



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 511 OF 2014

THE REGISTERED TRUSTEES OF THE SISTERS

OF MERCY TRADING AS THE MATER HOSPITAL.....APPELLANT

VERSUS

JNM (Suing as the Mother

And Next Friend of AMW.....RESPONDENT

(Being an appeal from the Judgment and Decree of the Hon Nchoe (Mr), Senior Resident Magistrate (SRM) at the Chief Magistrate's Court at Milimani in Civil Case No 2840 of 2008 delivered on 25th July 2014)

JNM.....1ST PLAINTIFF

JNM (Suing as the Mother

And Next Friend of a Minor AMW.....2ND PLAINTIFF

VERSUS

THE REGISTERED TRUSTEES OF THE SISTERS

OF MERCY (trading as the MATER HOSPITAL).....DEFENDANT

RULING

INTRODUCTION

1. The Respondent's Notice of Motion application dated 7th April 2017 and filed on 20th April 2018 was brought pursuant to the provisions of Sections 1A, 1B and 3A as read with Section 81(1) of the Civil Procedure Act and Order 51 Rule 4 of the Civil Procedure Rules. Prayer No (1) was spent. It sought the following remaining orders:-

1. Spent.

2. THAT this Honourable court be pleased to strike out this Appeal as lodged vide the Memorandum of Appeal lodged on the 14th November 2014.

3. THAT in the ALTERNATIVE to prayer 2 above, the Honourable Court be pleased to dismiss this Appeal for want of prosecution.

4. THAT the Honourable court be pleased to order that the costs of this application and the costs of the Appeal be borne by the Appellant/ Respondent herein.

2. The Respondent's Written Submissions were dated 5th June 2018 and filed on 28th June 2018. The Respondent's List of Authorities were

dated 10th October 2017 and filed 15th November 2017. The Appellant's Written Submissions dated 28th June 2018 and filed on 16th October 2018.

3. When the matter came up in court on 16th October 2018, the parties requested the court to render its decision based on their Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

THE RESPONDENTS' CASE

4. The Respondent swore her Affidavit in support of her application on 7th April 2017.

5. She stated that the proceedings from which the present Appeal was preferred commenced in 2005 and that it was now about twelve (12) years from the date of cause of action arose.

6. She averred that the Appellant's application seeking a stay of execution of the Judgment that was delivered in her favour was not heard on merit as Onyancha J (as he then was) directed that a stay of execution pending appeal remain in place as the Appellant had deposited the decretal sum in court.

7. She pointed out that the Appellant lodged its Appeal late on 14th November 2014 despite the said Learned Judge having ordered that it lodge its Memorandum of Appeal fourteen (14) days and serve the same within seven (7) days. She averred that the Appellant served her with the Memorandum of Appeal on 12th January 2015.

8. It was her contention that in any event even the time limit has not been given, then a party should take necessary steps within fourteen (14) days and serve the same within seven (7) days. She avers that the Appellant served her with the Memorandum of Appeal on 12th January 2015.

9. She added that despite the court having directed that the monies deposited in court be transferred in a joint interest earning account, she was not certain if the same had been transferred.

10. She was emphatic that there was no proper Appeal and that the one filed in court ought to be struck out and/or dismissed because in any event, the Appellant had been guilty of laches for not having taken steps to prosecute its appeal.

11. She stated that it was not just and fair for her to be kept away from her fruits of judgment for about twelve (12) years.

12. She therefore urged this court to allow her application as prayed

THE APPELLANT

13. In response to the present application the Appellant's counsel, Lucy Gakaria, swore her Replying Affidavit on 6th September 2017. The same was filed on even date.

14. The Appellant contended that it was not present when judgment in favour of the Respondent herein was delivered on 24th July 2014 and that it only became aware of the same vide her advocates letter dated 23rd September 2014 by which time, the period to file an appeal had already lapsed.

15. It stated that upon Onyancha J (as he then was) granting a stay of execution pending the hearing of the Appeal on 30th October 2014, a joint interest earning account in its advocates' name and those of the Respondent, was opened. It averred that since the Respondent was a co-signatory to the account, she could have called KCB to enquire if monies had been transferred from court to the said account instead of stating that she was not certain if the monies had been transferred from court to the bank account.

16. It stated that it had also been following up on the typed proceedings and judgment to enable it prepare a record of appeal and that currently the Appeal could not be set down for directions in the absence of the said typed proceedings and judgment. It contended that the delay in obtaining the proceedings was caused by the backlog in the typing of the same by the court.

17. It therefore urged this court to dismiss the Respondent's application and it be allowed to prosecute its Appeal herein.

LEGAL ANALYSIS

18. This court carefully perused the parties' submissions and noted that the Respondent's argument that the Memorandum of Appeal herein ought to have been filed within fourteen (14) days as stipulated in Order 8 Rule 6 of the Civil Procedure Rules did not paint the correct position of the law.

