



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 646 OF 2016

MBURU BASHIR.....APPELLANT

VERSUS

BILLY LUBANGA NAMAYI.....RESPONDENT

RULING

INTRODUCTION

1. The Respondent's Chamber Summons application dated 20th March 2019 and filed on 21st March 2019 was brought pursuant to the provisions of Order 42 Rule 35 (2), Order 42 Rule 11 and 12 of the Civil Procedure Rules 2010, Sections 14 (sic), 1B and 3A of the Civil Procedure Act and all other enabling provisions of the law. It sought the following orders:-

- 1. THAT the Appellant/Respondent's Memorandum of Appeal dated the 21st day of October 2016 and filed on the same day be dismissed for want of prosecution.**
- 2. THAT the Honourable Court be pleased to order the release forthwith of money and interest accrued jointly held by the Advocates for the parties hereunto at HFC TRM Branch, Thika Road in joint fixed deposit Account No 2269763402-0 to the Advocates for the Applicant/Respondent.**
- 3. THAT the Honourable Court further be pleased to order the Respondent/Appellant to comply with the orders of the Lower Court pertaining to costs.**
- 4. THAT the costs of this appeal and this application be provided for.**
- 5. Any other orders the court may deem just.**

2. The Respondent's Written Submissions were dated 3rd June 2019 and filed on 6th June 2019 while those of the Appellant were dated 15th July 2019 and filed on 17th July 2019.

3. Parties asked this court to render its decision based on their respective Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

THE RESPONDENT'S CASE

4. The Respondent's present application was supported by the Affidavit of his advocate, Nzilani Muteti, that was sworn on 20th March 2019.

5. Through his advocates, the Respondent pointed out that the Appellant herein filed their Memorandum of Appeal dated 21st October 2016 on 27th October 2016. He stated that on 31st July 2017, Mbogholi Msagha J directed the parties to open a joint account within thirty (30) days from the date of his order but that the same was done on 12th September 2019.

6. He pointed out that the matter was listed before the Deputy Registrar Hon L.M. Mbacho on 14th December 2017 but the Appellant never attended court. He added that the Appellant was yet to extract the decree, obtain certified copies of the proceedings and compile a proper Record of Appeal and that despite writing to his advocates to comply, they had not done so.

7. It was his contention that two (2) years had since passed since the filing of the Memorandum of Appeal and the prolonged delay was inexcusable and prejudiced him as he was being denied an opportunity to enjoy the fruits of his judgment.

8. She thus urged this court to allow his application as prayed.

THE APPELLANTS' CASE

9. In response to the said application, on 15th May 2019, the Appellant filed a Notice of Preliminary Objection dated 14th May 2019 in which he stated that the application was premature and incompetent as directions under Order 42 Rule 13 of the Civil Procedure Rules had not been given.

10. In addition to the said Preliminary Objection, on 14th May 2019, his advocate, Lynne Muthoni Munyingi swore a Replying Affidavit on his behalf. It was also filed on 15th May 2019.

11. Through his advocates, the Appellant stated that they had written several letters to the lower court requesting for certified copies of the proceedings but they had not received the same and as at the time they were filing their Replying Affidavit herein, they were informed that the said proceedings were being typed.

12. It was his contention that it was the failure to set down the matter for admissions, directions or filing the record of Appeal could not be attributed to them as they had made concerted efforts to obtain the certified copies of the proceedings and had not obtained the same.

13. It was his averment that he was still desirous of having his day in court to have the matter heard and determined on merit.

14. He therefore urged this court to dismiss the Respondent's present application.

LEGAL ANALYSIS

15. This court found it prudent to deal with the affidavit evidence that had been filed in response to the present application herein as it raised the same issues that had been raised in the Appellant's Notice of Preliminary Objection.

16. The Respondent submitted that his application was not only brought both under Order 42 Rule 11 and 35(2) of the Civil Procedure Rules but also under Section 3A of the Civil Procedure Act that provides that the court has inherent power "to make such orders as may be necessary for the end of justice or to prevent abuse of the process of the court."

17. He relied on Order 42 Rule 13 of the Civil Procedure Rules that provides that it is the responsibility of an appellant to cause the matter to be listed for directions by a judge in chambers and Order 43 Rule 35(1) and (2) of the Civil Procedure Rules that stipulates that after three (3) months of the giving of directions under Order 42 Rule 13 of the Civil Procedure Rules, a respondent shall be at liberty either to set down the appeal for hearing or for its dismissal.

18. He was emphatic that although an appeal cannot be dismissed before directions have been given, it was neither the responsibility of a respondent or the registrar to cause the appeal to be listed for directions under Order 42 Rule 13 of the Civil Procedure Rules and hence the appellant ought not to use his failure to comply with Order 42 Rules 11 and 13 of the Civil Procedure Rules to defeat the cause of justice.

