



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

HIGH COURT CIVIL APPEAL CASE NUMBER 107 OF 2016

THABU KALUMA NGETE

(Suing as the Legal Representative of the

Estate of KATAN MASHA (DECEASED).....APPELLANT

VERSUS

ROBINSON INVESTMENT LIMITED.....RESPONDENT

RULING

1. On 27/9/2016 the Hon J B Kalo CM delivered a ruling in CMCC 91 of 2016.
2. The Appellant aggrieved filed Memorandum of Appeal on 10/10/2016.
3. On 7/3/2019 the appellant filed the Record of Appeal and served it on counsel for the respondent.
4. On 12/6/2020 the matter came up for directions. On that date Ms. Oseko for the respondent raised objection to the taking of directions on the ground that the appeal was filed out of time and without leave. Mr. Ogeto's response was that the appeal was filed in time, that it was the Record of Appeal that was filed late. Ms. Oseko sought leave to file a formal objection.
5. On 29/6/2020 she filed Notice of Motion brought under section 79B, 79G of the Civil Procedure Act ,Order 42 rule 11 and Order 51 rule 1 of the Civil Procedure Rules 2010 and all other enabling laws; seeking the orders:-

a. THAT the Honourable Court be pleased to strike out the Appeal since the Appellant has never fixed the matter or taken any directions as by law required.

b. THAT the Honourable Court be pleased to strike out the Appel and Record of Appeal filed on 7/3/2019 for having been filed out of time and without leave of Court.

c. THAT the costs of this application be borne by the Appellant.

On the grounds:-

a. THAT a period of 2 years 5 months had lapsed since the Memorandum of Appeal was filed yet the Appellant has never fixed the matter for directions nor have any directions been taken (within 30 days) as required by the mandatory provisions of Order 42 Rule 11 of the Civil Procedure Rules.

b. THAT further a period of 2 years 5 months lapsed since the filing of the Memorandum of Appeal on 10/10/2016 until the filing of Record of Appeal on 7/3/2019 which delay is inordinate and unexplained by the Appellant.

c. THAT the Appellant has lost conceivable interest in the Appeal herein.

d. THAT the continued pendency of the suit herein unprosecuted has been prejudicial and vexations the Respondent.

e. THAT in principle, and in the wider interests of justice, the Appeal herein should be dismissed for failure to comply with

mandatory legal provisions, inexcusable delay and for the Appellant being otherwise guilty of laches.

6. The application was supported by the affidavit of Mark Ng'ang'a Githiru Advocate sworn on 29/6/2020 reiterating the grounds:-

a. THAT the Memorandum of Appeal was filed on 10th October, 2016 and subsequent thereto the Appellant filed the Record of Appeal more than two years and five months later. The inordinate delay on the Appellant's part has not been explained to date.

b. THAT further since the filing of the Memorandum of Appeal on 10/10/2016 (over 2 years 5 months ago), the Appeal has never fixed the mater for directions before the Court to date despite the mandatory requirements under Order 42 Rule 11 of the Civil Procedure Rules to so do within 30 days of filing the Appeal. Again the said failure is inordinate, unexplained and inexcusable on the part of the Appellant.

c. THAT indeed when the matter was last mentioned virtually before Court on 12/6/2020 which is over 3 years and 7 months since filing the Appeal, the Appellant's Advocate still had no explanation why directions have never been taken and why the record of Appeal was filed after such an inordinate delay.

d. THAT clearly, the Appellant herein literally went to sleep indefinitely after filing the Memorandum of Appeal. Indeed, vide an earlier Notice of Court dated 12/3/2020 (served on us on 12/3/2020), this matter had been listed for Notice to show cause why it should not be dismissed on 13/3/2020, but somehow the same was not dismissed. We attach hereto a copy of the said Notice to show cause for dismissal marked as MNG 1. Yet the Appellant took no steps to actively prosecute the appeal.

e. THAT a period of almost 5 years has lapsed since this Appeal was filed in Court. It is against the policy of this Honourable Court for litigation to remain pending unprosecuted inordinately and with indefinite inertia but rather proceedings ought to be diligently prosecuted and expeditiously disposed of. Litigation must come to an end to conclusively determine the parties' interest, restore certainty and ingrain public confidence in the judicial system of this country.

