



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 314 OF 2019

STEPHEN NDUNGU KAMANDE.....1ST APPELLANT

DURGA FEEDS LIMITED.....2ND APPELLANT

VERSUS

STEPHEN MURIUKI GEORGE

MONICAH IGOKI M'ITHINJI

(Both suing as administrators ad litem of the estate of

JOSPHINE MWENDWA-Deceased).....RESPONDENTS

RULING

1. The respondents herein took out the Notice of Motion dated 6th July, 2020 supported by the grounds presented on its face and the facts stated in the affidavit of advocate, **Edwin Omulama Onditi**. The respondents sought for the orders hereunder:

(i) Spent.

(ii) THAT the appeal be listed before the Duty Judge and that it be dismissed for want of prosecution.

(iii) THAT the sum of Kshs.1,100,000/ (Kenya Shillings One Million and One Hundred Thousand Shillings) deposited in this Honorable Court be released immediately to the respondents herein.

(iv) THAT costs of the application and of the appeal be awarded to the respondents.

2. The deponent stated in his affidavit that the appellants filed their memorandum of appeal on 11th June, 2019 and served a copy of the same upon the respondents soon thereafter. The deponent further stated that as a condition to the order for a stay of execution, it was agreed by consent of the parties that the appellants pay to the respondents the sum of Kshs.1,900,000/ and deposit the balance of Kshs.1,100,000/ in court as security for the due performance of the decree.

3. It was the averment of the deponent that subsequently, he notified the appellants of the availability of the lower court proceedings and upon his clients' instructions, wrote to the court to have the appeal listed for dismissal.

4. It was also the averment of the deponent that given the recent age of the appeal, he was advised by the registry to file a formal application for dismissal since appeals filed in the year 2019 and thereafter had not been placed for dismissal yet.

5. To oppose the Motion, **Kelvin Ngure** swore a replying affidavit on behalf of the appellants and stated that the appellants were only recently able to obtain the requisite documents to enable them file a record of appeal since their attempts at obtaining the typed proceedings, judgment and decree from the Executive Officer of the lower court proved futile and hence they cannot be faulted for the delay in prosecuting the appeal.

6. The deponent further stated that the delay is not inordinate and the respondent has not been prejudiced in the process. It was also the averment of the deponent that under Order 42, Rule 35(2) of the Civil Procedure Rules which is the provision that the respondents have come under, an appeal can only be dismissed for want of prosecution once directions have been given and the appeal has been admitted under Section 79B of the Civil Procedure Act, which is not the case here.

7. **Edwin Omulama Onditi** rejoined with a supplementary affidavit in which he *inter alia*, challenged the validity of the replying affidavit on the basis that at the time of filing the appeal, the respondents were represented by the firm of Kairu & McCourt Advocates while the reply was filed by a different firm; namely Kimondo, Gachoka & Company Advocates in the absence of an order of the court allowing the change of representation.

8. The deponent further asserted that it was always the duty of the appellant to ensure that the appeal is listed for directions pursuant to Section 79B of the Civil Procedure Act.

9. It was the averment of the deponent that the respondents continue to suffer prejudice owing to the delay in the appeal since they are being hindered from enjoying the fruits of their judgment.

10. In further rejoinder, advocate **Fredrick Ragui Kariuki** responded by stating that the appellants instructed the firm of Kimondo, Gachoka & Company Advocates to take over the matter in place of the firm of Kairu & McCourt Advocates on 1st July, 2020 on which date he resigned from the latter firm and was retained by the former firm of advocates in a bid to ensure smooth transition in the matter.

11. The deponent also stated that the firm of Kimondo, Gachoka & Company Advocates further took over the former offices of Kairu & McCourt Advocates which would explain the similarity in the address details indicated in the replying affidavit.

12. It was the averment of the deponent that there is a notice of change of advocates to explain the manner in which the change of advocates occurred and that the respondents are dwelling on trivial matters instead of addressing the merits of their Motion. In the end, the deponent urged this court to consider the provisions of Article 159(2) (d) of the Constitution which enjoins the courts to administer justice without undue regard to procedural technicalities.

