



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 129 OF 2017

JUMA HAMILTON..... APPELLANT

VERSUS

MARTIN MUTUA KITHUVI.....RESPONDENT

RULING

1. The respondent, *Martin Mutua Kithuvi* approached this court by way of a Notice of Motion dated 16th October 2018 requesting the court to invoke its inherent jurisdiction and to dismiss the appellant's appeal with costs for want of prosecution.

2. The application was brought under *Order 42 Rule 35* of the *Civil Procedure Rules; Sections 1A, 1B* and *3A* of the *Civil Procedure Act* and all other enabling provisions of the law. It is supported by the grounds stated on its face and the depositions in the supporting affidavit sworn by the respondent on 10th October 2018.

3. It is the respondent's contention that since the appeal was filed on 23rd March 2017, the appellant has not taken any steps to prosecute the same; that the delay in prosecuting the appeal amounts to an abuse of the court process and is occasioning prejudice on the applicant who is unable to access the fruits of his judgment. He urged the court to allow the application.

4. In response to the application, the appellant filed a replying affidavit dated 27th June 2019. He deponed that the delay in prosecuting the appeal has been occasioned by the trial court's failure to supply his advocates with typed copies of proceedings which they needed to enable them prepare a record of appeal; that he had information from his advocates that the proceedings were ready and awaiting certification by the trial court; that he is desirous of prosecuting his appeal and it was in the interest of justice that he be given an opportunity to do so.

5. By consent of the parties, the application was prosecuted by way of written submissions. I have carefully considered the rival written submissions filed by the parties and the authorities cited.

I concur with the decisions in the persuasive authorities cited by the parties namely, *Morris Njagi & Another V Mary Wanjiku Kiura, [2017] eKLR* and *Rosaries (EPZ) Limited V Stanlex Mbithi James, [2015] eKLR* to the effect that the law governing dismissal of appeals for want of prosecution is set out under *Order 42 Rule 35 (1) and (2)* of the *Civil Procedure Rules*. Under *Order 42 Rule 35 (1)*, the law provides the respondent with an option of either setting down an appeal for hearing or applying for its dismissal if the appellant had failed to fix it for hearing within three months of taking directions under *Order 42 Rule 13*. *Order 42 Rule 35 (2)* on the other hand does not give the respondent any such option. It provides that if after one year after service of the memorandum of appeal the appellant fails to set down the appeal for hearing, the Deputy Registrar with notice to the parties can list it before a judge for dismissal. Under this rule, the Deputy Registrar is given the prerogative of initiating the process of dismissal of an appeal for want of prosecution.

6. From the foregoing, it is clear that the law contemplates two situations in which an appeal can be dismissed for want of prosecution.

The first scenario is where an appeal has been admitted and three months after taking of directions on its disposal, the appellant fails to set it down for hearing.

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

7. It is not disputed that the instant appeal though filed about two years ago on 23rd March 2017 does not fall under any of the above two categories. The appeal has not been admitted since the record of appeal is yet to be filed and therefore, directions under *Order 42 Rule 13* have not been issued. The Deputy Registrar has also not taken the initiative of listing the appeal before a judge for dismissal.

8. That said, I wish to point out from the outset that the decision on whether or not to dismiss an appeal for want of prosecution under any of the circumstances contemplated under *Order 42 Rule 35* of the *Civil Procedure Rules* is dependent on the exercise of the court's discretion

after taking into account the particular circumstances and facts of each appeal. It is a discretion which must be exercised judiciously as opposed to arbitrarily or capriciously.

9. I have noted the positions taken by my sisters *Gitari J* in ***Morris Njagi & Another V Mary Wanjiku Kiura, [Supra]*** and *Aburili J* in ***Rosaries (EPZ) Limited V Stanlex Mbithi James, [2015]*** that an appeal that does not fall within any of the provisions of *Order 42 Rule 35* cannot be dismissed for want of prosecution.

I hold a contrary opinion. My view on the matter is similar to the one expressed by *Onyancha J* in ***Protein & Fruits Processors Limited & Another V Diamond Trust Bank Kenya Limited, [2015] eKLR*** in which he stated that this court can in appropriate cases exercise its discretion and inherent power to dismiss any appeal which amounts to an abuse of the court process where the ends of justice so require.

10. I have considered the reason advanced by the respondent for his failure to take any step towards prosecution of the appeal since it was filed. The reason is not entirely convincing considering that he has not availed any evidence to demonstrate that he has been actively following up on his request for supply of proceedings by the lower court. That notwithstanding, I find that even if the respondent had filed his record of appeal, the appeal would still not have been admitted and no step would have been taken towards its prosecution since the original record of the lower court is yet to be forwarded to this court. It is worth noting that the responsibility of calling for the original record of the lower court rests on the court's Deputy Registrar and not on the appellant.

11. Having taken everything into account, particularly the unavailability of the original record of the lower court, I am inclined to exercise my discretion in favour of sustaining the appeal. Since the respondent has claimed that the proceedings of the lower court are now ready and in order to ensure that he does not go back to sleep, I decline to dismiss the appeal on condition that the appellant shall file his record of appeal and cause the appeal to be listed for directions under *Section 79 B* of the *Civil Procedure Act* and *Order 42 Rule 13* of the *Civil Procedure Rules* within the next 90 days failing which the appeal will stand dismissed for want of prosecution with costs to the applicant. The Hon. Deputy Registrar is directed to call for the lower court file and ensure it is availed to this court within 30 days of today's date.

12. On costs, though ordinarily costs follow the event, given the laxity the respondent has demonstrated in the prosecution of the appeal, it is my view that the applicant was justified in filing the instant application and he is entitled to costs. I therefore exercise my discretion and award costs of the application to the applicant.

13. 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 Muriithi for the respondent

Ms Moragwa holding brief for Mr. Omagwa for the appellant

Mr. Salach: Court Assistant