



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 528 'B' OF 2016

CITY HOPPA LIMITED.....APPELLANT/RESPONDENT

VERSUS

HARRISON KAMAU KARABI.....1ST RESPONDENT/APPLICANT

BENARD OKWANI.....2ND RESPONDENT

KICHWA TOURS & CAR HIRE SERVICES LTD..... 3RD RESPONDENT

RULING

1. The 1st respondent, *City Hoppa Limited* (hereinafter the applicant) filed a Notice of Motion dated 4th October 2018 in which it sought the following orders:

- i. *That this Honourable court be pleased to vacate the stay of execution pending appeal to the respondent by the Chief Magistrate's court.*
- ii. *That the memorandum of appeal dated 10th August 2016 be struck out.*
- iii. *That the applicant be at liberty to execute the decree dated 13th July 2016 together with the accrued interest to date.*
- iv. *Cost of this application be provided for.*

2. The application is expressed to be brought under *Section 1A (1), (2), (3) 1 B (1) (a), (b), (d); Section 3A of the Civil Procedure Act and Order 42 Rule 11 and 13 (1) of the Civil Procedure Rules*. It is based on grounds that the respondent has been indolent ever since the stay orders were granted; that the stay orders were merely meant to frustrate the applicant from reaping the fruits of his judgment; that the respondent is guilty of unexplainable latches and abuse of court process; and that the appellant has not made any effort to prosecute the appeal or compile a record of appeal for more than two years.

These grounds are largely reproduced in the depositions made in the supporting affidavit sworn on 15th October 2018 by *Mr. Maina Njuguna*, learned counsel for the applicant.

3. The application is contested by the appellant through a replying affidavit sworn on 16th November 2018 by *Ms Serah Amondi Jumma*, learned counsel for the appellant. In her affidavit, counsel started by asserting that the application lacked merit as it was grounded on the wrong provisions of the law. She averred that the delay in filing the record of appeal was occasioned by the trial court's failure to supply them with certified copies of the court's proceedings despite having made a request for the same on 20th February 2017 and despite making numerous follow ups thereafter; that they only became aware that the proceedings had been typed and certified on 17th August 2018 when they perused the lower court file after receiving a notice from the High Court dated 19th October 2018; that they subsequently filed and served the record of appeal. The appellant urged the court to find that the delay complained about by the applicant was occasioned by circumstances beyond its control.

4. When the application came up for hearing, parties consented to having it disposed of by way of written submissions.

5. I have carefully considered the application, the affidavits on record as well as the rival written submissions filed on behalf of the parties and the authorities cited.

The thrust of the applicant's submissions is that after filing the appeal on 10th August 2016 and obtaining orders of stay of execution of the

decree pending disposal of the appeal, the appellant (respondent) went to sleep and only woke up after being served with the instant application; that the reason advanced by the respondent for the delay of one year is not credible and should not be accepted by this court since the record of appeal which according to the applicant was filed out of time and without leave of the court was not accompanied by a certificate of delay; that the appeal should be dismissed in order to allow the applicant to enjoy the fruits of his judgment.

6. The respondent on the other hand submitted that the application should be dismissed for lack of merit as it was anchored on the wrong provision of the law and secondly, it was premature as under *Order 42 Rule 35 (1)* of the *Civil Procedure Rules (the Rules)*, an appeal can only be dismissed if the appellant had failed to list it for hearing within three months of taking directions and directions in this appeal had not been issued. In support of this proposition, the respondent relied on the persuasive authorities of *Elem Investment Ltd V John Mokora Otwoma, [2015] eKLR* and *Suresh Ruginath Raniga & Another V Sagar Mohan S.M. Ram, [2015] eKLR*.

7. Though it is not expressly stated in the application, a reading of the affidavits filed herein and the applicant's written submissions clearly reveals the applicant's main objective in filing the instant application was to seek an order for the dismissal of the respondent's appeal for want of prosecution. A perusal of the application shows that the respondent is correct in its submission that the application is anchored on the wrong provisions of the law as the provisions cited relates to the overriding objective of the Civil Procedure Act; the inherent powers of the court and the issuance of directions on the hearing of appeals.

