time and further delay the matter.*

4. The application was canvassed by way of written submissions. The Applicant's submissions are dated 5/08/2021 while those of the Respondent are dated 6/09/2021.

5. Mr. Kimanthi for the Applicant first submitted that the Appellant is guilty of flagrant and culpable inactivity for not taking any steps to prosecute the matter for nearly two and a half years since the appeal was lodged. Learned counsel pointed out the dishonesty and lack of candidness on the part of the Appellant in purporting to use the Covid – 19 pandemic as an excuse when he has not explained on what he did from 2018 through to 2019 before the issue of Covid – 19 arrived in march, 2020. It was also submitted that the Appellant has not been proactive in pursuing for copies of proceedings from the lower court and is now taking his sweet time after depositing the decretal sums. Finally, it was submitted that the conduct of the Appellant is not deserving of any discretionary relief as he is out to prevent the Respondent/Applicant from enjoying the fruits of the lawful judgement and that the appeal should be dismissed and the decretal sums be released to the Applicant.

6. Mr. Masika for the Appellant submitted that the application does not meet the threshold for granting the orders sought as the same is not in line with the provisions of section 79B of the Civil Procedure Act and Order 42 Rule 13 and 35(1) of the Civil Procedure Rules. Counsel submitted that the appeal is yet to be admitted as the Deputy Registrar has been following up on the proceedings before listing the matter

before the Judge for directions. It was submitted that part of the delay has been caused by the Covid -19 pandemic. Finally, it was submitted that the Appellant is serious in prosecuting his appeal and hence his rights to fair trial should not be curtailed.

7. I have considered the rival affidavits and the submissions. The issue for determination is whether the application has merit.

8. It is noted that the Appellant duly filed his Memorandum of appeal dated 20/12/2018.

9. As the Applicant's gravamen is that the Appellant has failed to set down the appeal for hearing, it is proper to look at the proceedings in the file. It is noted that the Appellant filed his Memorandum of Appeal dated 20/12/2018. Vide a letter dated 6/01/2020 the Respondent/Applicant's Advocates requested the Deputy Registrar to invoke his powers by listing the matter before a Judge for dismissal. Subsequently, the Deputy Registrar listed the matter for mention for directions on **26/03/2020**, **29/10/2020** and **26/11/2020** all for the purposes of establishing whether the lower court record had been prepared and forwarded to the High Court. In the meantime, both Advocates for the parties wrote letters to the Deputy Registrar seeking guidance on directions in the appeal. While the Deputy Registrar was to give the way forward, the Respondent/Applicant herein filed the present application seeking for dismissal of the appeal and release of the security to him. What is not in doubt however is that the appeal remains unprosecuted and which the Appellant is now being accused for dragging his feet in having the same determined. It is necessary to have a look at the salient provisions of the law regarding admission and determination of appeal so as to establish whether or not the application has merit.

10. Section 79B of the Civil Procedure Act provides as follows:-

**“Before an appeal from a subordinate court to the High Court is heard a Judge of the High court shall peruse it, and if he considers that there is no sufficient grounds for interfering with the decree part of a decree or order appealed against he may notwithstanding section 79C, reject the appeal summarily”**

Order 42 rule 13 of the Civil Procedure Rules provides as follows:-

**1. On the notice to the parties delivered not less than twenty one days after the date of service of 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 each 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 judgement, 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**

**iii. part of a document which is not relevant, other than those specified in paragraph (a), (b) and (f).**

Order 42 Rule 11 of the Civil procedures Rules provides:-

**“Upon filing of the appeal the appellant shall within thirty (30) days cause the matter to be listed before a Judge for directions under section 79B of the Act.”**

**Order 42 Rule 35(1) (2) of the Civil Procedure Rules provide as follows:-**

**“(1) Unless within three (3) 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 to either set down the appeal for hearing, or apply but 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”.**

11. It is clear therefore, that the above provisions provide for the procedure of admissions and dismissal of appeals. Indeed, directions in the matter have not been taken. Even though the responsibility of setting the pace is upon the Appellant, the Respondent is also entitled to set the appeal down for hearing and if the Respondent takes the option of having the appeal dismissed then he is expected to comply with the provisions of order 42 Rule 35 of the Civil Procedure Rules. It seems the Respondent/Applicant has resorted to a shortcut route by filing the application for dismissal under Order 17 Rule 2 of the Civil Procedure Rule. The Applicant appears to be impatient as he did not wait for the Deputy Registrar to act upon his letter dated 6/01/2020 urging the Registrar to cause the appeal be listed before a Judge for dismissal. Indeed, the Registrar took up the gauntlet and fixed the matter on several days for directions as he sought for the lower court record to be availed so as to pave way for issuance of directions by the judge in chambers after which the Respondent/Applicant herein could then comfortably seek for dismissal of the appeal for want of prosecution. The prosecution and determination of appeals has its own procedures and hence it is ingenious for the Respondent/Applicant to abandon those procedures and attempt to seek refuge under Order 17 Rule 2 of the Civil Procedure Rules. The Applicant had already started to follow the procedure but abandoned it midway. It is my considered view that the Respondent/Applicant does not have the luxury of choosing which provision of the law to be invoked when seeking for dismissal of the appeal since the only provision is found in Order 42 Rule 35 of the Civil Procedure Rules. I find the application to be premature.

12. Even though I have arrived at the above finding, the explanation rendered by the Appellant should be considered. The Appellant has averred that he is still desirous of prosecuting the appeal and that the reasons for the delay was to do with the lower court registry failing to supply him with the certified copies of proceedings and judgement. It is also claimed that the Covid- 19 pandemic played a part in the delay as court operation were scaled down. I have seen the appellant’s correspondences to the court registry and Registrar as well as a copy of receipt for deposit for typing of proceedings. I find the explanation tendered by the appellant to be plausible and I accept the same. It is noted that the appellant has already complied with orders of court by depositing the entire decretal sums pending determination of the Appeal. Under those circumstances, I find it would be unjust to deny the Appellant a right to ventilate his appeal. The Respondent will not suffer any prejudice if the Appellant is given an opportunity to organize for setting down the appeal for hearing since the decretal sum is already available only awaiting determination of the appeal.

13. In light of the foregoing observations, it is my finding that the Respondent/Applicant’s application dated 28/06/2021 lacks merit. The same is dismissed with no order as to costs.

It is so ordered.

**DATED AND DELIVERED AT MACHAKOS THIS 28<sup>TH</sup> DAY OF SEPTEMBER, 2021**

**D. K. KEMEI**

**JUDGE**