



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 247 OF 2015

WICKLIFFE JUMA OTIENO.....APPELLANT

VERSUS

BRITISH PEACE SUPPORT TEAM (EAST AFRICA).....1ST RESPONDENT

CALEB ODHIAMBO.....2ND RESPONDENT

RULING

1. On 2nd July 2019, this court issued a Notice to Show Cause directing the appellant to attend court on 27th September 2019 to show cause why his appeal should not be dismissed for want of prosecution.

2. The appellant through his learned counsel *Mr. Ian Wanda* swore an affidavit dated 23rd September 2019 in which he gave reasons explaining why his appeal should not be dismissed as proposed. In his affidavit and in the oral submissions made before the court, Mr. Wanda contended that the delay in filing the record of appeal was caused by the trial court's failure to supply the appellant with certified copies of the lower court's proceedings in good time and that when he finally obtained the said proceedings and order subject of the appeal, he noticed an error on the order which has taken time to be rectified; that he is now making efforts to obtain an amended copy of the order so that he can file the record of appeal. He urged the court to give the appellant another chance to prosecute his appeal to its logical conclusion.

3. Learned counsel *Ms Obwangi* for the respondent on her part urged the court to dismiss the appeal arguing that since the appeal was filed on 25th May 2015, the appellant has not taken any step to prosecute the same and on 30th May 2019, he was served with a notice to file a record of appeal; that about 120 days later, the appellant is yet to file the record of appeal and this demonstrates that the appellant is not keen to prosecute the appeal. She invited the court to dismiss the appeal as proposed with costs to the respondents.

4. *Mr. Wanda* in his submissions in reply told the court that the record of appeal has been compiled and he is only waiting to receive the amended copy of the impugned order in order to complete the record and have it filed.

5. I have considered the depositions in the affidavit sworn on behalf of the appellant in response to the notice to show cause; the rival oral submissions made by counsel for the parties as well as the court record.

6. The court record confirms that since the appeal was filed on 27th May 2015 which is over four years ago, the appellant has not made any single step to facilitate its prosecution including the basic step of filing the record of appeal. The annexures to the replying affidavit exhibits only two letters dated 19th May 2015 addressed to the executive officer of Milimani Commercial Courts in which the appellant applied to be supplied with copies of the proceedings in the lower court. The appellant does not appear to have made any effort thereafter to follow up on his request for supply of the proceedings after the appeal was filed.

7. Be that as it may, I have noted that the appellant has annexed a record of appeal and evidence that he has requested the lower court to rectify the order earlier supplied to the appellant. In the premises, the claim that the appellant is waiting to be supplied with a rectified copy of the impugned order is plausible.

8. Given that the record of appeal is now ready save for the order subject of appeal, I find that it would be in the interest of substantive justice to give the appellant an opportunity to prosecute his appeal so that the same can be determined on merit. Consequently, I decline to dismiss the appeal as proposed but direct the appellant to file and serve the record of appeal within the next 21 days failing which the appeal will stand dismissed for want of prosecution with costs to the respondents.

9. It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 30th day of September, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Wanda for the appellant

Ms Obwangi holding brief for Ms Kirimi for the respondents

Mr. Salach: Court Assistant