



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO.184 OF 2016

1. REUBEN NDUNG’U NJOROGE

2. TOP CARRIERS LTD.....APPELLANTS

-VERSUS-

KENNEDY OCHIENG NYAKONE (Suing on behalf of the Estate of

JANE AUMA OCHIENG.....RESPONDENT

RULING

1. The Respondent’s **Notice of Motion** application dated **15th January, 2021** and filed on **29th January, 2021** was brought pursuant to the provisions of **Order 17 Rule 2(3)** of the **Civil Procedure Rules, 2010** and **Section 3A** of the **Civil Procedure Act** and all other enabling provisions of the law. It is seeking for the following orders:-

a) That the appeal herein be dismissed for want of prosecution;

b) That the monies deposited at NCBA Bank Nkrumah Branch together with interest be released to the Respondent;

c) That the costs of the application and those of the entire suit be awarded to the Respondent.

2. The application was premised on grounds that; *it has been more than four (4) years since the instant appeal was filed and neither the Appellant nor his advocate have taken steps to prosecute the appeal. As such, the Appellants seem to have lost interest in prosecuting the appeal and the delay is prejudicial to the Respondent as well as the estate of the deceased who have been kept away from the fruits of their successful judgment since 2016 and have now sought the court to dismiss the appeal under Order 17 Rule 2(3) of the Civil Procedure Rules.*

3. The application was further supported by an **affidavit** sworn by the Respondent’s advocate on record, **M/s Grace A. Okumu** on **15th January, 2021**. She elucidated the grounds on the face of the application with an addition that the matter was lastly mentioned on **5th November, 2019** wherein the Appellant and/or his counsel failed to show up. That since then, no other action has been taken towards prosecuting the appeal. She has urged the court to take note that the much delay exhibited in this matter is tantamount to denial of justice for the Respondent/Applicant.

4. Further, the Applicants filed written submissions on **18th May, 2021** following directions by this court in which they have argued that the present appeal is ripe for dismissal under **Order 17 Rule 2** of the **Civil Procedure Rules**. Firstly, because it has met the threshold of one year without any action being taken by the Appellant. Secondly, that there has been inordinate delay on the part of the Appellant. And lastly, that unlike the Appellants, the Respondents have suffered prejudice for being kept from enjoying the fruits of a successful Judgment. The court was then invited to consider the test as applied in the case of **Ivita-vs-Kyumbu [1984] KLR 441**, wherein it was considered that inordinate delay causing injustice, would be inexcusable.

5. In response to the Appellants’ concerns that the application had to be brought under **Order 42 Rule 35** of the **Civil Procedure Rules**, the Respondent/Applicant submitted that the burden was placed upon the Appellants to ensure that the appeal is fixed for directions within 30 days and not the Respondents.

6. The application is opposed by the Appellants through the **Replying Affidavit** of **Kelvin Ngure** who described himself as the Claims Manager at the Respondent’s Insurer’s Company. It is sworn on **22nd April, 2021** and filed on the **27th April, 2021**. It is expressed therein

that the Appellants wrote to the Executive officer of the lower court requesting for typed and certified copies of the lower court's Judgment and decree for purposes of filing the record of appeal. To that effect, annexed thereto was a letter dated 17th July, 2019 addressed to the Executive officer wherein it is averred that the same has never been responded to. The deponent is thus of the view that the delay has not been occasioned by the Appellants. In any event, the same can be addressed by an award of damages.

7. It is further deponed that the instant application has been brought under the wrong provisions of the law since **Order 17 Rule 2** of the **Civil Procedure Rules** upon which the application is premised, does not provide for dismissal of appeals for want of prosecution. If the appeal is to be dismissed for want of prosecution, it is averred that the application be brought under **Order 42 Rule 35(2)** of the **Civil Procedure Rules** which is the proper provision of law to move the court. In addition to that, since the appeal has not been admitted and directions issued as provided for under **Section 79B** of the **Civil Procedure Act**, it is only the Deputy registrar who can list the appeal before a judge in chambers for dismissal or further orders, and until that is complied with, this court cannot be moved on an application as the Applicant has done seeking the dismissal of the Appeal.