13. At the hearing of the Motion, the parties were directed by this court to put in written submissions. In their submissions dated 3rd August, 2020 the respondents reiterated that there has been no proper change of advocates for the appellants, reason being the appellants' former and current advocates did not comply with the proviso of Order 9, Rule 9 of the Civil Procedure Rules which requires a change of advocates upon delivery of judgment to be effected pursuant to an order of the court. Consequently, the respondents are of the view that the current advocate for the appellants are improperly on record and that the replying affidavit, notice of change of advocates and related documents ought to be struck out on that basis.

14. It was the contention of the respondents that there has been an inordinate and inexcusable delay in prosecution of the appeal since it has been well over one (1) year since the appeal was filed and the same has not been set down for hearing.

15. It was similarly the contention of the respondents that they had previously moved the Deputy Registrar to have the appeal listed for dismissal and upon non-compliance, they filed the instant Motion. The respondents referred this court to the case of **Kenya Nut Company Limited v Justine Musyoka Nkabi [2018] eKLR** where the Employment and Labour Relations Court (ELRC) dismissed an appeal for want of prosecution for a period of eight (8) years.

16. In response, the appellants through their submissions dated 25th September, 2020 argued that the respondents are usurping the powers of the Deputy Registrar since the law is clear that it is only the Deputy Registrar who can have an appeal listed before a judge for dismissal purposes. It is on this basis that the appellants argue that the Motion is not properly before this court.

17. The appellants went ahead to submit that in any event, in the absence of issuance of directions in the instant appeal, the same cannot be deemed ripe for dismissal. The case of **Jurgen Paul Flach v Jane Akoth Flach [2014] eKLR**, among others, was quoted and in which the court appreciated that:

“See Order 42 Rule 35(1). Also see Kirinyaga General Machinery v. Hezekiel Mureithi Ireri HCC No.98 of 2008 where while interpreting Order XLI 31 (now Order 42 rule 35), Mary Kasango J., observed:-

“It is clearly seen from that rule that before the respondent can move the court either to set the appeal down for hearing or to apply for dismissal for want of prosecution, directions ought to have been given as provided under rule 8B. Directions have never been given in this matter. The directions having not being given the orders sought by the respondent cannot be entertained.””

18. The appellants are also of the view that the respondents have not demonstrated the prejudice they stand to suffer should time be extended to the appellants for prosecution of the appeal, whereas they have shown that in the event that the appeal is dismissed at this stage, they will have lost their right of appeal in addition to the right to have their appeal heard on its merits. To support their submission, the appellants referred this court to the case of **Elem Investment Ltd v John Mokora Otwoma [2015] eKLR** in which the court determined as follows:

“...am enjoined by the Court of Appeal decision in Abdurrahman Abdi v Safi Petroleum Products Ltd & 6 others [2011] eKLR, Civil Application No. Nai. 173 of 2010 where the Court stated:

“The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the court strikes out its document. The court in that regard exercises judicial discretion.””

19. In defence of the averments regarding their legal representation, the appellants relied entirely on the averments made in the supplementary affidavit of Fredrick Ragui Kariuki.

20. The appellants are of the view that there has been no inordinate delay in prosecuting the appeal and that any existing delay has been sufficiently explained in the respective affidavits filed on their behalf.

21. In their rejoinder submissions dated 29th September, 2020 the respondents contended *inter alia*, that the appellants cannot be heard to cast blame on other persons for the delay in prosecuting the appeal and also that the appellants cannot be heard to seek refuge from the provisions of Article 159(2)(d) of the Constitution to cover up for their inadvertence, citing the case of **Kakuta Maimai Hamisi v Peris Pesu Tobiko & 2 others [2013] eKLR** in which the Court of Appeal rendered itself in the manner hereunder:

“A five judge bench of this Court expressed itself very succinctly but a few days ago on this precise point is the case of MUMO MATEMU V TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE & 5 OTHERS Civil Appeal No. 290 of 2012 as follows;

“In our view it is a misconception to claim, as it has been in recent times with increased frequency, that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle under Section 1A and 1B of the Civil Procedure Act (Cap 21) and Section 3A and 3B of the Appellate Jurisdiction Act (Cap 9). Procedure is also a handmaiden of just determination of cases.””