19. Notably, Order 8 Rule 6 of the Civil Procedure Rules provides as follows:-

“Where the court has made an order giving any party leave to amend, unless that party amends within the period specified or, if no period is specified, within fourteen days, the order shall cease to have effect, without prejudice to the power of the court to extend the period.”

20. It was very clear that the said order relates to amendment of pleadings and not the filing of pleadings where leave had been granted to file the same out of time and time for filing not prescribed.

21. On the other hand, Section 58 of Interpretations and General Provisions Act Cap 2 (Laws of Kenya) is of general application. The same provides that:-

“Where no time is prescribed or allowed within which anything shall be done, such thing shall be done without unreasonable delay, and as often as due occasion arises.”

22. This court took the view that Section 58 of the Interpretations and General Provisions Act was what was applicable herein and not Order 8 Rule 6 of Civil Procedure Rules for the reason that the Order of Onyancha J (as he then was) relating to the Appellant’s Notice of Motion application dated and filed on 22nd October 2014 and Onyancha J (as he then was) did not specify the period within which the Memorandum of Appeal was to be filed.

23. Consequently, the filing of the Memorandum of Appeal on 14th November 2016 was not out of time as it was lodged fourteen (14) days from 30th October 2014 when the aforesaid application was compromised.

24. Turning to the issue of service of the Memorandum of Appeal, it is to be served upon a respondent after a judge of the High Court had given directions on admission or rejection of the Appeal as provided in Order 42 Rule 12 of the Civil Procedure Rules where it is stipulated as follows:-

“After the refusal of a judge to reject the appeal under section 79B of the Act, the registrar shall notify the appellant who shall serve the memorandum of appeal on every respondent within seven days of receipt of the notice from the registrar.”

25. This court was therefore not been persuaded by the Respondent’s submissions that service of the Memorandum of Appeal upon her advocates on 12th January 2015 was out of time because directions under Section 79B of the Civil Procedure Act and Order 42 Rule 12 of the Civil Procedure Rules had not yet been given.

26. This court did not also find favour in her submissions that the Appeal was defective for failing to indicate any specific order for the reason that there was a prayer in the body of Memorandum of Appeal seeking that the Appeal be allowed and the Appellant having alluded to appealing against the entire judgment. It, however, agreed with the Respondent that the orders set out in the Memorandum of Appeal were not properly set out.

27. It also agreed with the Respondent that the Appellant had not demonstrated having pursued this matter diligently. There were only two (2) letters to wit 30th September 2014 and 31st August 2017 to the Executive Officer Chief Magistrates Court Milimani Commercial Courts in which the Appellant’s counsel had sought to be furnished with typed judgment and proceedings.

28. There was therefore inordinate delay in the Appellant prosecution its Appeal. The same had also caused prejudice to the Respondent as she has been kept away from her fruits of judgment.

29. However, as the Appellant correctly pointed out, there has been delay in the court furnishings parties with typed proceedings. This was not a delay that can be attributed to litigants. The Respondent actually acknowledged the difficulties when she stated that courts had been allowing litigants to type the proceedings for themselves. The delay could therefore be said to have been excusable.

30. This court noted the holding in the case of County Executive of Kisumu vs County Government of Kisumu & 8 Others [2017] eKLR where the Supreme Court held:-

“that a delay in getting typed proceedings is not a *prima facie* panacea for a case of delay whenever it is pleaded” and that each case must be decided on its own merits.

31. In balancing the rights of the Appellant to appeal and the Respondent’s right to enjoy her fruits of judgment as was considered in the case of Protein & Fruits Processors Ltd & Another vs Diamond Trust Bank Kenya Ltd [2015] eKLR that was relied upon by the Respondent, this court agreed with the Appellant that its Appeal should not be dismissed on account of a delay in obtaining typed judgment and proceedings.

32. Accordingly, having considered the parties’ Written Submissions and the case law they each relied upon, this court found and held that although the delay by the Appellant in prosecuting this case had been inordinate and it had the potential of prejudicing the Respondent, the delay was excusable. Notably, a court should only dismiss a matter where all the three (3) ingredients to wit, inordinate and inexcusable delay and prejudice to an opposing party exist. If one (1) ingredient is absent, a court should lean towards saving a suit for determination on merit.

DISPOSITION

33. For the foregoing reasons, the upshot of this court’s decision was that the Respondent’s Notice of Motion application dated 7th April 2017 and filed on 20th April 2018 was not merited and the same is hereby dismissed. Costs shall be in the cause.

34. To progress this matter further, it is hereby directed that the Deputy Registrar High Court of Kenya Civil Division facilitates the typing

of proceedings and the placing of the lower court file in the file herein within the next thirty (30) days from the date of this Ruling.

35. The Appellant to file and serve its Record of Appeal within sixty (60) days from the 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 Appellant shall have failed to file its Record of Appeal as aforesaid, the Appeal herein will stand as automatically dismissed and the sum of Kshs 1,852,900/= deposited in court released to the Respondent.

36. Orders accordingly.

DATED and DELIVERED at NAIROBI this 24th day of January 2019

J. KAMAU

JUDGE