8. For the Appellants, written submissions were filed on **21st May, 2021** and the key contention adopted therein was that unless directions have been issued in the appeal, the court cannot be moved for the dismissal of the appeal. Reliance has been placed on the case of **Jurgen Paul Flach –vs- Jane Akoth Flach, Nakuru Civil Appeal No. 119 of 2012**, wherein it was stated that where directions had not been issued, dismissal of an appeal for want of prosecution cannot be granted. Based on that view, it has been submitted that the Respondent's application is thus premature to be considered by this court and should be dismissed on that ground.

9. As regards the delay that has been exhibited, it has been submitted by the Appellants that the same was occasioned by a delay in the supply of the certified proceedings but as at the time the instant application was being listed for hearing, it had been confirmed that the typed proceedings were merely awaiting certification since they were ready. In those circumstances, it is the Appellants' case that they would suffer greater prejudice by losing their right of appeal if the application is allowed. It has however been denied that the Respondent would suffer any prejudice because half of the decretal sum has already been paid to them and the remaining other half deposited in court as security for the appeal. In support of that line of thought, the Appellants' counsel has relied on a plethora of cases which I have read through.

Analysis and Determination

10. I have considered, the application by the Respondent, the Appellants' response thereof, the rival submissions, the authorities and law cited by the parties as well as the court records. I find that the central issue for consideration is whether the instant appeal can be dismissed for want of prosecution as sought in the application dated **15th January, 2021**.

11. The subject appeal was filed vide a **Memorandum of Appeal** dated **23rd December, 2016**, seeking to set aside in its entirety the Judgment of the trial court delivered on **28th November, 2016**. The Applicant contended that it has been over four (4) years and yet the Appellants have not taken any step to further prosecute the appeal.

12. It should be noted that the Law's delay is one of whips and scorns of time and the prolonged nature of litigation is a source of torment. Indeed, lengthy delays may make it impossible for the opposing party in any suit to receive a fair trial. It is against this view, that the arguments by each party and the merit of the application before the court will be considered.

13. In the present case, the applicable law on the process of appeals is regulated by the **Civil Procedure Act** and **Civil Procedure Rules**. The relevant provision on dismissal of an appeal for want of prosecution is provided for under **Order 42 Rule 35(1) &(2)** of the **Civil Procedure Rules** which states:

(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."

14. Before delving further into the issue, I wish to point out that the present application is expressed to have been brought under **Order 17 Rule 2(3)** of the **Civil Procedure Rules** which empowers the court to give notice in writing to the parties to show cause why the suit should not be dismissed in the event that no action has been taken up for a period of more than a year. A fair reading of **Order 17 Rule 2(3)**, it is discernable that the provision is invoked by the court on its own motion once it is satisfied that none of the parties has taken any step in having the suit prosecuted for over one year. Both parties are then invited to show cause why the subject suit should not be dismissed for want of prosecution. Clearly, that provision cannot be invoked by either party in an application for dismissal of a suit for want of prosecution. Nonetheless, in my view, both **Order 17 Rule 2(3)** and **Order 42 Rule 35(2)** of the **Civil Procedure Rules**, give effect to the overriding objective which is the just, expeditious, proportionate and affordable resolution of civil disputes.

15. So that, while I agree with the Appellants that the application has been brought under the wrong provisions of the law, I am hesitant to dismiss the application on that ground since that defect can be cured by the provisions of **Article 159(2)(d)** of the **Constitution**, which provides that justice shall be administered without undue regard to technicalities.

16. Similarly, the Court of Appeal in the case of **Kenya Trypanosomiasis Research Institute –vs- Anthony Kabimba Gusinjilu (Suing for and on behalf of 112 Plaintiffs) [2019] eKLR**, said :

“Lastly, having established that the respondent’s application dated 17th December 2010 had been brought under the wrong law, we agree with the court’s finding that the irregularity was not serious enough to prevent the court from exercising its discretion, hearing and determining the said application on its merit. Taking note that the rules of procedure should be used as handmaids of justice but not to defeat it, the court weighed the issues before it and found that there would be no injustice visited on the appellant in the spirit of Article 159 (2)(d) of the Constitution and Sections 1A and B of the Civil Procedure Act.”