Annexed to the affidavit are the notices made by this court.

7. In reply Peter Onsogo Ogeto Advocate swore an affidavit on 20/7/2020 (received under protest by the firm of Githiru & Co on ground that pleadings filed out of time and without leave of court).

He reiterated his submissions on 12/6/2020, that appeal was filed on 10/10/2016, 13 clear days after the Ruling was delivered, hence within the statutory period.

8. Thereafter he wrote to the registry for the proceedings and was told they were being typed on priority basis. That when they received the proceedings, they prepared the Record of Appeal, filed and served on 16/4/2019, listed the matter for directions on 24/4/2019. That the affidavit in support was not about the appeal being filed out of time but the inordinate delay in prosecuting the appeal that it was not their fault that the typed proceedings were not ready, and sought that this court takes judicial notice of the delay in supply of typed proceedings.

9. Parties chose to rely on their affidavits.

Section 79 (B) of the CPC states:-

“ summary rejection of appeal:- 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”.

Section 79G states:-

“Every appeal from a subordinate court to the High Court shall be filed within a period of 30 days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree on order.

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time”

10. These provisions' must be read together with the provisions of order 42 Civil Procedure Rules 2010.

11. If we recall the appeal the records that the issue was that the appeal was filed out of time and without leave. Order 42 rule 1 states:

i. Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.

ii. The Memo of Appeal shall set forth concisely... the grounds.... and such grounds shall be numbered consecutively.

The Record will show that the appellant indeed filed a Memorandum of appeal in the prescribed manner on 10/10/2016.

12. What is evident is that the appellant did not file the memorandum of appeal together with a certified copy of the decree/order appealed against.

13. Order 42 rule 2 states:-

“Where such certified copy of the decree/order is not filed with the memorandum of appeal, it may be filed,

- As soon as possible in any event within such time as the court may order.

- And when such decree/order is filed, the issue of summary rejection may not arise.

14. A copy of the court order made/issued on 12/10/2016 was filed together with the Record of Appeal on 7/3/2016. Was this as soon as possible? The record will show that the record was received from the lower court on 8/3/2019 and certified by the Deputy Registrar on 2/4/2019. So it is evident that as seen as the appellant received the proceedings, he filed the Record of Appeal.

15. Order 42 rule 11 provides that upon the filing of the appeal the appellant shall within 30 days cause the matter to be cause listed before a judge for an order under 79B. This could only have been done after the proceedings had been obtained and the Record of Appeal filed. The Record of Appeal was filed on 7/3/2019, the file was however not placed before the judge for the appeal to be admitted/rejected. Section 79B stipulate that before the appeal is heard a judge “shall peruse it”

16. The record of the file shows that no such perusal had taken place because there was no entry to that effect. Hence, before the appeal was admitted/rejected summarily appellant could not make moves, but even when appellant filed the matter for directions when it came up before me on 12/3/2020 parties were absent and I noted that the Record of Appeal had been filed and on the assumption that the same had been admitted, fixed it for directions”.

17. What is clear is that the appeal was filed in time. The Record of Appeal and the order filed long thereafter but clearly because the proceedings had not been availed to the applicant.

18. Hence the complaint that there was delay in prosecuting the appeal is not founded on the facts before me.

19. So what should happen?

Now that the appeal was filed on time and the record is on file, it is my view that the appellant cannot be faulted for the delay. The record speaks for itself.

In the interests of justice and to avoid any further delay, I have perused the appeal and it appears to raise a point of law. Hence it is arguable and in the interests of justice, the same is admitted for hearing in compliance with Section 79B and C of the Civil Procedure Act.

Having done so, I find that the application was premature in part, and on the other part, not tenable.

The application is denied with costs to the respondent.

The Parties can now take directions.

Delivered, Dated and Signed at Nakuru this 16th Day of October 2020

Mumbua T. Matheka,

Judge.

In the Presence of: Via ZOOM

Edna CA

For the Applicant; N/A Ogeto

For the Respondent; Ms. Muthoni for Githiru

Ms Muthoni. We can have date in January

Ct. M on 18th of January 2020 for direction. Mention Notice to issue to the appellants.