



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO 593 OF 2018**

**NJENGA ORLALE .....1<sup>ST</sup> APPELLANT**

**LYDIA MUTHONI NJENGA.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**OKONGO OMARI ORLALE.....RESPONDENT**

**RULING**

1. The Respondent's Notice of Motion application dated 24<sup>th</sup> June 2019 and filed on 26<sup>th</sup> June 2019 sought the striking out of the Memorandum of Appeal and/or in the alternative the dismissal of the Appellants' Appeal for want of prosecution and further, for the release of the decretal sum that had been deposited in the escrow account at NIC PLC Lavington Branch in the joint names of his advocates and those of the Appellants. He swore his Affidavit in support of his application on 24<sup>th</sup> June 2019.
2. He averred that the Appellants filed their Memorandum of Appeal on 17<sup>th</sup> June 2018 but they had not moved the court for the listing of the Appeal for the giving of directions under Order 42 Rule 13 of the Civil Procedure Rules, 2010. It was his contention that they had also failed to demonstrate what steps they had taken to obtain certified copies of the proceedings with a view to filing their Record of Appeal.
3. It was his averment that the intentional delay in the prosecution of the Appeal herein was greatly prejudicing him as he had been denied the fruits of his judgment which were deposited in an escrow account. He therefore urged this court to allow his application as prayed.
4. In opposition to the said application, on 26<sup>th</sup> July 2019, the 1<sup>st</sup> Appellant swore a Replying Affidavit on his own behalf and on behalf of the 2<sup>nd</sup> Appellant herein. The same was filed on even date.
5. The Appellants termed the Respondent's present application as scandalous, frivolous, vexatious, abuse of the court process amongst other issues and were emphatic that their Appeal herein could not be dismissed for the reasons that the Appeal had not been admitted and directions given under Sections 79B of the Civil Procedure Act Cap 21 (Laws of Kenya) and Order 42 Rule 35 of the Civil Procedure Rules.
6. They asserted that they had not filed a Record of Appeal as they had not been able to obtain the certified copies of the proceedings. It was their contention that the delay in not filing the said Record of Appeal was due to factors beyond their control.
7. They added that their Appeal had raised arguable grounds of appeal and that having complied with the orders of the court to deposit half of the decretal sum in an escrow account, they ought to be allowed to exercise their constitutional right of appeal. They therefore asked this court to disallow the said application.
8. In support of their case, the Respondent relied on the case of **Abdirahman Abdi vs Safi Petroleum Products Limited & 6 Others [2011] eKLR** which reiterated the position that courts have been mandated to administer justice without undue regard to procedural technicalities as stipulated in Article 159(2)(d) of the Constitution of Kenya, 2010.
9. He added that since the Appellants had indicated that they could not access the lower court file, this court should direct the Deputy Registrar of the High Court to facilitate the typing of the proceedings within a given time to enable them file a Record of Appeal.
10. The Appellants relied on several cases amongst them **Morris Njagi & Another Mary Wanjiku Kiura [2017] eKLR** where the common thread was that an appeal could only be dismissed once directions had been given. They further placed reliance on the case of **D.T. Dobie (Kenya) Limited vs Joseph Mbaria Muchina & Another (1980) KLR** where it was held that courts should work towards sustaining a suit rather than striking it out unless the cause of action was so weak that it was beyond redemption.
11. 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”.**

12. 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).**

13. 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”.**

14. 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.

15. 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.

16. 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.

17. 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.

18. 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.

19. 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”.**

20. 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”**

21. 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.

22. 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.

23. 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.

24. 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.

25. 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**

26. For the foregoing reasons, the upshot of this court’s decision was that the Respondents’ Notice of Motion application dated 24<sup>th</sup> June 2019 and filed on 26<sup>th</sup> June 2019 was not merited and the same is hereby dismissed. Costs of the application will be in the cause.

27. To progress this matter further, the Appellants are hereby directed to file and serve their Record of Appeal within one hundred and twenty (120) 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 Respondent’s advocates court shall be released to the Respondents advocates forthwith.

28. For the avoidance of doubt, 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 ninety (90) days from date of this Ruling.

29. Either party will be at liberty to apply.

30. It is so ordered.

**DATED and DELIVERED at NAIROBI this 28<sup>th</sup> day of April, 2020**

**J. KAMAU**

**JUDGE**