



REPUBLIC OF KENYA (Draft)

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 471 OF 2015

ELECTRIC LINK (EAST AFRICA) LIMITED.....1ST APPELLANT

JOEL KIOKO MATATA.....2ND APPELLANT

VERSUS

MARY MUENI KASOMO & JOSHUA MUE MUNYAO

(Suing as administrators of the estate of DAVID

MUNYAO (deceased).....RESPONDENTS

RULING

1. The Respondents' Notice of Motion application dated 12th April 2019 and filed on 7th May 2019 sought the dismissal of the Appellants' Appeal for want of prosecution. The said application was supported by the Affidavit of the 1st Respondent that was sworn on 12th April 2019 on her own behalf and on behalf of the 2nd Respondent herein.
2. The Respondents averred that four (4) years had lapsed before the Appellants had taken any steps to prosecute their appeal and that further, they did not comply with a Notice dated 6th January 2019 giving them twenty one (21) days to file a Record of Appeal failing which the Appeal herein would be dismissed.
3. It was their contention that litigation had to come to an end and because the courts aid the vigilant and not the indolent like the Appellants herein, she urged this court to allow her application as prayed.
4. In opposition to the said application, on 24th May 2019, the 2nd Appellant swore a Replying Affidavit on his own behalf and on behalf of the 1st Appellant herein. The same was filed on 17th June 2019.
5. The Appellants averred that they deposited half the decretal sum in a joint interest earning account and released the other half to the Respondents evidencing their interest in prosecuting the Appeal herein. They denied of ever having been served with the Notice the Respondents had alluded to and indicated that they had not been able to file their Record of Appeal because they had not received the certified copies of the proceedings from the lower court despite having asked for them for a long time and that the file was missing in the years 2016 and 2017.
6. It was their contention that they would suffer irreparable loss, harm and injury if their Appeal was dismissed as had been sought by the Respondents herein.
7. In their Written Submissions, the Respondents reiterated the averments contained in their Supporting Affidavit and emphasised that the Appellants had failed to furnish the court with any proof to show that they had requested for certified copies of the proceedings or that the court file was missing.
8. In reiterating their contentions in the Replying Affidavit, the Appellants relied on the cases of **Pyramid Hauliers Co Limited vs James Omingo Nyaaga & 3 Others [2017] eKLR** and **Eastern Province Kenya Limited vs Rongai Workshop & Transporters Limited & Another [2014] eKLR**, the latter which relied on the case of **Ivuti vs Kyumbu [1984] KLR 441** where the principles to be applied in an application for dismissal of appeal were laid down. They asked this court to grant them thirty (30) days to fast rack the Appeal herein.
9. 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”.

10. 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).**

11. 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”.

12. 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.

13. 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.

14. 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.

15. 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.

16. 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.

17. 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”.

18. 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”

19. 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.

20. 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. 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.

22. Notably, the Appellants had not yet filed a Record of Appeal hence no appeal had been admitted or directions given. The Appeal herein could not therefore be dismissed under Order 42 Rule 35 (1) of the Civil Procedure Rules. There was also no evidence that the Registrar had issued a notice under Order 42 Rule 12 of Civil Procedure Rules.

23. Going further, a perusal of the court file showed that the Notice to file a Record of Appeal within twenty one (21) days dated 8th January 2019 was served upon the Appellants’ advocates on 16th January 2019. As was correctly pointed out by the Respondents, the said advocates failed to provide documentary proof to show what efforts they had made to demonstrate that they had tried to obtain the certified copies of the proceedings to enable them file the Record of Appeal or that the court file was missing as they had contended.

24. The said advocates had been indolent and had been woken up from slumber by the Respondents’ present application. The blame lay squarely on them. There was evidently lack of diligence on their part as they ought to have exercised due care to ensure that they proceeded expeditiously when they were served with the Notice to file a Record of Appeal. Failure to do so greatly prejudiced the Appellants herein as they now risked their Appeal being dismissed.

25. Having said so, it is trite law that no party should be penalised just because there was a blunder particularly by his or her advocate. Indeed, in the case of **Republic vs Speaker Nairobi City County Assembly & Another Ex Parte [2017] eKLR**, it has been held that blunders will continue being made and that just because a party has made a mistake does not mean that he should not have his case heard on merit.

26. Bearing in mind that even where there had been inordinate delay that was inexcusable, the court was enjoined to grant an appellant another opportunity to prosecute his or her appeal if justice could still be done to the respondent as was held in the case of **Ivuti vs Kyumbu** (Supra).

27. As no Record of Appeal had been filed herein, it was 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.

DISPOSITION

28. For the foregoing reasons, the upshot of this court’s decision was that the Respondents’ Notice of Motion application dated 12th May 2019 and filed on 7th May 2019 was not merited and the same is hereby dismissed. Costs of the application will be in the cause.

29. To progress this matter further, the Appellants are hereby directed to file and serve their Record of Appeal within one hundred and twenty (20) days from date of this Ruling. In the event they 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 the joint interest earning account in the names of their advocates and the Respondents’ advocates court shall be released to the Respondents advocates forthwith.

30. Either party is at liberty to apply.

31. It is so ordered.

DATED and DELIVERED at NAIROBI this 30th day of April 2020

J. KAMAU

JUDGE