



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL APPEAL NO.21 OF 2017**

**PHOEBE ATIENO ALIAS ODANGA PHOEBE.....1<sup>ST</sup> APPELLANT**

**LEEMAN ONYANGO ODUO.....2<sup>ND</sup> APPELLANT**

**-VERSUS-**

**PAUL JUMA ONYANGO &**

**FELIX ONYANGO (Suing as the administrator of the**

**Estate of ROSE AKINYI DECEASED).....RESPONDENT**

*(An appeal from the judgment/Decree of Hon. L. Gicheha, SPM*

*delivered on 26<sup>th</sup> January, 2017 in Nakuru CMCC No.880 of 2014)*

**RULING**

1. This is a ruling on application dated 6<sup>th</sup> November 2018. It seeks to dismiss this appeal for want of prosecution. Grounds on the face of the application are as set out hereunder:-

- i. That the learned trial magistrate erred in law and in fact in making a finding and arriving at an award of damages which is inordinately too high as to represent an erroneous estimate of damages payable.
- ii. That the learned trial magistrate erred in law and in fact in disregarding the Appellant's submissions and on all points of fact and law in as far as the award of damages is concerned.
- iii. That the learned trial magistrate erred in law and in fact in awarding loss of dependency in the sum of Kshs.2,464,000/= by applying wrong multiplicand, multiplier and basic salary payable and arrived at an erroneous award.
- iv. That the learned trial magistrate erred in law and in fact in awarding loss of expectation of life and pain and suffering in addition to loss of dependency.
- v. That the learned trial magistrate erred in law and in fact in awarding a sum of Kshs.143,500/= and yet the same was not proved.

2. That the appellant filed the instant appeal dated 22<sup>nd</sup> February 2017 on 23<sup>rd</sup> February 2017; that for over one year the appellant has failed to take any steps with a view of setting the appeal for hearing; that the appellant has lost interest in the appeal whose pendency prejudices the respondents.

3. The application is supported by affidavit sworn by **Paul Juma Onyango** the respondent herein.

4. The applicant restated the ground on the face of the application in the averments. He further averred that due to pendency of this appeal, prejudices the respondents who are Decree Holders in CMCC No.880 of 2014 from enjoying the fruits of the judgment delivered on 26<sup>th</sup> January 2017.

5. In response to the application, the respondent/appellant filed replying affidavit sworn by **Chelangat Caroline Mutai Advocate** on 8<sup>th</sup> May 2019.

6. She averred that the appellant being aggrieved by decision of **Hon. Liz Gicheha**, lodged this appeal and applied for proceedings as shown by copy of letter attached to the replying affidavit.
7. She averred that prior to writing the said letter, they had made several visits to the registry to get copy of proceedings to enable them prepare record of appeal. She further attached letter dated 11<sup>th</sup> September 2018 asking proceedings and in response to the letter, the registry informed them that the proceedings were not ready; that despite follow-ups thereafter they have not received proceedings to date and failure to get them is beyond their control.
8. Parties agreed to converse the application by way of written submissions.
9. Applicant/respondent submitted that the trial magistrate delivered judgment in favour of the applicant for a sum of kshs 2, 727,500 and costs and interest on 26<sup>th</sup> January 2017. Stay of execution was issued on condition that the appellant pay half the decretal amount being a sum of kshs 1,363,750 to the applicant, which was duly paid.
10. Respondent/applicant averred that the application herein is premature, as the appeal has not been admitted. That Order 42 Rule 35(1) provide for filing of such application if the appellant takes no action within three (3) months from taking of directions; that the appeal herein has not been admitted thus this application is premature.
11. That if this appeal is dismissed, grave injustice will be occasioned to the appellant as it will amount to being condemned without being heard; that the appeal has high chances of success and the appellant should be given an opportunity to prosecute it.
12. The applicant argues that whereas the applicant has personally sworn affidavit in support of the application, the respondent/appellant has filed an affidavit sworn by the advocate and submitted that the advocate has no capacity to depone to contested matters of fact being the agent of the appellant. He cited the case of **Republic Vs Nairobi City County Government & 6 others Ex Parte Mike Sonko Mbuvi [2015] eKLR** where the court held as follows:-

**“Whereas there is nothing barring an advocate from swearing an affidavit in appropriate cases, where the matters deposed to are agreed on purely legal positions, advocates should refrain from the temptation of being the avenue through which disputed facts are proclaimed. The rationale for the said principle is to insulate the advocate, an officer of the court, from the vagaries of litigation which, on occasions may be very unpleasant. By swearing an affidavit on such issues an advocate subjects himself to the process of cross-examination thus removing him from his role of legal counsel to that of a witness, a scenario which should be avoided like plague. In my view, however innocent an averment may be, counsel should desist from the temptation to be the pipe stem through which such an averment is transmitted.”**