19. He averred that in the event the court was to be inclined to give the Appellant an opportunity to list his appeal for directions, then it should order that part of the decretal amount be released to him pending the hearing and determination of the appeal herein. He relied on **Civil Appeal No 110 of 2001 (Nairobi) Haron Ogechi Nyaberi vs British American Insurance Co Ltd** in support of his case.

20. On the other hand, the Appellant relied on the case of **Njai Stephen vs Christine Khatiala Andika [2019] eKLR** where this very court held that directions must be given before an appeal can be dismissed for want of prosecution.

21. It also placed reliance on the cases of **Kirinyaga General Machinery vs Hezekiel Mureithi Ileri [2007] eKLR** and **Suresh Ruginath Raniga & Another vs Sagar Mohan S.M. Ram [2012] eKLR** where the common holding was that an appeal cannot be dismissed before directions had been given and admitted for hearing.

22. He distinguished the case of **Haron Ogechi Nyaberi vs British American Insurance Co Ltd** (Supra) that in the case therein, there had been a delay of about eleven (11) years and the appellant had failed to give no specific lawful reason for the said delay.

23. He was categorical that he was entitled to a fair trial as is envisaged in Article 50(1) of the Constitution of Kenya, 2010. He also relied on Sections 1A and 3A of the Civil Procedure Act that gives the court inherent powers as aforesaid. He stated that his advocates had made several requests to be furnished with certified copies of the proceedings as was evidenced in their letter to the Executive Officer dated 10th January 2018.

24. 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 ground for interfering with the decree, part of a decree or order appealed against he may, notwithstanding section 79C, reject the appeal summarily”.

25. Order 42 Rule 13 of Civil Procedure Rules provides as follows:-

- 1) **On notice to the parties delivered not less than twenty-one days after the date of service of the 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 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:**

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

26. It is evident from the provisions of Section 79B of Civil Procedure Act that a judge has to peruse the appeal before he can summarily reject the same. These are the directions contemplated in Order 42 Rule 11 of the Civil Procedure Rules that states as follows:

“Upon filing of the appeal the appellant shall within thirty days, cause the matter to be listed before a judge for directions under section 79B of the Act”.

27. If the appeal is not summarily dismissed, then the registrar shall notify the appellant who shall then serve the Memorandum of Appeal upon all the respondents within seven (7) days of receipt of the notice from the Registrar in accordance with Order 42 Rule 12 of the Civil Procedure Rules.

28. After service of the Memorandum of Appeal, on notice to the parties delivered not less than twenty one (21) days, the appellant shall again cause the appeal to be listed before the judge for directions as seen in Order 42 Rule 13 of the Civil Procedure Rules.

29. Notably, the procedure for rejection and/or admission of appeal and giving of directions is very well set out in the Civil Procedure Rules. However, this procedure does not seem to be strictly followed and differs from one court to another. 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 the 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.

30. 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.

31. 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”.

32. 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”

33. 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. This is the position that this court took.

34. 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.

35. As can be seen herein, there are two (2) avenues for the dismissal of an appeal for want of prosecution under Order 42 Rule 35 of the Civil Procedure Rules. The first scenario is when an appellant fails to cause the matter to be listed for directions under Section 79B of the Civil Procedure Act as is envisaged in Order 42 Rule 11 of the Civil Procedure Rules. The second scenario is that if after service of Memorandum of Appeal the appeal would not have been set down for hearing, the registrar shall on notice to the parties list the appeal before the judge for dismissal as provided in Order 42 Rule 35 (2) of the Civil Procedure Rules.

36. 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.

37. 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(1) of the Constitution of Kenya, 2010 that provides that every person has a right to have his dispute determined in a fair hearing. Indeed, the Appellants herein would suffer great prejudice if they were denied an opportunity to fully present their Appeal to be heard on merit.

38. This court was satisfied that the Appellants could not be penalised for the delays caused by the court system and that they stood to suffer great prejudice if their Appeal was not heard on merit.

DISPOSITION

39. For the foregoing reasons, the upshot of this court’s decision was that the Respondent’s Notice of Motion application dated 20th March 2019 and filed on 21st March 2019 was not merited and the same is hereby dismissed. Costs shall be in the cause.

40. To progress this matter further, the Appellant is hereby directed to file and serve his Record of Appeal within ninety (90) days from date of this Ruling. In the event the proceedings of the lower court and the lower court file will have been placed in the file herein and the Appellant shall have failed to file his Record of Appeal as aforesaid, the Appeal herein will stand as automatically dismissed and the decretal sum deposited in court will be released to the Respondent as has been sought in his present application.

41. Since the Appellant does not have control of the court diary or the typing of proceedings, the Registrar of High Court Civil Division Milimani Law Courts is hereby directed to facilitate the typing of the judgment and proceedings and placing of the lower court file within sixty (60) days from date of this Ruling.

42. Either party will be at liberty to apply.

43. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JANUARY 2020

J. KAMAU

JUDGE