



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 535 OF 2016

LEONARD MUTURAAPPELLANT/APPLICANT

VERSUS

PETER GATHENYA MWARIRIRESPONDENT

RULING

1. The respondent in this appeal *Peter Gathenya Mwariri* (the applicant) moved this court through a Notice of Motion dated 2nd July 2018 seeking that the appellant's appeal filed on 12th August 2016 be dismissed with costs to him on a higher scale and that the sum of KShs.1,317,273 deposited in an interest earning fixed deposit account number [1004XXXXXX] in NIC Bank of Kenya Limited Wabera Street in the names of the counsel on record for both parties be retired and all proceeds therefrom including all accrued interest be released to the respondent's advocate *Mr. Evans Thiga Gaturu* or the respondent.
2. The application is premised on grounds stated on its face which are reproduced in the supporting affidavit sworn by the respondent on 2nd July 2018. I must point out at the outset that the prayers sought in the motion when considered in the context of the grounds anchoring the motion and the depositions in the supporting affidavit are fraught with contradictions and are to say the least most confusing.
3. The applicant on the one hand claims that after judgment was delivered by the trial court in his favour on 12th July 2016 in the sum of KShs.1,155,503.30 together with costs and interest, the appellant, who is the respondent in this application filed an appeal on 12th August 2016 and had not prosecuted it by the time the application was filed. On the other hand, in grounds No. 6 and 8 and in paragraphs 6 and 7 of his supporting affidavit, the applicant contends that the respondent after obtaining stay orders and complying with the court order of depositing the decretal amount in an interest earning account failed to file and prosecute his appeal within the time prescribed by the law and that since there is no appeal, the money held in the fixed interest earning account should be retired and released to him through his advocate so that he can finally enjoy the fruits of his judgment.
4. The applicant also contends that the respondent's failure to prosecute the appeal is deliberate and is intended to ensure that he will never realize the fruits of his judgment.
5. The application is opposed through the replying affidavit sworn on 10th September 2018 by *Mr. Allen Odongo*, an advocate practicing in the firm of Kairu & McCourt Advocates which represents the appellant in this appeal. Though conceding that no step had been taken by the appellant to prosecute the appeal since it was filed, *Mr. Odongo* averred that the delay in prosecuting the appeal was caused by the trial court's failure to supply the appellant with typed copies of its proceedings and judgment in order to enable him prepare the record of appeal; that the appellant's efforts in following up on his request for the proceedings have not elicited any response to date; that the lower court file also got misplaced as it could not be traced and the appellant had to apply for its reconstruction; that therefore, the delay in filing the record of appeal and in prosecuting the appeal had been occasioned by the trial court and not by the appellant.
6. It is also the appellant's contention that the application is premature as the appeal was not ripe for dismissal; that under *Section 79 B* of the *Civil Procedure Act* (the *Act*) and *Order 42* of the *Civil Procedure Rules*, an appeal has to be admitted and directions given before it could be set down for hearing or be dismissed as prayed and that since the instant appeal has not even been admitted, it cannot be dismissed for want of prosecution.
7. The appellant further asserted that he is keen on prosecuting his appeal and that he should be given an opportunity to have his appeal prosecuted and determined on merit; that he has an arguable appeal and that it would be against the interests of justice to oust him from the seat of justice given that he is not to blame for the delay in prosecuting the appeal.
8. To counter the averments made on behalf of the appellant in the replying affidavit, the applicant filed a further affidavit sworn on 5th November 2018 in which he urged the court to find that the appellant had not given any good reason for his failure to file a record of appeal for two years; that the appellant had not demonstrated that he has made any effort to obtain the lower court's proceedings and judgment or that the lower court file had been missing or was at any time misplaced as alleged.