13. Further in the case of **Oyugi vs Law society of kenya & Another[2005]1 KLR 436** where **Judge Ojwang** stated as follows:-

**“It is not competent for a party’s advocate to depone to evidentiary facts at any stage of the suit and by deponing to such matters the advocate courts an adversarial invitation to step down from his privileged position at the Bar, into the witness box. He is liable to be cross-examined on his depositions and it is impossible and unseemly for an advocate to discharge his duty to the court and to his client if he is going to enter into the controversy as a witness. He cannot be both counsel and witness in the same case. Besides that, the counsel’s affidavit is defective for the reason that it offends the proviso to Order 18, Rule 3(1) by failing to disclose who the sources of his information are and the ground of his beliefs.”**

14. Applicant submitted that whereas the appellant alleged that he wrote two letters to court dated 6<sup>th</sup> November 2017 and 11<sup>th</sup> September 2018, only the letter dated 6<sup>th</sup> November 2017 which is stamped as received on 29<sup>th</sup> November 2019 is annexed; neither the letter dated 11<sup>th</sup> September 2018 nor receipt for filing is attached to the affidavit.
15. On allegation that the typed proceedings were not ready, the applicant argued that no correspondences were attached to the affidavit by the respondent/appellant to confirm that.
16. The applicant /respondent submitted that the appeal has been lying in court for a period in excess of 2 years 3 months.

#### **ANALYSIS AND DETERMINATION**

17. I have considered averments by parties and arguments by their advocates in submissions filed. I have also perused and considered annexures to the affidavits filed.
18. Counsel for the appellant indicated that despite several follow-ups, the lower court proceedings have not been supplied to them. This may explain why it is not part of the record of appeal.
19. This application was filed on 8th November 2018. The appellant has only attached one letter dated 6<sup>th</sup> November 2017 in which they applied for proceedings for judgment delivered on 26<sup>th</sup> January 2017. No explanation has been given as to why the appellant took ten months from the date of judgment to apply for proceedings.
20. The high court registry on the other hand communicated with the lower court asking for original record, certified proceedings, exhibits and extracted Decree by letter dated 8<sup>th</sup> May 2018, that was 6 months after request for proceedings by the appellant. There is no document to show what happened from 8<sup>th</sup> May 2018 to 8<sup>th</sup> November, 2018 when the respondent/applicant filed this application. There is nothing to

show that the appellant has been following up proceedings in that period.

21. On argument that the application is premature, it is true as argued by counsel for the appellant that the appeal has not been admitted and directions given to require setting it down for hearing as provided by Order 42 Rule 35 (1 ). However, Order 42 Rule 35(2) provide as follows:-

**“If, within one year after the service of memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal.”**

22. Memorandum of appeal was filed in the instant case on 27<sup>th</sup> February 2017. It is now over 2 years and it has not been set down for hearing. From the above provision, the matter is suitable for listing by registrar for parties to show cause why it should not be dismissed for want of prosecution. The court has not done so and I believe it was in order for counsel for the applicant to make this application. At the time the application was filed in November 2018, the appeal had been pending for over one year. This application is not therefore premature.

23. I however note that the record of appeal was filed on 29<sup>th</sup> May 2019. I have not seen the lower court proceedings in the record of appeal filed. I have not also seen the lower court file.

24. It may be true the the lower court proceedings have not been availed to the appellant’s advocate as alleged; I believe if they were supplied, it would have formed part of the record of appeal filed on 29<sup>th</sup> May 2019.

25. From the foregoing, I am of the view that efforts by the appellant to prosecute may have been frustrated by unavailability of court proceedings. Their compliance with condition of stay of execution by paying half the decretal amount to the respondent is a demonstration of good will on their part. The delay is not entirely the appellant’s fault. I am inclined to give the appellant an opportunity to prosecute this appeal.

**26. FINAL ORDERS**

1. Application dated 6<sup>th</sup> November 2018 is hereby dismissed.
2. The officer in charge Nakuru CM registry to avail both certified proceedings and the lower court file Nakuru Cmcc No.880 of 2014 within 30 days from the date of this ruling.
3. Appellant to set down the appeal for directions within 30 days from the date of this ruling.
4. Each party to bear own costs.

**Judgment dated, signed and delivered at Nakuru this 31<sup>st</sup> day of July 2019.**

.....

**RACHEL NGETICH**

**JUDGE**

**IN THE PRESENCE OF:-**

Schola/Jenifer Court Assistant

Mr. Kimani holding Juma Advocate Counsel for Appellant

Ms. Oyange holding brief for Orege Counsel for Respondent