



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL SUIT NO. 133 OF 2013

DANSON MARAMBAPLAINTIFF

VERSUS

SIMEON MWAMBUI MANYONGLI.....DEFENDANT

RULING

1. On 17th December, 2018 this matter came up for a mention for Notice to show cause why the appeal filed on 4th October, 2013 should not be dismissed for want of prosecution.
2. The Applicant's counsel argued that the appeal arise from a matter in Voi and that although a record of appeal had been filed, the decree was not in the court file. He urged the court to allow them thirty (30) days to construct a skeleton file since their file was destroyed. The Appellant was then granted thirty (30) days to file and serve a record on appeal.
3. On 19th February, 2019 the matter came up for mention to confirm if the Appellant had filed record of appeal. The Appellant's counsel requested for a further thirty (30) days since they had neither filed a record of appeal nor served the Respondent, who was not in court. This Honourable court indulged the Appellant and allowed them the thirty (30) days to enable them file the record of appeal. The matter was then scheduled for mention on 25th March, 2019 for confirming the filing of a record of appeal and further directions to issue.
4. On 25th March, 2019, the Appellant's counsel indicted to court that she had not filed the record of appeal and that they had written to the Executive Officer requesting for the original record of proceedings but the same had not been supplied. She stated that the Appellant was eager to pursue the appeal having filed the memorandum of appeal 2013 and that the delay in filing record of appeal has not been occasioned by him.
5. The Respondent on the other hand has prayed for the appeal to be dismissed or want of prosecution for the following reasons.
 - (a) This is s claim that was filed in 2012 and judgment therein delivered on 16.9.2013;
 - (b) Proceedings were typed and certified on 21st November, 2013 and that all the facts are on the file;
 - (c) the court record also shows that on 17th December, 2018, the appellant's counsel appeared before H0n. Justice Njagi and requested for 30 days to enable them file their record of appeal but they have not done so todate;
 - (d) the appeal has been pending for six (6) years.
6. According to the Respondent's counsel, it is clear that the Appellant is not keen or ready to prosecute the appeal. The Respondent's counsel prays that the appeal filed on 4th October, 2013 be dismissed as per the notice to show cause earlier issued by this court.
7. The applicable law on the process of appeal is provided for and regulated by the Civil Procedure Act and Civil Procedure Rules.
8. In the present case, what is in issue is whether the appeal filed on 4th October 2013 should be dismissed for want of prosecution. The relevant provision of dismissal of an appeal for want of prosecution is provided for under Order 42 rule 35 which states :

“35 (1) unless within three months after the giving of direction 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 apply by summons for its dismissal for want of prosecution.

(2) If within one year after service of the memorandum of appeal shall not have been set down for hearing, the registrar shall by notice to the parties list the appeal before Judge in chambers for dismissal.”

9. I have perused the court record in the instant case and confirm from the memorandum of appeal dated 4th October, 2013 that the appeal was filed on even date. It is quite evident that no directions were taken regarding the hearing of the appeal until the same came up on 17th December, 2018 when it had been listed for dismissal for want of prosecution by the Honourable court. It is therefore not in doubt that there has been inordinate delay in having this appeal prosecuted.

10. It is against this background that I set out the applicable law in determining this application. Under Article 50 (1) of the Constitution, 2010, it is proved that

“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.

(e) to have the trial begin and conclude without unreasonable delay;

11. From these provisions, while the Constitution guarantees every person the right to have dispute resolved in accordance with the law, in a fair and public hearing before a court or an independent and impartial tribunal or body, it does not provide information as to the length of the time between the commencement of the action or charge to the date of conclusion of the case. The prescriptive period in civil claims has been deliberately left to the legislature.

12. In view of what has been stated herein above, there is no dispute that the Appellant has not approached the court since the filing and service of the memorandum of appeal. There is even no evidence of the Appellant requesting the Executive Officer of the court for typed and certified copies for the original record of proceedings.

13. The manner in which the superior courts have approached the issues of delay in prosecuting of and appeal was well captured in the cases of **EASTERN PROVINCE KENYA LTD VRS RUNGAI WORKSHOP & TRANSPORTERS LTD & ANOTHER (2014) eKLR and IKTA VRS KYUMBU (1984) KLR 441** by laying down the test to be applied as follows;

“ The test to be applied in application for dismissal for want of prosecution is whether the delaying is prolonged and inexcusable, and if it is whether justice can still be done despite the delay.

These, even the delay is prolonged, if the court is satisfied with the Plaintiff’s excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of the discretion of the court”.

14. The rationale of this decision is the supremacy of the courts in exercise of discretion so as not to deprive a party the right to access court and pursue his/her claim, which by reason of delay, would not see the light of the day. This principle recognizes the fundamental rights and obligations of a court of law is to do substantive justice between the parties.

15. It is worth noting that the appellant in the instant case has not given satisfactory reason to justify the delay in having this appeal prosecuted as it has been lying in court for six (6) years, and indeed the Respondent has been denied the fruits of his judgment which was delivered on 16th September, 2013.

16. For the above stated reasons, I find that the Respondent is right that the appeal has taken too long to be prosecuted and proceed to dismiss the same with costs to the Respondent.

It is so ordered.

Ruling is delivered, dated and signed his 25th day of June, 2019 at Mombasa.

LADY JUSTICE D. O. CHEPKWONY