17. Turning back to **Order 42 Rule 35** of the **Civil Procedure Rules**, it has been submitted by the Appellants that the provisions of **Order 42 Rule 35(1)** and **(2)** have not been complied with by the Respondent hence the instant application is premature. The main contention by the Respondent/Applicant is that since filing of **Memorandum of Appeal**, no positive and significant step has been taken by the Appellants to prosecute the appeal for over four years. As such, the applicant aver that the delay is inordinate and prejudicial to him. However, the Appellants on the other have contested that the delay is not by their fault but by the failure of the court to supply the typed and certified proceedings, Judgment and decree for purposes of compiling the Record of Appeal.

18. On the foregoing, there are two situations relevant to the facts of this case from the reading of **Order 42** of the **Civil Procedure Rules**. **First**, under **Order 42 Rule 10** and **11** of the **Civil Procedure Rules**, the appeal is deemed to have been brought and filed before the appellate court. **Secondly**, when it is said to be filed and entered in the register, the Appellant shall within thirty days cause the matter to be listed before a Judge for directions under **Section 79B** of the **Civil Procedure Act**.

19. Going by the provisions of **Section 79B**, the Judge is expected to peruse the **Memorandum of Appeal** and the lower court record to infer whether sufficient grounds exist to interfere with the Judgment or decree. In the event the judge is satisfied that no plausible grounds exist, the appeal is summarily dismissed.

20. The relevant aspect of this provision is the requirement for the Appellant(s) to schedule the appeal for directions even before the Registrar compiles and transmits the record of appeal to the appeals’ court. (See the case of **Pyramid Hauliers Co. Limited –vs- James Omingo Nyaaga & 3 Others [2017] eKLR.**

21. In the case of **Pinpoint Solutions Limited & Another -vs- Lucy Waithegeni Wanderi (as the Legal Administrator of the Estate of James Nyanga Muchangi) [2020] eKLR** , the court elaborated on the procedure relating to dismissal of appeals for want of prosecution, saying

“20. 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.

21. 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.”

22. From the above authority, it would appear that an appeal cannot be dismissed for want of prosecution before directions have been taken. In the present case, there is no doubt that directions have not been issued in the subject appeal and hence the orders for dismissal cannot issue.

23. However, there is no justification for the Appellants to file the appeal just for the sake of filing and thereafter go to sleep and purport to hide under the provisions of **Order 42 Rule 35** of the **Civil Procedure Rules**. I say so, because an appeal cannot be left to hang on the Respondent’s head indefinitely considering that he was a successful litigant before the trial court where the Appellant is unwilling to take action on it. Justice would then demand that the same be resolved in one way or the other. I am of the view that dismissal of such a stale appeal is the proper resolution.

24. But, from the explanation given by the appellants, some of the concerns raised are legitimate and beyond the Appellants’ control given that the Appellants have had to wait for the certified copies of the proceedings before compiling the record of appeal. The Appellants have averred that the proceedings are now ready.

25. I am of the view that they should be given a chance to prosecute the appeal given that they have had to wait for the certified copies of proceedings and he undisputed fact that they have paid half the decretal sum to the Respondent and the other half is being held in a joint interest earning account. I am also of the view that despite the long delay, the injury caused can be compensated by way of payment of costs.

26. Accordingly, the **Notice of Motion** dated **15th January, 2021** be and is hereby disallowed but with the following orders: -

a) That the Deputy Registrar of the High Court supplies the original record of proceedings of the trial court to the Appellant within 30 days from today’s date to enable the preparation of the record of appeal.

b) That the record of appeal be filed and served upon the Applicant/ Respondent within 14 days from the 30 days allowed for its preparation.

c) That the parties to appear before the Deputy Registrar on 16th November, 2021 to confirm compliance with the above orders.

d) That the costs of this applicant to abide the outcome of the appeal.

It is hereby so ordered.

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF OCTOBER, 2021.

D. O. CHEPKWONY

JUDGE

In the presence of:

No appearance for and by either party

Court Assistant - Gitonga