



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO.61 OF 2018

KELVIN OLUOCH ODOTE.....PLAINTIFF/APPLICANT

-VERSUS-

PAUL KAMAU MWANIKI.....DEFENDANT/RESPONDENT

RULING

1. This is a ruling on **application dated 15th May 2019**. It seeks to dismiss appeal for want of prosecution. Grounds on the face of the application are that the appeal was filed on 28th May 2018 and since filing; the appellant has not taken any steps to have appeal heard and determined; that the applicant has suffered prejudice as a result of the delay.

2. In response, the respondent filed replying affidavit dated 1st August 2019.

Respondent averred that the application is bad in law, made in bad faith, inept, lacks merit and afterthought. He further averred that an application seeking to dismiss the plaintiff's suit was filed on **25th January 2018** and ruling delivered on **14th May 2018**.

3. That being aggrieved by the said ruling, the respondent filed this appeal.

4. He averred that proceedings have not been availed to his Advocate despite frequent follow ups. He attached letters addressed to court seeking proceedings. He stated that failure to prosecute this appeal has been caused by delay in furnishing of court proceedings; that he is eager to prosecute the appeal and allowing this application will not occasion any prejudice to the applicant. He urged court to dismiss the application herein.

5. Parties agreed to proceed by way of written submission. By submissions dated 16th August 2019, the applicant/plaintiff submitted that this appeal arise from an order issued by **Hon. E. Soita in Molo Civil Suit Number 304** of 2014 and from **28th May 2018** when it was filed no steps have been taken to have the appeal heard or set for directions.

6. Applicant submitted that **Order 42 Rule 11** of the **Civil Procedure Rules** provide that within 30 days from date of filing appeal, the appellant shall cause it to be listed before a judge for directions under **Section 79B** of the **Act**. Further the applicant submitted that **Rule 35(1)** provide that the respondent can apply for dismissal if after 3 months after directions have been given the appellant does not set the suit down for hearing.

7. Applicant submitted that the respondent/defendant have failed to file and serve record of appeal; that the appeal arose from a road traffic accident where the plaintiff/respondent suffered serious injuries and applicant is using delaying tactics to deny plaintiff justice. Further that the respondent/appellant has not filed replying affidavit a clear indication that that they have no reason to file to this court causing delay.

8. The applicant cited the case of **Mombasa HCCA No. 170 of 2009 Pan Africa Syndicate Limited Vs Aon Minet Insurance Brokers Limited[2019]** where the court held as follows:-

The record of appeal has not been filed hence the appeal is not ready to be set for hearing. The same continues hanging over the respondent and has denied him the enjoyment of fruits of the judgment in their favour."

9. Appellant filed submissions dated 22nd October 2019. Submissions started by giving the background of the case Appellant submitted that he filed application dated 25th January 2018 in the lower court seeking to strike out the suit under **Order 5 Rule 2 of the Civil Procedure Rules** on the ground that the plaintiff obtained summons to enter appearance after 2 years from time of filing suit. This prompted the plaintiff to file application dated 23rd February 2018 to enlarge time and validate the summons issued on 13th December 2016. Ruling in application granted plaintiff time to regularize summons to enter appearance. The applicant being aggrieved by the said ruling filed this appeal.

10. Applicant submitted that the primary file has never been traced to enable typing of proceedings. The appellant submitted that the applicant was served with replying affidavit deponed on 1st August 2019 on 20th August 2019 as showed by annexed replying affidavit received contrary to allegation in applicant's submissions.

11. Respondent further submitted that the appeal was filed in time and the appellant has been vigilant following up proceedings to enable them file record of appeal and should not be punished for unavoidable circumstances.

12. Appellant further submitted that the appeal herein is not ripe for dismissal as the appeal has not been admitted, appellant cited the case of **Leonard Mutura Vs Peter Gthenya Mwariri[2019]eKLR** where the court held as follows:

“

I wish to comment on the appellant's submissions that since the appeal does not fall under any of the situations envisaged under Order 42 Rule 35 of the Rules, it cannot be dismissed for want of prosecution. My view is that even where the requirement of Order 42 Rule 35 (1) have not been met, the court can in appropriate cases exercise its discretion and dismiss an appeal where it is satisfied that the appeal was filed in bad faith with no intention of ever prosecuting it or that the appellant had abandoned the same and its pendency amount to a clog on the wheels of justice,”

13. Further, in **Morris Njagi & another Vs Mary Wanjiku Kiura [2017]** where the court held that a party cannot apply for dismissal where directions have not been given and provision under which appeal can be dismissed for want of prosecution is **Order 42 Rule 35(2)**. Appellant submitted that the application has not met threshold for dismissal for want of prosecution.

ANALYSIS AND DETERMINATION

14. On filing and service of replying affidavit, I note that it was filed on 16th August 2019 and served via **Courier Service** as shown by receipt **No.G4SW4412152314475** attached to affidavit of service. I note that the applicant filed submissions the same date the replying affidavit was filed. It is evident therefore that at the time of filing submissions, the applicant had not been served with replying affidavit. The applicant however did not ask court to disregard the replying affidavit nor file further submissions. I will therefore consider the replying affidavit in this ruling.

15. I have perused the court file and note that the lower court file is not attached to this file. The lower court proceedings are not in this file. Attached to the replying affidavit are 5 correspondences showing communication to the Executive Officer, Molo asking for proceedings and judgment. There is no indication that the registrar responded to the said correspondences nor position concerning availability of the lower court file. It is evident that the file has not been placed before the judge for directions.

16. I do agree that application to dismiss suit for want of prosecution should be done after directions have been taken as provided in **Order 42 Rule 35**

(2) but the appellant has a duty to move the Deputy Registrar to place the file before a judge for directions. Even if a file has not been traced, it should be placed before a judge for directions on way forward.

17. I will however not dismiss the suit at this stage as it is not ripe for dismissal under **Order 42 Rule 35 (2)** but direct that the file be placed before a judge for directions within 30 days from today's date.

18. FINAL ORDERS

1. Application dated is hereby dismissed

2. File be place before a judge for directions within 30 days from today's date.

Ruling dated, signed and delivered via email at Nakuru

This 30th day of April 2020.

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RACHEL NGETICH JUDGE

TO:

Omonywa Namwacha Advocates – Counsel for Applicant

Kairu & Mcourt Advocates – Counsel for Respondent