



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 442 OF 2018

PINPOINT SOLUTIONS LIMITED.....1ST APPELLANT

JEREMIAH NJUKI MWANGI.....2ND APPELLANT

VERSUS

LUCY WAITHEGENI WANDERI (As the Legal Administrator

of the Estate of JAMES NYANGA MUCHANGI).....RESPONDENT

RULING

1. The Respondent's Notice of Motion application dated 18th December 2019 and filed on 19th December 2019 sought orders for the dismissal of the Appeal herein for want of prosecution. On 18th December 2019, she swore an Affidavit in support of her application.
2. She pointed out that on 3rd December 2018, the Appellants herein were granted a stay of execution pending appeal on condition that they deposited half the decretal sum in a joint interest earning account and paid her half of the decretal sum. She pointed out that they complied with the said order albeit out of time.
3. She stated that her advocates invited the Appellants' advocates to fix a date for directions but they did not show up as a result of which no date was fixed. She added that her advocates also notified the said Appellants' advocates of the intention of filing the present application but the said advocates did not respond to the same.
4. She pointed out that there had been inordinate and inexcusable delay in setting down the Appeal herein for hearing which amounted to abuse of the court process. She urged this court to dismiss the Appeal as failure by the Appellants to prosecute the same was denying her the opportunity to enjoy the fruits of her judgment.
5. In opposition to the said application, on 19th February 2020, the Appellants' advocate, Allan Odongo, swore a Replying Affidavit. The same was filed on 21st February 2020.
6. He pointed out that they applied for certified copies of the decree, judgment and proceedings on 19th October 2018 but they had not received the same and that the lower court file had not been availed for the Appellants to file a Record of Appeal. He added that the Appeal herein was yet to be admitted and that directions on the hearing of the said Appeal had also not been given.
7. His further contention was that the overriding objective was the expeditious disposal of suits and that the Constitution mandated that the same would be done, justly, equitably and proportionately to guarantee the Appellants' right of fair hearing. He averred that the Appellants were keen on prosecuting the Appeal herein on merit and urged this court not to dismiss their Appeal as the delay in obtaining certified copies of the proceedings was beyond their control.
8. In support of her case, the Respondent relied on the cases of **Pan Africa Paper Mills Ltd vs Silvester Nyarango Obwocha [2018] eKLR**, **Mwangi Kaimenyi vs Attorney General & Another [2014] eKLR** to support her argument that there had been inordinate and inexcusable delay in setting down the Appeal for hearing and that it was the duty of an appellant to set down an appeal for directions. She submitted that the delay had occasioned her injustice.
9. On their part, the Appellants relied on the cases of **Njai Stephen vs Christine Khatiala Andika [2019] eKLR**, **Kirinyaga General Machinery vs Hezekiah Mureithi Ireri [2007] eKLR** amongst other cases where the common holding was that an appeal could not be dismissed if directions had not been given.

10. 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.

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. 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.

17. 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.

18. 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”.

19. 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”

20. 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.

21. 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.

22. 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.”

23. 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.

24. It was therefore the considered opinion of this court that allowing the present application would be shutting out the Appellants from accessing the court and would be contrary to Article 50(1) of the Constitution of Kenya.

DISPOSITION

25. For the foregoing reasons, the upshot of this court’s decision was that the Respondent’s Notice of Motion application dated 18th December 2019 and filed on 19th December 2019 was not merited and the same is hereby dismissed. Costs shall be in the cause.

26. To progress this matter further, the Appellants are hereby directed to file and serve their Record of Appeal within one hundred and eighty (180) days from date of this 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 Appellants shall have failed to file their Record of Appeal as aforesaid, the Appeal herein will stand as automatically dismissed.

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

28. Either party is at liberty to apply.

29. Orders accordingly.

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

J. KAMAU

JUDGE