



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL APPEAL NO 231 OF 2016**

**GRACE W KANYUGI.....1<sup>ST</sup> APPELLANT**

**ROBERT MWANGI NGUNJIRI.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**JACTONE AKUTO KODHE [Suing as the administrator of the**

**Estate of Daniel Ouma Okuto Deceased] .....RESPONDENT**

**RULING**

**INTRODUCTION**

1. The Respondent's Notice of Motion application dated 5<sup>th</sup> April 2018 and filed on 6<sup>th</sup> April 2018 was brought pursuant to the provisions of Orders 17 Rule 2 (3); 42 Rule 32; 50 Rule 1 of the Civil Procedure Rules; Sections 1A, 1B, 3A & 63 (e) of the Civil Procedure Act Cap 21 Laws of Kenya Constitution and all other enabling provisions of the law. It sought the following orders:-

- 1. THAT the Appeal herein, being the Memorandum of Appeal dated 3<sup>rd</sup> May 2016, be struck out for being an abuse of court process.**
- 2. THAT in the alternative the Appeal be dismissed for want of prosecution.**
- 3. THAT the NIC Bank Limited City Centre Branch be directed to uplift the entire funds held in escrow/call Account No 1004000\*\*\*\* in the joint names of Adera & Company Advocates and Kairu & McCourt Advocates and pay the net proceeds to Adera & Company Advocates.**
- 4. THAT the costs of and relating to this Application be paid by the Appellants to the Respondent/Applicant.**

2. The Respondent's Written Submissions were dated and filed on 21<sup>st</sup> June 2018 while those of the Appellant's were dated 29<sup>th</sup> June 2018 and filed on 5<sup>th</sup> July 2018.

3. When the matter came before the court on 22<sup>nd</sup> November 2018, the Respondent requested it to render its decision based on its Written Submissions which he relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

**THE RESPONDENT'S CASE**

4. The present application was supported by the Affidavits of Mutuku Maweu, the Respondent's advocate. The Supporting and Supplementary Affidavits were sworn on 5<sup>th</sup> April 2018 and 19<sup>th</sup> June 2018 respectively. The Supplementary Affidavit was filed on 21<sup>st</sup> June 2018.

5. The deponent stated that judgment was entered in favour of the Respondent against the Appellants on 19<sup>th</sup> August 2016 in the sum of Kshs 1,842,046.20. However, they had not filed a Record of Appeal or pursued and/or obtained a Decree and typed proceedings.

6. He pointed out that the Respondent lost his son nine (9) years ago and he was being denied his fruits of judgment to the detriment of the deceased's dependants.

7. He therefore urged this court to allow the Respondent's application as prayed.

### **THE APPELLANTS' CASE**

8. In response to the said application, the Appellants' advocate, Daniel Muthee, swore a Replying Affidavit on 8<sup>th</sup> June 2018 on their behalf. The same was filed on 11<sup>th</sup> June 2018.

9. He contended that they obtained a stay of execution of the judgment that was delivered in favour of the Respondent against the Appellants on condition that they paid a sum amounting to Kshs 1,500,000/= to the Respondent and Kshs 499,307/= deposited in court in a joint account in the names of both counsel.

10. He stated that despite having applied for certified copies of the proceedings and judgment from the lower court on 16<sup>th</sup> September 2016, they had never obtained the same making it difficult for them to file a Record of Appeal.

11. He further pointed out that the Appeal herein had not been admitted for hearing and directions given as provided in Section 79B of the Civil Procedure Act.

12. He urged this court not to dismiss the Appeal herein as the Appellant had an arguable appeal and ought to be given an opportunity to prosecute the case and that the same be determined on merits.

13. He therefore asked this court to dismiss the present application.

### **LEGAL ANALYSIS**

14. The Respondent relied on the cases of **Protein & Fruit Processors Ltd & Another vs Diamond Trust Bank (K) Ltd [2015] eKLR**, **Justus Gachoki Wachira vs Emma Makena [2011] eKLR** and **Haro E Ogechi Nyaberi vs British American Insurance Co Ltd [2012] eKLR** to buttress his submissions that courts have inherent powers to dismiss the Appeal herein for want of prosecution notwithstanding that directions not having been issued because of the overriding objectives to do justice without any delay as provided under Article 159 (2) (d) of the Constitution of Kenya.

15. On their part, the Appellants placed reliance on the case of **Jurgen Paul Flach vs Jane Akoth Flach [2014] e KLR**, where the court therein declined to dismiss the appeal because directions had not been given. They also relied on the case of **Allan Otieno Osula vs Gurdev Engineering & Construction Ltd [2015] eKLR** in which it was held that an appeal is a constitutional right of an appellant and even when he had not satisfactorily explained the delay in prosecution his appeal, the same will not be dismissed for want of prosecution. They also referred this court to the case of **Justus Gachoki Wachira vs Emma Makena** (Supra) that was also relied upon by the Respondent to buttress their argument that even where there has been delay, courts have declined to dismiss appeals for want of prosecution.

16. 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.

17. 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”.**

18. 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).

19. 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”.**

20. 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.

21. 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.

22. 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.

23. 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.

24. 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”.**

25. 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”**

26. 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.

27. 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.

28. Notably, every person is entitled as envisaged under Article 50 of the Constitution of Kenya to have a fair trial. The said Article 50 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.”**

29. 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.

30. 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**

31. For the foregoing reasons, the upshot of this court's decision was that the Respondent's Notice of Motion application dated 5<sup>th</sup> April 2018 and filed on 6<sup>th</sup> April 2018 was not merited and the same is hereby dismissed. Costs shall be in the cause.

32. To progress this matter further, the Appellants are hereby directed to file and serve their 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 Appellants shall have failed to file their Record of Appeal as aforesaid, the Appeal herein will stand as automatically dismissed

33. Since the Appellants do 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.

34. In the event that the Appellants shall not prosecute their Appeal expeditiously, the Respondent will be at liberty to take such appropriate steps to safeguard his interests.

35. Either party shall have the liberty to apply.

36. Orders accordingly.

**DATED and DELIVERED at NAIROBI this 14<sup>th</sup> day of March 2019**

**J. KAMAU**

**JUDGE**