9. The application was orally argued before me on 1st April 2019 by learned counsel *Mr. Gaturu* for the applicant and learned counsel *Mr. Muthee* who held brief for *Mr. Odongo* for the appellant. In their submissions, both counsel expounded on the positions taken by their respective clients in supporting and opposing the motion.
10. I have carefully considered the application, the affidavits on record and the rival submissions made by learned counsel. I have also perused the court record. Having done so, I am unable to agree with *Mr. Gaturu's* submissions that no appeal has been filed in this matter and that the appellant ought to have sought leave of the court to file his appeal out of time which he failed to do.
11. My perusal of the court record shows clearly that the appellant filed his appeal on 12th August 2016 through a memorandum of appeal dated 11th August 2016 which *Mr. Gaturu* also referred to in his submissions. The appeal was filed within the time prescribed by the law since the judgment subject matter of the appeal was delivered on 14th July 2016. It is thus my finding that there is a competent appeal on record and this is what forms the basis of the instant application.
12. *Mr. Gaturu's* submission that there is no appeal on record defeats logic because if he believed that the appellant did not have a competent appeal on record, one wonders how or why he would have moved the court to have a non-existent appeal dismissed for want of prosecution. Counsel appears to be labouring under a misconception that filing of a record of appeal is what constitutes the filing of an appeal and not the filing of a memorandum of appeal. This is not the legal position. *Order 42 Rule 1* of the *Civil Procedure Rules* makes it clear that appeals to the High Court are lodged by way of filing a memorandum of appeal signed in the same way as a pleading. Failure to file a record of appeal cannot invalidate an appeal. It only makes it impossible for the appellant to take the procedural steps that are required to facilitate the prosecution of an appeal.
13. Having established that there is a valid appeal on record and that the applicant's complaint is that the appellant had failed to take any step towards its prosecution for over two years including the most basic step of filing a record of appeal, I find that the only issue for my determination in this application is whether or not the applicant has established sufficient basis for dismissal of the appellant's appeal for want of prosecution.
14. The law governing dismissal of appeals for want of prosecution is set out under *Order 42 Rule 35* of the *Civil Procedure Rules* (the *Rules*). The law envisages two scenarios in which an appeal can be dismissed for want of prosecution.
15. The first scenario can be discerned from *Order 42 Rule 35 (1)* which provides that if after three months after the giving of directions the appellant has not set down the appeal for hearing, the respondent has the option of either setting down the appeal for hearing or applying to have the same dismissed for want of prosecution.
16. *Order 42 Rule 35 (2)* contemplates the second scenario. It mandates the Deputy Registrar on notice to the parties to list an appeal before a judge in chambers for its dismissal if within one year after service of the memorandum of appeal the appellant had failed to set it down for hearing.
17. It is not disputed that the appeal herein was filed on 12th August 2016 which is over two years ago and that to-date it has not been set down for hearing. However, it does not fall within the situation contemplated by *Order 42 Rule 35 (1)* since the appellant is yet to file a record of appeal which is a pre-condition to having the appeal admitted for hearing to enable the court give directions under *Order 42 Rule 13*. As directions are yet to be given, the appellant cannot set down the appeal for hearing.
18. The appeal was however ripe for dismissal under *Order 42 Rule 35 (2)* of the *Rules* since the applicant's claim that he was served with the memorandum of appeal on 23rd September 2016 has not been disputed by the appellant. The applicant should have prompted the Deputy Registrar through a letter or the Deputy Registrar could have moved the court on her own motion by listing the appeal before a judge for dismissal for want of prosecution.
19. I wish to comment on the appellant's submission that since the appeal does not fall under any of the situations envisaged under *Order 42 Rule 35 of the Rules* it cannot be dismissed for want of prosecution. My view is that even where the requirements of *Order 42 Rule 35 (1)* have not been met, the court can in appropriate cases exercise its discretion and dismiss an appeal where it is satisfied that the appeal was filed in bad faith with no intention of ever prosecuting it or that the appellant had abandoned the same and its pendency amounts to a clog on the wheels of justice.
20. In this case, though the appellant has maintained that he has always been willing and eager to prosecute his appeal but has been prevented from doing so by the trial courts persistent failure to supply him with certified copies of proceedings and judgment to enable him file the record of appeal which must be filed before any step is taken towards prosecuting the appeal, he has not availed to this court any tangible evidence to demonstrate when he applied for the said proceedings or to substantiate his claim that he has been following up with the trial court to fast track the process of having the said proceedings availed to him.
21. The only letter annexed to the replying affidavit bears the trial court's date stamp of 14th September 2018 but its actual date is not clear since there appears to be some overwriting on the same. The fact that the letter was received by the court on 14th September 2018 about two years after the appeal was filed and since then, no further effort appears to have been made to follow up on the request for the said proceedings is a clear indicator that the appellant has not been proactive and diligent in pursuing his appeal. He cannot, therefore, entirely escape blame for the delay in prosecuting the same.
22. I however note that even if the record of appeal had been filed, this court is yet to receive the original record of the lower court and without it, the court cannot issue its directions under *Section 79 B* of the *Civil Procedure Act*. The calling of the original record of the lower court to this court is the responsibility of this court through its Deputy Registrar and not the appellant.

23. I have considered the appellant's claim that he is still interested in prosecuting his appeal and that he should be given an opportunity to do so. I agree with the appellant that the interest of substantive justice requires that he be given a chance to be heard on his appeal so that the same can be determined on merit. I am also mindful of the fact that the applicant being the successful litigant in the lower court is entitled to enjoyment of fruits of his judgment and further delay in the prosecution of the appeal will occasion him prejudice but in my view, it is prejudice which can be ameliorated by an award of costs.

24. Having weighted the competing interest of the parties in this appeal, I am inclined to give the appellant an opportunity to prosecute his appeal but on terms which will ensure its expeditious disposal and at the same time compensate the applicant for the prejudice he may have suffered due to the appellant's indolence in pursuing his appeal. I, thus decline to dismiss the appeal on two conditions which are as follows:

i. The appellant shall file and serve his record of appeal within 45 days of today's date.

ii. The appellant shall pay the applicant thrown away costs in the sum of KShs.20,000 within 30 days of today's date.

25. If the appellant defaults in complying with any of the two conditions above, the appeal shall stand dismissed with costs to the applicant in which case the funds deposited in the interest earning account held jointly by counsel on record for the parties will be released to *Mr. Evans Gaturu* Advocate for onward transmission to the respondent.

26. The Deputy Registrar is also hereby directed to urgently call for the original record of the lower court and ensure that it is forwarded to this court within the next 14 days.

27. It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 24th day of May 2019.

C. W. GITHUA

JUDGE

In the presence of:

Ms Muragwa for the appellant/applicant

No appearance for the respondent though duly notified

Mr. Salach: Court Assistance.