



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 263 OF 2015

MOSES KINYUA NDEGWA.....1ST APPELLANT

GEORGE KINYUA *aka* GACHERU..... 2ND APPELLANT

VERSUS

ALEX MUSEMBI KISILU.....RESPONDENT

RULING

1. The respondent, *Alex Musembi Kisilu* (hereinafter the applicant) moved the court by way of a Notice of Motion dated 31st October 2018 in which he sought the following orders:

- i. *That the appeal be dismissed with costs for want of prosecution.*
- ii. *That the appeal be struck out for duplicity with Nairobi HCCA No. 364 of 2015.*
- iii. *Costs of the application be awarded to the respondents.*

2. The application was filed under *Order 42 Rules 1 (1), 2, 11, 12, 13 (1), 3 and 35 (1)* of the *Civil Procedure Rules* and *Section 79 G* of the *Civil Procedure Act*.

3. It is based on the grounds stated on its face and the depositions in the supporting affidavit sworn by *Mr. Nelson Kaburu Felix*, learned counsel for the respondent.

In a nutshell, the respondent contends that the appeal should be dismissed for want of prosecution as the appellants have failed to take the steps that are necessary to facilitate it for hearing within the prescribed time as set out in *Order 42* of the *Civil Procedure Rules*. The applicant has invited the court to note that since the appeal was filed on 8th June 2015, the appellants have done nothing to progress it for hearing and that therefore, the court should exercise its inherent powers and have it struck out. In addition, the applicant urged the court to strike out the appeal for duplicity as it was allegedly similar to the appeal filed in HCCA No. 364 of 2015.

4. The application is opposed. *Kelvin Ngure*, the Claims Manager at *Directline Assurance Company Limited* swore a replying affidavit in which he sought to explain the delay in prosecuting the appeal. He deponed that the delay was occasioned by the trial court's failure to supply the appellants with certified copies of the decree, judgment appealed from and copies of typed proceedings to enable them prepare the record of appeal; that the length of the delay is not unreasonable or inordinate as to occasion prejudice on the respondent that cannot be compensated by an award of damages or costs.

5. The deponent further averred that the appeal was not ripe for dismissal as it does not fall under any of the situations contemplated under *Order 42 Rule 35* considering that the appeal was yet to be admitted and no directions on its disposal had been issued and that *Order 42 Rule 35 (2)* was thus not applicable. He further asserted that the appellants have an arguable appeal and as they are keen on prosecuting it, they should not be ousted from the seat of justice; that if the appeal is dismissed, they will suffer great prejudice as they will be condemned to settle the lower court's award before their appeal was determined on merit.

6. By consent of the parties, the application was canvassed by way of written submissions which I have carefully considered alongside the authorities cited. I have also considered the application and the affidavits filed in support and in opposition thereof.

7. The law governing dismissal of appeals is contained in *Order 42 Rule 35* of the *Civil Procedure Rules*. This provision envisages two situations in which an appeal can be dismissed for want of prosecution.

8. In the first scenario, *Order 42 Rule 35 (1)* provides for dismissal of an appeal on application by the respondent where three months after directions had been taken, the appellant had not set down the appeal for hearing. It is worth noting that under this rule, the respondent is given an option of setting down the appeal for hearing in place of applying for its dismissal.

In the second scenario, the Deputy Registrar of the court is mandated to list an appeal before a judge for dismissal with notice to the parties if one year after service of the memorandum of appeal, the appellant had failed to fix it for hearing.

9. The respondents have argued that the application is premature and misconceived since in their view, the appeal is not ripe for dismissal considering that the appeal has neither been admitted nor have directions on its disposal been issued. In support of this proposition, they relied on several persuasive authorities including the cases of *UAP Insurance Company Limited V Washington Gatura Kimani, [2016] eKLR* and *Suresh Ruginath Raniga & Another V Sagar Mohan S.M. Ram, [2012]* in which the court (*Njuguna & Mabeya JJ*) followed the decision in *Kirinyaga General Machinery V Hezekiel Mureithi Ileri, [2007] eKLR* where it was held that before the respondent can either set the appeal down for hearing or apply for its dismissal, three months must have elapsed after directions on its disposal had been issued.

10. The applicant on his part relying on another persuasive authority namely, *Joseph M. Nganga & 2 Others V Lawrence Muriungi Gichunge, HCCA No. 106 Of 2015*, has urged the court to find that the law imposes a duty on the prosecution of appeals on the appellant and that if the appellant fails or neglects to perform his or her duty, the court has inherent power to dismiss the appeal in order to avoid abuse of the court process and to breath life to the principle that litigation must come to an end.