22. I have considered the grounds laid out on the face of the Motion; the facts deponed in the affidavits in support of and in opposition thereto; the contending submissions; and the authorities cited.

23. Before I consider the merits of the Motion, I am enjoined to consider two (2) preliminary issues that were raised by the respective parties.

24. The first has to do with whether the Motion is properly before this court. This issue was primarily raised by the appellants on the basis that the respondents usurped the powers of the Deputy Registrar in listing appeals for dismissal for want of prosecution under **Order 42, Rule 25(2)** of the **Civil Procedure Rules**. The same provides that:

(2) 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.”

25. It is clear from the foregoing that the Deputy Registrar retains the power to list appeals before a judge for dismissal. Having settled that, upon studying the orders sought in the Motion, I note that order (ii) of the same is essentially seeking to have the instant appeal listed before the duty judge for dismissal. In addition, I considered the arguments of the respondents that they had written to the deputy registrar to follow up on the listing of the appeal for hearing but that their communication did not elicit any response and subsequently, to request that the appeal be listed for dismissal. This position is confirmed in the correspondences dated 20th February, 2020; 24th February, 2020 and 6th July, 2020 annexed to the Motion.

26. I am therefore not convinced that the orders sought in the Motion amount to a usurping of the powers available to the Deputy Registrar since the respondents have shown the steps taken in causing the Deputy Registrar to list the appeal for dismissal and there is nothing to indicate that there was any action taken or response made.

27. The second issue relates to whether the documents filed by the appellants: namely, the affidavits in response to the Motion; the notice of change of advocates; and the submissions on the Motion ought to be struck out. Upon considering the contending averments of the parties, I studied the record and established that at the time of filing the memorandum of appeal on 11th June, 2019 the appellants were represented by the firm of Kairu & McCourt Advocates.

28. This was the position until such time as the replying affidavit of Kelvin Ngure sworn on 23rd May, 2020 was filed on behalf of the appellants by the firm of Kimondo, Gachoka & Company Advocates. Subsequently, the said firm filed a notice of change of advocates dated 23rd July, 2020. Going by the copy availed to this court, it remains unclear whether a copy of the same was served upon the erstwhile advocates for the appellants.

29. Suffice it to say that **Order 9, Rule 9** of the **Civil Procedure Rules** which the respondents used to challenge the aforementioned documents stipulates as follows:

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected by order of the court—

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

30. In the present circumstances, it is not in dispute that judgment had already been entered in the main suit. It is apparent that at the time of filing the memorandum of appeal, the appellants were represented by the firm of Kairu & McCourt Advocates until such time as the notice of change of advocates was effected. It is therefore evident that going by the provisions of **Order 9, Rule 9** (supra), the appellants ought to have complied by either seeking leave of the court to come on record or by filing a consent between the outgoing and the incoming advocates.

31. In the absence of any credible evidence to show adherence to the law above, I am inclined to find that the firm of Kimondo, Gathoka &

Advocates is improperly on record and consequently, all documents filed by the said firm of advocates are invalid and ought to be struck out on that basis. In finding so, I draw support from the case of **Bridges Exploration Limited v Stephen Karanja [2019] eKLR** in which the court held that:

“It is evident that before a Notice of Change of Advocates can only be filed after judgment has been delivered, it must be preceded by either an application wherein an incoming advocate seeks leave to come on record for a party or by a consent between the outgoing and proposed incoming advocate or party intending to act in person as the case may be.”

32. Might I add that the above-cited provision is capped in mandatory terms and gives no room for discretion.

33. Having determined so, I will now address the merits of the Motion which in the absence of properly filed documents in response, stands unopposed.

