



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 112 OF 2014

KAPADIA KAMLESH.....APPELLANT

VERSUS

NAOMI NJERI KAMAU.....RESPONDENT

RULING

1. The application for determination before me is the Notice of Motion dated 2nd July 2019 in which the respondent (the applicant) seeks that the appellant's appeal be dismissed for want of prosecution and that funds held in a joint interest earning account No. [...] at I&M Bank Limited, Kenyatta Avenue be released to the applicant. The applicant also prays for costs of the application and the appeal.
2. In the grounds anchoring the motion and in the supporting affidavit, the applicant contends that the appellant has not demonstrated any interest in prosecuting the appeal since he has not taken any step towards that end since 30th April 2014 when stay of execution pending appeal was granted by consent of the parties; that the delay of over 5 years is inordinate and inexcusable especially taking into account that the decree subject of the appeal was issued about 7 years ago; that litigation must come to an end and that the respondent will suffer prejudice if the application was not allowed.
3. The application is opposed. In her replying affidavit, the appellant's learned counsel, *Ms Shabana Osman* deponed that the delay in prosecuting the appeal has been occasioned by the court registry's failure to call for the lower court's original record; that the appellant applied for supply of typed proceedings of the lower court to enable him prepare the record of appeal and the same had not been supplied to date; that the delay has thus been caused by circumstances beyond his control; that he should be given an opportunity to prosecute his appeal which, in his view, has high chances of success.
4. When the application came up for hearing on 15th June 2020, parties agreed it disposed of by way of affidavit evidence.
5. I have considered the application and the affidavits on record both in support and in opposition to the motion. I have also perused the court record.

The law governing dismissal of appeals for want of prosecution is set out in *Order 42 Rule 35 (1) and (2) of the Civil Procedure Rules (the Rules)*.

Under *Order 42 Rule 35 (1)*, upon application by the respondent, the court is empowered to dismiss an appeal for want of prosecution if within three months after the giving of directions, the appeal had not been set down for hearing. *Order 42 Rule 35 (2)* on the other hand requires the court's Registrar, with notice to the parties, to list an appeal before a judge for dismissal if one year after service of the memorandum of appeal it had not been set down for hearing.

6. It is clear from the court record that this appeal does not fall under any of the categories envisaged by *Order 42 Rule 35* of the *Rules* since directions under *Order 42 Rule 13* are yet to be taken and the Hon. Deputy Registrar has not moved this court to have the appeal dismissed for want of prosecution. Be that as it may, this court would still have discretion to dismiss the appeal for want of prosecution if the appellant (respondent) failed to demonstrate sufficient cause to warrant the exercise of the court's discretion in his favour by salvaging the appeal.

7. From the court record and from the depositions in the party's affidavits, it is clear that the respondent has not taken any step towards facilitating prosecution of the appeal since the same was filed on 28th March 2014. The respondent has blamed this court and the lower court for the delay claiming that this court had failed to call for the lower court's original record and that since requesting for the lower court's typed proceedings in March 2014, the trial court had failed to supply him with the proceedings to enable him compile and file the record of appeal.

8. In my view, the respondent's explanation is not convincing for two main reasons: To start with, the court record confirms that the lower court file was forwarded to this court over an year ago on 5th April 2019. Secondly, the respondent has not exhibited any correspondence to the trial court to prove his claim that he indeed applied for supply of the lower court typed proceedings in March 2014 and that the same had not been supplied by the time the instant application was filed.

9. From the foregoing, it is apparent that the respondent has been anything but diligent in pursuing hearing of the appeal. If it is indeed true that since March 2014 he has been waiting to be supplied with typed copies of the lower court's proceedings, it is inconceivable that for all this time which is over five years, he has not made any follow up to ascertain the status of the proceedings or sought this court's intervention to facilitate or fast track the supply of the said proceedings.

10. Having said that, I note from the lower court file that it contains copies of the trial court's proceedings which are certified. Given that the appellant has claimed that the only reason he was unable to file his record of appeal is unavailability of the trial court's proceedings which are now available and considering his averment that he was keen on prosecuting the appeal at the earliest opportunity, I think that rather than shutting the door of justice on the appellant, it would be fair and just to grant him an opportunity to prosecute his appeal on terms that would facilitate its expeditious disposal.

11. In my view, declining to grant the application as sought will not occasion the applicant any prejudice that cannot be ameliorated by an award of costs.

12. For the foregoing reasons, I decline to allow the application on condition that the appellant will file and serve his record of appeal within 90 days of today's date failing which the appeal will stand dismissed for want of prosecution.

13. The appellant is ordered to pay the applicant thrown away costs of KShs.20,000 within 30 days from today's date.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 30th day of July 2020.

C. W. GITHUA

JUDGE

In the presence of:

Ms Wamunya holding brief for Mr. Nyaburi for the respondent/applicant

No appearance for the respondent

Ms Mwinzi: Court Assistant