11. Having considered the different positions taken by the parties in this matter, I am persuaded to agree with the applicant's submission that the law indeed imposes the duty of prosecuting appeals on the appellant and that is why the appellant is required under the various rules in *Order 42* of the *Civil Procedure Rules* to take specific steps which are geared towards facilitating expeditious hearing of appeals. This does not however mean that if the appellant fails to take any of the steps required under *Order 42* of the *Rules*, the appeal should automatically be struck out or be dismissed for want of prosecution or that if directions have not been given under *Order 42 Rule 13*, the appeal cannot be dismissed for want of prosecution.

12. In my view, the decision on whether or not to dismiss an appeal for want of prosecution is discretionary. The court's discretion must however be exercised judiciously taking into account all the peculiar facts and circumstances of the appeal in question before deciding whether or not to dismiss it for want of prosecution.

13. In every case, the court should base its decision on what the ends of justice require in each particular case after weighing the interests of both parties. In my considered view, in deciding applications such as

the one under consideration, the court should take into account not only the provisions of *Order 42 Rule 35* but should also bear in mind the overriding objective of the parent act as set out in *Sections 1A and 1B* of the *Civil Procedure Act* and the principles enunciated under *Article 159 (2) (b) and (d)* of the *Constitution of Kenya 2010*, which enjoins courts to dispense substantive justice without delay. It is thus my opinion that *Order 42 Rule 35* should not be read in isolation.

14. That said, it is my humble view that in appropriate and suitable cases, the court can in the exercise of its discretion and inherent power dismiss any appeal which amounts to an abuse of the court process even where directions under either *Section 79 B* of the *Act* or *Order 42 Rule 13* of the *Rules* have not been issued. I say so because as a court of justice, the court has a duty to dispense justice not only to the appellant but also to the respondent since both of them are equally entitled to the protection of the law. And in as much as the appellant is entitled to exercise his right of appeal and to have that right safeguarded, the respondent is equally entitled to enjoy the fruits of his judgment and not to have that right unduly hampered by the appellant. The court is therefore called upon to balance the competing interests of the parties in order to arrive at a just and fair decision in each case.

15. In this case, the reason given by the appellant for the delay of over three years in initiating the process of prosecuting this appeal is that it was unable to file a record of appeal due to the trial court's failure to supply its counsel with certified copies of proceedings and judgment despite various requests. It is noteworthy that the appellant has not substantiated this claim since it has not availed any iota of evidence in the form of correspondence with the lower court confirming the request for typed proceedings or any follow up on the same.

16. In view of the foregoing, I am not satisfied that the appellant has sufficiently explained the long delay in the prosecution of the appeal. Given the foregoing, I would not have had any hesitation in dismissing the appeal as invited by the respondent but I have noted from the court's record that the original record of the lower court is yet to be availed to this court. It is common knowledge that no steps can be taken towards prosecution of an appeal until the lower court file is received and a record of appeal is filed.

17. Considering that the appellants have expressed their interest in pursuing the appeal and bearing in mind the circumstances of this case, I think that the interests of justice will be better served if I gave them another opportunity to prosecute the appeal once the original record of the lower court is received by this court.

I am fully aware that sustaining the appeal may occasion some prejudice on the applicant but in my view, the applicant is not likely to suffer any prejudice that cannot be compensated by an award of costs.

18. The applicant had also sought in prayer 2 that the appeal be struck out for duplicity as it was similar to HCCA No. 364 of 2015. The appellants have not denied having filed HCCA No. 364 of 2015 or that it is similar to the current appeal. In my view, the existence of a separate and similar appeal cannot be a ground for striking out an appeal since the two appeals can be consolidated for hearing or the appellants can exercise the option of withdrawing one of them.

19. For all the foregoing reasons, I decline to allow the Notice of Motion dated 31st October 2018 and it is accordingly dismissed on condition that the appellants will file the record of appeal and cause it to be causerlisted for directions under *Section 79 B* and *Order 42 Rule 13* within the next 60 days failing which the appeal will stand dismissed for want of prosecution with costs to the applicant. The Deputy Registrar is also directed to call for the original record of the lower court and to ensure that it is availed to this court within the next 30 days.

20. On costs, though ideally costs follow the event, the circumstances surrounding the filing of this application justify the exercise of this court's discretion in the applicant's favour. The applicant is consequently awarded costs of the application.

21. It is so ordered.

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

C. W. GITHUA

JUDGE

In the presence of:

Mr. Kaburu for the respondent

Mr. Mwaragwa for the appellant

Mr. Salach: Court Assistant