



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 236 OF 2019

1. ZAKIR KAMRUDIN

2. FACHRUDIN KAMRUDIN.....APPELLANTS

-VERSUS-

MARK ODENDE ONYANGO T/A MAONDE CONSTRUCTION.....RESPONDENT

RULING

1. The Respondent has moved this court vide a **Notice of Motion** application dated **12th March, 2021** seeking for the following orders:-

a. That this appeal be dismissed for want of prosecution.

b. That in the alternative, the Appellant do deposit in court the sum of Kshs.4,158,579.96 being the principal sum, within 30 days as security for costs failing which the Appeal be dismissed with costs.

c. That the Appellant do pay costs of this application.

2. The application is premised on the ground that the Appellant has failed to take any steps to prosecute the appeal. The Respondent has also sworn an affidavit in support of the application where he contends that the Judgment was entered against the Appellants on **25th October, 2019** pursuant to which the Appellants filed an appeal. But he argues that since then, no further steps have been undertaken to prosecute the appeal. The Applicant/Respondent further states that the Appellants have lost interests in the appeal which has kept him from enjoying the fruits of his Judgment. However, the Respondent avers that if the court is inclined to maintaining the appeal, then it should compel the Appellants to deposit the decretal sum in a joint interest earning account.

3. Further, the Respondent/Applicant filed submission on the **15th June, 2021**. Having read through the same, they do reflect the above averments and need not replicate the same again.

4. The Appellants opposed the application and their case is that they have taken reasonable grounds to prosecute the appeal by writing a letter to the lower court seeking for certified copies of the proceedings to be provided but the same is yet to be availed. The Appellants have averred that as at now, the proceedings have already been typed and they are only awaiting to be certified. The Appellants undertake to avail the certificate of delay and file the appeal as immediately as the proceedings are availed.

5. As for whether the prayer for security for costs should issue, it is submitted that the right of appeal should not be pegged on some conditions but should be absolute. In any event there is no material that has been placed before the court to show that the appellants intend to avoid the decree issued in this matter.

Analysis and Determination

6. I have considered the application by the Applicant/Respondent, the Respondent's/Appellant's response thereof and the rival submissions filed by the parties. I find that the only issue for consideration is whether the instant appeal should be dismissed for want of prosecution as sought for in the application dated **12th March, 2021**.

7. From the onset, it is important to point out that it has not been contested that the subject appeal was filed on **22nd November, 2019** vide a **Memorandum of Appeal** of even date seeking to set aside the Judgment of the trial court delivered on **25th October, 2019** especially on the award of damages.

8. That two years down the line, neither has the Record of Appeal been filed nor has the appeal been listed down for directions so that the delay is undoubtedly inordinate unless otherwise satisfactorily explained. The Applicant/Respondent now contends that the Respondents/Appellants have never taken any step to prosecute the appeal besides merely writing a letter requesting for certified copies of proceedings and instead of following up on the same. It is clear it went to slumber.

9. The Applicant further submits that the indolent behavior by the Respondents/Appellants is detrimentally keeping him from enjoying the fruits of his Judgment and if for whatever reason the court is not inclined to dismiss the appeal, then the Appellants should be compelled to deposit the decretal sum in joint interest earning account.

10. The Respondents/Appellants on the other hand seem to shift the blame on the lower court's failure to supply copies of certified proceedings for the purpose of filing the Record of Appeal. They have even undertaken to file the Appeal as soon as possible given that the proceedings are now ready.

11. The relevant provision on dismissal of an appeal for want of prosecution is provided for under **Order 42 Rule 35(1) and (2)** of the **Civil Procedure Rules, 2010** 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."

12. From the reading of the above provision, there are two situations relevant to the facts of this case. The first being that, under **Order 42 Rule 10 and 11** of the **Civil Procedure Rules**, an appeal is deemed to have been brought and filed before the appellate court. Secondly, when the appeal is filed and entered in the register, the Appellant is expected to cause the appeal to be listed before a Judge for directions under **Section 79B** of the **Civil Procedure Act** within thirty days. Under **Section 79B**, the Judge is expected to peruse the **Memorandum of Appeal** and the lower court record to infer whether sufficient grounds exist so as to interfere with the award. In the event the Judge is satisfied that no plausible grounds exist, the appeal is to be summarily dismissed.

13. However, emphasis has to be laid that the relevant aspect of this provision is the requirement for the Appellant 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**).

14. Nonetheless, 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;

"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.

15. The court went further to state that;

"This court takes the view that an appeal cannot be dismissed before directions had been given. As there was no indication that directions have 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."

16. 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, thus the orders for dismissal cannot issue.

17. 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 head of the Respondent indefinitely in a case where the Appellant is unwilling to take action on it considering that he was a successful litigant before the trial court. Justice would then demand that the same be resolved in one way or the other. In my considered view, the dismissal of such a stale appeal is the proper resolution.

18. It might be a legitimate concern that the delay exhibited in the present case might be attributable to the delayed supply of the certified copies of the proceedings by the lower court but the Appellants have not shown that they have been diligent enough to follow up with the registry on the same. Once they wrote the letter requesting for the certified copies on **30th October, 2019**, they never took any other active step until they were awoken by the instant application.

19. However, given that the said proceedings are allegedly ready and that the Appellants have not only undertaken to compile the Record of Appeal but also avail a Certificate of delay, I am inclined to avail them a chance to prosecute the appeal since I find no injury that the Respondent can suffer that cannot be compensated by way of payment of costs.

20. As regards the prayer for provision of security for costs in the amount equivalent to the decretal sum, I am of the view that security for

costs should not be confused with security for due performance of the decree. Whereas the former is designed to ensure that a litigant who by reason of near insolvency and is unable to pay the costs of the litigation in the event he or she loses, is disabled from carrying on with the litigation indefinitely except upon terms and conditions which afford some measure of protection to the other parties. The latter, is intended to secure the due performance of decree in the event an application for stay is made and the same is governed by the provisions of **Order 42 Rule 6(1)** of the Civil

Procedure Rules.

21. In any event, in an application for security of costs, the onus is on the Applicant to prove such inability or lack of good faith on the part of the Respondent that would make an order for security reasonable. Since the Respondent/Applicant has not discharged that burden of proof, I see no basis of granting the order for security of costs. It has also not been shown that the costs the Respondent is likely to incur in defending the appeal are equivalent to the decretal sum. If the Respondent keenly reads through the provisions of **Order 42 Rule 6** of the **Civil Procedure Rules** he will understand the better step undertake.

22. In the circumstances, the **Notice of Motion** dated **12th March, 2021** is disallowed but with the following orders:-

a. That the Deputy Registrar of the High Court calls for and avails the original record of proceedings 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 served upon the Applicant/Respondent within 60 days from the date hereof.

c. That the parties are directed to appear before the Deputy Registrar at a date to be fixed at the court registry before the expiry of timelines given above 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.

RULING DELIVERED VIRTUALLY, SIGNED AND DATED AT MOMBASA THIS 26TH DAY OF NOVEMBER, 2021.

D. O. CHEPKWONY

JUDGE

In the presence of:

No appearance for Appellant

Mr. Obura counsel for Respondent

Court Assistant - Bancy