8. The law governing dismissal of appeals for want of prosecution is set out in *Order 42 Rule 35* of the *Rules*. This notwithstanding, it is my finding that the wrong citation of the law applicable to the prayers sought in the application goes to the format as opposed to the substance of the motion and does not affect the competence of the same.

9. As stated earlier, the law on dismissal of appeals for want of prosecution is contained in *Order 42 Rule 35* of the *Rules*. A reading of this provision shows that the law contemplates two situations in which appeals can be dismissed for want of prosecution.

In the first scenario, a respondent is given the option of either setting down an appeal for hearing or applying for its dismissal if within three months after the taking of directions, the appellant has failed to fix it for hearing.

In the second scenario, the Deputy Registrar of the court is mandated to list the appeal before a judge for dismissal with notice to the parties if within one year of service of the memorandum of appeal, the appellant had not set it down for hearing.

10. In this case, the memorandum of appeal was filed on 10th August 2016 but it is not clear when it was served on the respondent.

The respondent has denied the applicant's claim that it has been indolent in the manner in which it has handled its appeal. It has maintained that the delay in the prosecution of the appeal was caused by the trial court's failure to supply it with certified copies of proceedings in good time to enable its advocates prepare a record of appeal; that the advocates filed and served a record of appeal immediately they became aware of the availability of the lower court's proceedings and that therefore, the delay was occasioned by circumstances beyond its control.

11. I have looked at the annexures to the replying affidavit and have noted that apart from the letter dated 17th February 2017 addressed to the Executive Officer of the trial court requesting for certified copies of proceedings and judgment, the appellant has not annexed any other correspondence with the lower court to substantiate its claim that it had made numerous efforts to follow up on the request for proceedings. Given that the appeal was filed on 10th August 2016 and the request for proceedings was made on 17th February 2017 about four months later and there being no evidence to confirm that the appellant actively followed up on the request for proceedings, I am satisfied that the appellant cannot entirely escape blame for the delay in the prosecution of the appeal.

12. I have considered the appellant's argument that the appeal cannot be dismissed as prayed as no directions have been issued under *Order 42 Rule 13* of the *Rules*. I have noted the opinions expressed by my brother and sister judges in *Elem Investment Ltd V John Mokora Otwoma, [2015] eKLR* and *Suresh Ruginath Raniga & Another V Sagar Mohan S.M. Ram, [2015] eKLR* but I must say that I hold a contrary view. My take is that in suitable and appropriate cases, this court in the exercise of its discretion and inherent powers can dismiss an appeal which amounts to an abuse of the court process even if directions under either *Section 79B* of the *Act* or under *Order 42 Rule 13* of the *Rules* have not been issued.

13. In this case, considering that the appellant has already filed and served the record of appeal and the original record of the lower court has already been received by this court, it is my finding that subject to the taking of directions under *Order 42 Rule 13*, the appeal is ready for hearing and in the circumstances, it would not be fair and just to dismiss the appeal at this point in time for want of prosecution. The ends of justice in my view would require that the appellant be given an opportunity to prosecute the appeal so that the same can be determined on merit.

14. With due respect, I do not find any substance in the applicant's claim that the record of appeal was filed out of time and without leave of the court allegedly because it was filed outside the 30 days period prescribed by the law. I am not aware of any law that limits the period of filing the record of appeal to 30 days after the date of the decision or order appealed against. The applicant appears to be confusing a record of appeal with a memorandum of appeal which under *Section 79G* of the *Act* should be filed within 30 days of the decision appealed against unless the time is enlarged by the court.

15. The prayer seeking lifting of orders of stay of execution issued by the trial court is in my view misconceived firstly because the orders were meant to remain in force pending disposal of the appeal which is still pending and secondly because the High Court cannot interfere with orders of the lower court unless they have been made the subject of an appeal to the High Court.

16. For all the foregoing reasons, I decline the invitation to dismiss the appeal on condition that the appellant shall cause the appeal to be mentioned for directions not later than October 2019 failing which the appeal shall stand dismissed for want of prosecution with costs to the applicant.

17. Considering the circumstances under which the current application was filed, I will not make any order as to costs of the application.

18. It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 31st day of July, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Ms Cheruiyot holding brief for Mr. Maina for the appellant/respondent

Mr. Balala holding brief for Mr. Mege for the respondents

Mr. Salach: Court Assistant