



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO 19 OF 2016

WOODVENTURE (K) LIMITED.....APPELLANT

VERSUS

FLORENCE MUKULU KIOKO

(Suing as the legal representative

of the Estate of GERALD MBITHI –DECEASED).....1ST RESPONDENT

EXPRESS AUTOMATION LIMITED.....2ND RESPONDENT

RULING

1. The 1st Respondent's Notice of Motion application dated 4th February 2019 and filed on 5th February 2019 sought the dismissal of the Appellants' Appeal for want of prosecution and further, that the stay orders that were granted in **Milimani Commercial Court CMCC No 13203 of 2016** on 5th July 2017 be set aside and/or discharged. She swore the Affidavit in support of her application on 4th February 2019.
2. She averred that it was over two (2) years since the Appellant filed its Appeal but that it had never set the suit down for directions and/or undertaken any steps to prosecute the same. She pointed out that the suit in the lower court was over fifteen (15) years old and that the delays in the prosecution of the Appeal herein had caused and continued to cause her prejudice.
3. It was her contention that the stay orders that were issued by the lower court had made it impossible for her advocates to execute against the Appellant herein. She thus urged this court to allow her application as prayed.
4. In opposition to the said application, on 9th May 2019, Fredrick Muriithi Thuka, the Appellant's Human Resource and Administration Manager, swore a Replying Affidavit on behalf of the Appellant herein. The same was filed on even date.
5. The Appellant pointed out that 2nd Respondent's insurer, M/S Kenindia Assurance paid the 1st Respondent a sum of Kshs 1,717,205/= as full and final settlement of the decretal sum and that it was clear that she wanted to be paid double to its detriment.
6. It averred that if she was pursuing any costs, then she ought to pursue the same from the 2nd Respondent or its insurer. It therefore urged this court to dismiss the present application with costs to it.
7. Only the 1st Respondent filed Written Submissions in this matter. She submitted that Article 159(2)(b) of the Constitution of Kenya, 2020 provides that in exercise of judicial authority, courts shall be guided by the principle that justice shall not be delayed and that Sections 1A and IB of the Civil Procedure Rules, 2010 stipulates that the overriding objective of the Civil Procedure Act Cap 21(Laws of Kenya) is to among other things, facilitate the expeditious disposal of disputes governed by the said Civil Procedure Act.
8. She further referred this court to the provisions of Section 79B of the Civil Procedure Act, Order 42 Rule 35(1) of the Civil Procedure Rules, Order 42 Rules 10 and 11 of the Civil Procedure Rules and further placed reliance on the cases of **Eastern Province Kenya Limited vs Rongai Workshop & Transporters Limited & Another [2014] eKLR** and **Naftali Onyango vs National Bank of Kenya Limited [2005] eKLR** amongst other cases to buttress her argument that there had been inordinate delay in the Appellant prosecuting its Appeal, which delay had continued to cause her prejudice.
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 Appellant 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 and consequently, this court could not dismiss the Appeal herein for want of prosecution on that ground either.

23. However, this court was concerned that in its Replying Affidavit, the Appellant did not indicate whether or not it wished to pursue the Appeal herein. It merely stated that the 1st Respondent had been paid the entire decretal sum by the 2nd Respondent's insurer and that she ought to pursue costs from the 2nd Respondent or its insurer. The 1st Respondent could not be held hostage by the Appellant's uncertainty of whether or not to proceed with the Appeal herein.

DISPOSITION

24. For the foregoing reasons, the upshot of this court's decision was that the 1st Respondent's Notice of Motion application dated 4th February 2019 and filed on 5th February 2019 was not merited and the same is hereby dismissed. Costs of the application will be in the cause.

25. To progress this matter further, the Appellant is hereby directed to file and serve its Record of Appeal within one hundred and twenty (120) days from date of this Ruling. In the event it shall have failed to file its Record of Appeal as aforesaid, the Appeal herein will stand as automatically dismissed.

26. For the avoidance of doubt, 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 in the file herein within ninety (90) days from date of this Ruling to enable the Appellant comply with the directions in Paragraph 25 hereinabove.

27. Either party will be at liberty to apply.

28. It is so ordered.

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

J. KAMAU

JUDGE