



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 159 OF 2018

J.J. OMBAKI /AG.....1ST APPELLANT

ENOCK LIAKA MUCHILWA.....2ND APPELLANT

VERSUS

MILLICENT ALICE ACHIENG (suing as Administrator

to the estate of the late WILLIAM ODIDI- Deceased).....RESPONDENT

RULING

INTRODUCTION

1. The Respondent's Notice of Motion application dated 1st April 2019 and filed on 5th April 2019 was brought pursuant to the provisions of Order 17 Rule 2(3), Order 41 Rule 35 (2), Order 51 Rule I of the Civil Procedure Rules 2010 Cap 21 Laws of Kenya and all other enabling provisions of the law. It sought the following orders:-

- 1. THAT the Appellant's Appeal being the instant suit against the Respondent/Plaintiff be dismissed for want of prosecution.**
- 2. THAT the Registrar lists the Appeal before a Judge in chamber for dismissal for want of prosecution.**
- 3. THAT the costs of this application and of the entire suit be awarded to the Respondent in the Appeal.**

2. The Respondent's Written Submissions were dated 13th June 2019 and filed on 25th June 2019 while those of the Appellants were dated 19th March 2019 and filed on 26th June 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 her advocate, Musili Mbiti, that was sworn on 1st April 2019.

5. Through her advocates, the Respondent pointed out that judgment in **CMCC No 7195 of 2009** was delivered in her favour on 26th February 2018 for a sum of Kshs 1,616,882/= plus costs of the suit and interest whereupon the Appellants herein filed their Memorandum of Appeal dated 24th March 2018 on 26th March 2018. She stated that since 20th September 2018, they had not prosecuted or taken any steps to prosecute the Appeal.

6. She averred that the Appeal herein was an abuse of the court process and was intended to deny him the entire fruits of his judgment.

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

THE APPELLANTS' CASE

8. In response to the said application, on 10th May 2019, the Claims Manager at Directline Insurance Company Limited who were the insurers of the Appellants' motor vehicle registration number KBB 108TB (sic) (hereinafter referred to as "the subject motor vehicle"), Kelvin Ngunjiri, swore a Replying Affidavit on behalf of the Appellants herein. The same was filed on 15th May 2019.

9. Through their advocates, the Appellants stated that they sought and obtained an order for stay of execution on condition that they pay the Respondent a sum of Kshs 892,918/= and deposit a similar amount into a joint interest earning account in the names of their advocates and those of the Respondent. They duly complied with the said order whereupon their advocates wrote to the Executive Officer requesting for the typed proceedings to enable them prepare a Record of Appeal.

10. However, they had not obtained the same as the lower court file could not be traced. It was their contention that it was therefore not possible to compile a Record of Appeal. They pointed out that the delay in compiling the said Record of Appeal was not thus occasioned by them.

11. They added that the Appeal was yet to be admitted for hearing and consequently, they could not list the matter for directions. It was their averment that they were still keen on prosecuting their appeal and therefore asked this court not to oust them from the seat of justice.

12. It therefore urged this court to dismiss the Respondent's present application.

LEGAL ANALYSIS

13. The Respondent submitted that since 20th September 2018, nine (9) months had passed without the Appellants listing their appeal for directions as was required under Order 42 Rule 11 of the Civil Procedure Rules. She pointed out that they could not blame the Executive Officer for the delay in furnishing them with the certified copies of the proceedings because their letter requesting for the said proceedings was served upon the Cash office on 11th January 2019. She contended that the letter was served late and to the wrong office.

14. It was her contention that the delay was intentional, contumelious and therefore inexcusable and was causing her serious prejudice because she had not been able to enjoy the fruits of her judgment sixteen (16) months since judgment was delivered in her favour.

15. On their part, the Appellant were emphatic that they had not been indolent or delayed in prosecuting the appeal herein. They submitted that it would be unfair and unjust to have their Appeal dismissed for want of prosecution due to administrative delays by the court.

16. It was their further submission that the appeal herein was not ripe for dismissal for want of prosecution for the reason that directions under Section 79B of the Civil Procedure Act had not yet been given and as such the appeal had not been admitted for hearing.

17. They relied on the cases of **Kirinyaga General Machinery vs Hezekiel Mureithi Ireri [2007] eKLR**, **UAP Insurance Company Limited vs Washington Gatura Kimani [2016] 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.

18. They further relied on Article 159 of the Constitution of Kenya which mandate courts to do substantive justice and the case of **Allan Otiemo Osula vs Gurdev Engineering & Construction Limited [2015] eKLR** where it was held that the right of appeal is a constitutional right of every appellant and in as much as there has been delay and the same has not been satisfactorily explained, the court has to weigh the cost and prejudice likely to be suffered to an appellant and a respondent if the appeal is to be struck out without hearing the appeal on merit.

19. They stated that the Respondent had not demonstrated what prejudice they would suffer if they were given more time to prosecute their appeal because they had already been paid half of the decretal sum while the other half had been deposited into a joint account as security and she could access the same once the Appeal was heard and determined on merit.

20. They were emphatic that rather it was them who stood to suffer prejudice if they were not allowed to prosecute their appeal which had high probability of success.

21. 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”.

22. 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).

23. 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”.

24. 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.

25. 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.

26. 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.

27. 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.

28. 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”.

29. 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”

30. 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.

31. 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.

32. 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.

33. 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.

34. 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.

35. 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

36. For the foregoing reasons, the upshot of this court's decision was that the Respondent's Notice of Motion application dated 1st April 2019 and filed on 5th April 2019 was not merited and the same is hereby dismissed. Costs shall be in the cause.

37. To progress this matter further, the Appellants are hereby directed to file and serve their 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 their 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 its present application.

38. Since the Appellants do 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.

39. Either party will be at liberty to apply.

40. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JANUARY 2020

J. KAMAU

JUDGE