



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 304 OF 2015

MAKAU MUTISYA.....APPELLANT

VERSUS

JAMES GICHUKI GICHUHI..... 1ST RESPONDENT

LAWRENCE GICHUKI GICHUHI..... 2ND RESPONDENT

PETER ITUGI KAMAU.....3RD RESPONDENT

MACHAKOS COOPERATIVE UNION..... 4TH RESPONDENT

REUBEN MUSYOKI MULI..... 5TH RESPONDENT

RULING

1. The respondents filed the notice of motion dated 27th January 2021 pursuant to **Section 3A of the Civil Procedure Act, Order 42 Rule 32 of the Civil Procedure Rules and Sections 1A and 1B of the Civil Procedure Act** and sought for the following orders;

a) That the memorandum of appeal dated 23/6/2015 and filed in this court on 28/6/2015 and the record of appeal dated 13/0/207 and lodged in 16/10/207 be struck out and the appeal be dismissed with costs.

b) That the costs of this application be provided for.

2. The application was based on the grounds stated on the face of the motion and the facts deponed in supporting affidavit of Paul Amuga who stated that this appeal was filed on 28/6/2015 and served upon the firm on 29/6/2015. It is argued that the appellant failed to prosecute the appeal since 28/6/2015 and that the continued pendency of this suit is prejudicial to the 1st, 2nd and 3rd respondents.

3. The application is opposed by the appellant who filed the replying affidavit of Nzilani Muteti who deponed that the record of appeal herein was filed on 16/10/2017 and the same was served upon the respondent advocate on 23/10/2017.

4. Since then, the appellant averred that he has filed a complete record of appeal and that he is awaiting the appeal to be admitted as is required under the civil procedure rules.

5. The appellant further argued that the failure of the matter being set down for admission and directions cannot be attributed to the appellant.

6. It is the appellant's submission that the application is premature and incompetent and that if allowed the appellant shall stand to suffer loss and damage having not had his day in court.

7. On 3/6/2021 the court ordered that the application be disposed of by written submissions.

8. The respondents/applicants in their submissions argued that this appeal was filed on 28/6/2017 and that it is not in dispute that the appellant/respondent has not taken any action towards prosecuting the appeal since then.

They further argued that the appeal has been lying idle in the court registry from the date it was filed that a period of more than 6 years.

9. Under Order 42 rule 11 of the Civil procedure Rules the appellant shall within thirty days from the date of filing appeal cause the matter to be listed before a judge for directions. They added that from the above it is clear that the appellant has no interest in prosecuting his appeal and the court should not allow the appeal to remain pending forever and considering that the appellant has in place an order staying execution of the decree hence the continued pendency of the suit is highly prejudicial to the respondents.

10. The appellant on the other hand argued that since the memorandum of appeal was filed no notice has been issued or dispatched to the appellant as provided for under order 42 rule 12 of the Civil Procedure Rules and hence the appellant is not aware whether the appeal was admitted or not. That order 42 rule 4(a) to (f) clearly sets out the documents required to be in the court record and the appellants' record of appeal has fully complied with all the requirements and awaiting compliance of section 79B of the civil procedure act.

11. That in this case failure of the matter not being set down for admission and directions cannot be attributed to the appellant as he has complied with all the requirements and is awaiting admission of the appeal and notice to attend to deal with directions which is the prerogative of the deputy registrar.

12. I have carefully considered the grounds stated on the face of application, and the facts deponed in the rival affidavits plus the submissions. The main issue for determination is **whether to dismiss this appeal for want of prosecution?**

13. The respondents/applicants submitted that Order 42 Rule 11 and 13 of the Civil Procedure Rules requires that an appellant, within thirty (30) days of filing the appeal, cause the matter to be listed for directions under Section 79B of Civil Procedure Act. They added that it was the duty of an appellant to cause the appeal to be placed before the judge for directions.

14. The appellant/respondent has however argued that failure of the matter not being set down for directions cannot be attributed to himself as he has complied with all the requirements and is awaiting directions from the Deputy Registrar.

15. In *Njai Stephen v Christine Khatiala Andika* [2019] e KLR the court held inter alia that

“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.

Notably, every person is entitled as envisaged under Article 50 of the Constitution of Kenya to have a fair trial. The said Article 50 of Constitution of Kenya provides as follows:-

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

It therefore follows that every person ought not to be shut out from accessing court or having his day in court. Indeed, the right of a party to enjoy the fruits of his judgment must be weighed against the right of a party to access court to have his dispute heard and determined by a court or tribunal of competent jurisdiction.

It was therefore the considered opinion of this court that allowing the present application would be shutting out the Appellant from accessing the court and would be contrary to Article 50 of the Constitution of Kenya.”

16. It is therefore the view of this court that since there were no directions given, this appeal cannot be dismissed under Order 42 Rule 35 (1) of the Civil Procedure Rules and therefore allowing the present application would be shutting the appellant from accessing the court which would be contrary to Article 50 (1) of the

Constitution of Kenya, 2010.

17. This court is therefore satisfied that the appellants should not be penalized for the delays caused by the court system and subsequently finds that the instant application lacking merit and is therefore dismissed. Each party to bear their own costs.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 24TH DAY OF SEPTEMBER, 2021.

.....

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant

..... for the Respondent