



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 358 OF 2018

CHARLES KITWI.....APPELLANT

VERSUS

PETER NGOLA MUTUA.....RESPONDENT

RULING

1. The Respondent's Notice of Motion application dated 14th October 2019 and filed on 23rd October 2019 sought the striking out of the Appellant's Memorandum of Appeal. He swore his Affidavit in support of his application on 14th October 2019.
2. He stated that the Appellant filed his Memorandum of Appeal on 3rd August 2018 and that since then, he had not taken any other action towards prosecuting his Appeal herein. He added that the Appellant had not explained the cause of the delay and that since there was no justifiable cause for the said delay, then his Memorandum of Appeal ought to be struck out.
3. He averred that he had been prejudiced by the delay and thus urged this court to allow his application as prayed.
4. In opposition to the said application, on 20th November 2019, the Appellant's advocates, Kevin Ngure, filed a Replying Affidavit, which was sworn on 14th November 2019. On the same date, he also filed Grounds of Opposition that were dated 14th November 2019.
5. He termed the present application an abuse of the court process, frivolous, bad in law, incurably defective, an afterthought, brought in bad faith and *res judicata*. He pointed out that the Respondent had failed to disclose to the court that a similar application was dismissed by Njuguna J on 24th September 2019. It was his contention that the learned judge granted him an order for stay of execution pending appeal and that he deposited the decretal sum in a joint interest earning account in the names of the advocates.
6. He averred that he had been unable to file a Record of Appeal because he had not been furnished with certified copies of the proceedings, judgment and decree despite his requests to be furnished with the same. He added that the appeal had not been admitted for hearing, directions had not been given and hence the present application was premature. It was his contention that he ought to be allowed to prosecute his appeal to its logical conclusion and thus urged this court to dismiss the said application with costs.
7. The Appellant did not file any Written Submissions, opting instead to rely on his Replying Affidavit and Grounds of Opposition. On the other hand, the Respondent filed Written Submissions and placed reliance on the cases of **Protein & Fruits Processors Ltd & Another vs Diamond Trust (K) Ltd [2015] eKLR**, **Justus Gachoki Wachira vs Emma Makena [2011] eKLR** and **Haro E. Ogechi Nyaberi vs British American Insurance Co Ltd [2012] eKLR** where the common thread was that courts have inherent powers to dismiss appeals for want of prosecution notwithstanding that directions had not been given.
8. He further relied on the case of **Gardner vs Jay [1983] 29 CH D 50** where the court therein held that "**discretion must be exercised according to common sense and according to justice**" and Section 3A of the Civil Procedure Act Cap 21 (Laws of Kenya) which provides that the court has inherent power "**to prevent abuse of the process of court.**"
9. Order 42 Rule 35 of the Civil Procedure Rules, 2010 envisages two (2) scenarios for the dismissal of an appeal for want of prosecution. 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.

10. 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”.

11. 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).

12. 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”.

13. 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.

14. 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.

15. 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. The appellant does not seem to have any role in fixing the appeal for directions as contemplated under Order 42 Rule 11 of 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. 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.

20. This court took the view that an appeal cannot be dismissed before directions had been given. As there was no indication that directions had been given herein, the Appeal herein could not be dismissed under Order 42 Rule 35 (1) of the Civil Procedure Rules. In any event, there was also no evidence that the Registrar had issued a notice under Order 42 Rule 12 of Civil Procedure Rules. There was also no indication that the lower court file and proceedings had been forwarded to the High Court for the Registrar to proceed as aforesaid.

21. Notably, every person is entitled as envisaged under Article 50(1) of the Constitution of Kenya, 2010 to have a fair trial. The said Article 50(1) of Constitution of Kenya provides as follows:-

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

22. It therefore follows that every person ought not to be shut out from accessing court or having his day in court. Indeed, the right of a party to enjoy the fruits of his judgment must be weighed against the right of a party to access court to have his dispute heard and determined by a court or tribunal of competent jurisdiction.

23. It was therefore 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.

DISPOSITION

24. For the foregoing reasons, the upshot of this court’s decision was that the Respondent’s Notice of Motion application dated 14th October 2019 and filed on 23rd October 2019 was not merited and the same is hereby dismissed. Costs shall 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 Ruling. In the event the proceedings of the lower court and the lower court file will have been placed in the file herein and the Appellant shall have failed to file his Record of Appeal as aforesaid, the Appeal herein will stand as automatically dismissed

26. Since the Appellant does not have control of the court diary, the Registrar of High Court Civil Division Milimani Law Courts is hereby directed to facilitate the typing of proceedings and placing of the lower court file within ninety (90) days from date of this Ruling.

27. Either party is at liberty to apply.

28. Orders accordingly.

DATED and DELIVERED at NAIROBI this 29th day of September 2020

J. KAMAU

JUDGE