



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL CASE NO. 177 OF 2016

BERNARD ONYONKA.....APPELLANT

VERSUS

NATION MEDIA GROUP.....RESPONDENT

RULING

The respondent filed an application dated 12th November 2018 seeking orders that the court strike out the appeal and they be awarded costs. The appeal was based on the grounds that the judgment was delivered on 8th December 2015 and the appellant has not served a memorandum of appeal on the respondent. The record of appeal was filed on 21st June 2017 and served on the respondent on 17th September 2018. Other grounds were that the appellant is out of time as per *Section 79B* of the Act, *Order 42 Rule 12* has not been complied with and that in default of *Order 42 rule 13(1)* of the *Civil Procedure rules* the court should reject the facility for giving appellate directions.

APPLICANT'S CASE

The respondent became aware of this appeal on 11th September 2018 when the appellant served a mention notice drawn on 17th July 2018. The appellant served the record of appeal on the respondent's advocate on 17th September 2018, notably, the record of appeal was filed on 21st June 2017, a year before service.

The memorandum of appeal was filed on time but the appellant failed to comply with the mandatory requirements as to service, provided for by *Order 42 Rule 12*. The memorandum has not been filed to date and was only included in the record of appeal one year after it was filed.

Order 42 rule 1 requires the appellant to cause the matter to be listed for directions within 30 days but the appellant moved the court in October 2018, a year and four months from the date of filing the memorandum of appeal.

A total period of one year and nine months have passed without any notification of the said appeal which shows the appellant is not interested in the proceedings. The appeal is defective and should be struck out.

RESPONDENT'S CASE

The respondent submits that the memorandum of appeal is to be served once directions under *Order 42 rule 12* have been taken, that is after a judge has declined to summarily dismiss the appeal under *Section 79B* of the *Civil*

Procedure Act. The appeal has not been admitted to date and therefore the need to serve the memorandum of appeal has not arisen.

The deputy registrar has not notified the appellant that the appeal has been admitted to pave way for the service of the memorandum of appeal. Time does not run for the service of the appeal until the appeal has been admitted to hearing. Before the deputy registrar notifies the appellant that the appeal has been admitted he is not obligated to serve the memorandum of appeal.

The record of appeal was prepared and served before the appeal was admitted therefore the appellant ought to be commended for filing and serving the record of appeal ahead of time.

The appellant has written several letters requesting to have the file placed before the honourable judge for admission. Failure to have the appeal admitted is not attributable to the appellant. The respondent has not been prejudiced and should not be allowed to capitalize on procedural technicalities. The only provision that allows for the dismissal of an appeal is *Order 42 Rule 35* which does not apply in these circumstances. He urged the court to dismiss the application.

ISSUES FOR DETERMINATION

a) Whether the Appeal should be dismissed.

Order 42 Rule 11 of the Civil Procedure Rules states;

“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.”

Order 42 Rule 12 of the Civil Procedure rules states;

“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.”

It is clear that the matter was never set before a judge for directions. However, the appellant stated that he wrote several letters but has not provided proof of the same. That does not negate that the matter was never set down for directions.

In Morris Njagi & another v Mary Wanjiku Kiura [2017] eKLR the court held;

“A party can only apply for dismissal where directions have been given. This is under Order 42 rule 35 (1) Civil Procedure Rules. I have already pointed out that no directions have been given. The appeal has to be admitted first before it can be listed for hearing. The provision under which this appeal could be dismissed for want of prosecution is Order 42 rule 35 (2). This provision could not be invoked by the applicant. The applicant did not write to request the registrar to list the appeal for dismissal.”

In Rosarie (EPZ) Limited -V- Stanlex Mbithi James (2015) eKLR the court held;

“Since under Order 42 rule 35 (1) the appeal cannot be dismissed before directions have been given the applicant should have taken advantage of Order 42 rule 35 (2) and cause the registrar to list the appeal for dismissal. If there had been such correspondence which the registrar ignored, I would have been inclined to the application. Since however, there is no evidence that the applicant had requested the registrar to list the matter in terms of Order 42 rule 35 (2) and the latter failed, I find it difficult to accede to the application.”

Order 42, Rule 35(2) states;

“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.”

The respondent was at liberty to have the registrar list the matter in terms of Order 42 rule 35 and failed to do so. That was the option available to him at this point. He relies on Order 42 rule 12 but the provision of service of the memorandum of appeal in that rule is based on notification from the registrar after refusal of the judge to reject the appeal under Section 79B. There has been no such refusal to reject the appeal. The registrar has not notified the appellant and he cannot consequently serve the memorandum as required.

In Morris Njagi & another v Mary Wanjiku Kiura (supra) the court held;

“I am of the view that since no directions have been issued in the appeal the applicant (respondent) cannot move the court to dismiss the appeal for want of prosecution.”

The bottom line is that the application is not merited and therefore fails. The applicant is free to move the registrar to place the file before a judge for dismissal in accordance with the provisions of the rules.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 24th day of April, 2019.

In the presence of;

Mr. Langat holding brief for the Applicant

Mr. Etyang - Court assistant

And in the absence of Mr. Momanyi for the Respondent