



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 330 OF 2013

NYAMODI OCHIENG-NYAMOGO &

WILLYS NYAMODI NYAMOGO t/a

NYAMOGO & NYAMOGO ADVOCATES.....APPELLANT

VERSUS

CHEMUSIAN COMPANY LIMITED.....1ST RESPONDENT

REGENT MANAGEMENT LIMITED.....2ND RESPONDENT

S.M GATHOGO t/a VALLEY AUCTIONEERS.....3RD RESPONDENT

RULING

INTRODUCTION

1. The Respondent's Notice of Motion application dated 17th January 2018 and filed on 19th January 2018 was brought pursuant to the provisions of Section 1A and 3A of the Civil Procedure Act, Order 42 Rule 35, Order 51 (sic) Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law. It sought the following orders:-

1. THAT the Appeal against the Applicants herein be dismissed with costs for want of prosecution.

2. THAT the deposit paid to court, a sum of Kshs 600,000/= via Bankers Cheque No 188274 issued on 14th February 2014 by the Respondent be released to the 2nd Applicant.

3. THAT the costs of this Application and the entire Appeal be awarded to the Applicant.

2. The Respondent's Written Submissions were dated 22nd June 2018 and filed on 25th June 2018. Despite having been given ample time to file their Written Submissions, the Appellant did not file the same.

3. When the matter came up on 15th October 2018, the Respondents requested the court to deliver 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 Respondents' present application was supported by the Affidavit of their advocate, Hillary K Sigei, that was sworn on 17th January 2018.

5. Their case was that the Appellant filed the Memorandum of Appeal in 2013 and that since 27th January 2014, the Appellant had not taken any further action to prosecute the Appeal herein. They also said that Appellant had failed to prosecute the Notice of Motion application dated 12th June 2013 for over four (4) years.

6. They contended that the delay in prosecution of the Appeal herein was causing them prejudice and that the delay in prosecuting the same

amounted to an abuse of the court process.

7. The Respondents' Grounds of Opposition to the Appellant's Preliminary Objection were dated 12th June 2018 and filed on 13th June 2018. It was their averment that the Preliminary Objection that the Appellant had raised was incompetent, fatally defective, lacked merit, frivolous, vexatious, an abuse of the court process, in bad faith, it was intended to delay and prejudice the hearing of the Appeal herein and was not premised on any known provision of the law.

8. They therefore urged this court to dismiss the Appellant's Appeal for want of prosecution.

THE APPELLANT'S CASE

9. In opposition to the Respondents' present application, the Appellant filed a Notice of Preliminary Objection dated 11th May 2018 on even date. The ground of objection was that directions have not been taken.

10. Nyamodi Ochieng Nyamogo, an advocate in the Appellant's firm also swore a Replying Affidavit in response to the present application on 26th July 2018. It was filed on the same date

11. The Appellant's case was that it had not set down the Appeal for hearing because it had been negotiating with the Respondent to value the office equipment that was carted from its offices on 31st May 2012 but because the said equipment was not in its possession, it could not proceed with the exercise.

12. It asserted that since the Respondents had clearly demonstrated their unwillingness to proceed with the negotiations, it was ready to proceed with the Appeal herein.

13. It therefore urged this court to dismiss the Respondents' application.

LEGAL ANALYSIS

14. The Respondents argued that Order 42 Rule 35 of the Civil Procedure Rules, 2010 envisaged two (2) scenarios for the dismissal of an appeal for want of prosecution.

15. The first scenario was when an appellant failed 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 was 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.

16. They placed reliance on the case of **Malonza Maiko vs James Kisilu Mang'eli [2017] eKLR** where the court observed that the appellant therein had lost interest in the appeal for having failed to file a Record of Appeal.

17. They also placed reliance on the case of **Protein Fruits Processors Ltd & Another vs Diamond Trust Bank Kenya Ltd [2015] eKLR** where the court dismissed an appeal that had been pending in court for over six (6) years.

18. It was their contention that the Appellant had not given any explanation why it had not filed any Record of Appeal, five (5) years after the filing of the Memorandum of Appeal. This court agreed with the Respondents, that the Appellant had not advanced any plausible explanation why it had not taken steps to prosecute the Appeal herein.

19. Be that as it may, this court took the view that an appeal cannot be dismissed before directions had been given.

20. 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”.

21. 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).

22. 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”.

23. 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.

24. 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.

25. 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.

26. 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.

27. 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”.

28. 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”

29. 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.

30. 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.

31. 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 of the Constitution of Kenya.

DISPOSITION

32. For the foregoing reasons, the upshot of this court's decision was that the Respondents' Notice of Motion application dated 17th January 2018 and filed on 19th January 2018 was not merited and the same is hereby dismissed. Costs shall be in the cause.

33. To progress this matter further, the Appellant is hereby directed to file and serve its Record of Appeal within sixty (60) 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 its Record of Appeal as aforesaid, the Appeal herein will stand as automatically dismissed and the sum of Kshs 600,000/= deposited in court be released to the 2nd Respondent as has been sought in the present application.

34. 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 thirty (30) days from date of this Ruling.

35. Either party will be at liberty to apply.

36. Orders accordingly.

DATED and DELIVERED at NAIROBI this 22nd day of January 2019

J. KAMAU

JUDGE