34. I will re-cite **Order 42, Rule 35** of the **Civil Procedure Rules, 2010** which provides for the circumstances and manner of dismissal of an appeal as follows:

“(1) 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.

(2) 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.”

35. I already established that the respondents moved this court under **Order 42, Rule 35(2)** (supra).

36. From the record, it is apparent that the appellants filed their memorandum of appeal on 11th June, 2019. The record shows that the appellant’s advocate wrote to the lower court requesting for the typed proceedings, judgment and decree to enable the preparation and filing of the record of appeal. There is nothing to indicate that this correspondence elicited a response.

37. It is apparent from the record that the respondents’ advocate managed to obtain the typed proceedings and judgment in the main suit and further notified the appellants’ advocate of the same vide the letter dated 20th February, 2020. According to the said letter, the proceedings were made available as at 21st January, 2020. As earlier indicated, what followed were the correspondences by the respondents’ advocate to the Deputy Registrar.

38. The courts have always held the provisions of **Order 42, Rule 35** (supra) in high regard. The courts have also held that an appeal cannot be dismissed under **Rule 35(1)** of the Order unless and until directions are given. This position was held by the court in the case of **Jurgen Paul Flach v Jane Akoth Flach [2014] eKLR** as follows:

“See Order 42 Rule 35(1). Also see Kirinyaga General Machinery v. Hezekiel Mureithi Ileri HCC No.98 of 2008 where while interpreting Order XLI 31 (now Order 42 rule 35), Mary Kasango J., observed:-

“It is clearly seen from that rule that before the respondent can move the court either to set the appeal down for hearing or to apply for dismissal for want of prosecution, directions ought to have been given as provided under rule 8B. Directions have never been given in this matter. The directions having not being given the orders sought by the respondent cannot be entertained.”

39. The above was reaffirmed by the court in the case of

“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.”

40. In the instant appeal, from my perusal of the record and proceedings I have not come across anything to indicate that directions have been given or to show that a request has been made by the Deputy Registrar for forwarding of the lower court file to the High Court.

41. It therefore follows that the appeal is yet to be set down for hearing and cannot be deemed ripe for dismissal under the provisions of **Order 42, Rule 35(1)** (supra).

42. Further to the foregoing, I will reiterate that there is nothing on record to indicate that the Deputy Registrar has listed the appeal before a judge for dismissal pursuant to the provisions of **Order 42, Rule 35(2)** (supra).

43. While I am in agreement with the averment of the respondents that the appellants are responsible for actively following up on their appeal, I am enjoined by law to consider the interest of justice and to weigh the interest of the parties herein.

44. From the circumstances and from the record, it is apparent that the appeal was filed in the year 2019 and that there is in place an order

for a stay of execution, the conditions for which the appellants have complied with. The respondents themselves acknowledged that they were paid part of the decretal sum. In the premises, I find that it would be in the interest of justice to grant the appellants an opportunity to be heard on their appeal even though I am alive to the fact that the respondents are entitled to enjoy the fruits of their judgment and as it seems, they partly are.

45. The upshot therefore is that the Motion is hereby struck out but the following orders are hereby made in an attempt to expedite the prosecution of the appeal:

- a) The Deputy Registrar-Civil Division/Civil Appeals to call for the lower court file to be forwarded to the High Court-Civil Appeals Division within 14 days from this day.**
- b) The appellants shall prepare, file and serve their record of appeal within 14 days from the lapse of the 14-day period in order a).**
- c) Thereafter, the appellants shall move the Deputy Registrar for listing of the appeal for directions on hearing and shall ensure to prosecute their appeal within 90 days from the date of the directions failing which the appeal shall stand dismissed.**
- d) Costs of the Motion to abide the outcome of the appeal.**

Dated, Signed and Delivered at Nairobi this 22nd day of October, 2020.

.....

L. NJUGUNA

JUDGE

In the presence of:

..... **for the 1st and 2nd Appellants**

..... **for the 1st and 2nd Respondents**