



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO.56 OF 2015

NANCY NJOKI WAMBUGU (Suing as legal representative of

WINNIE MUENI MWANIKI (deceased).....APPELLANT

VERSUS

MARGARET KANUGU.....RESPONDENT

(An appeal from the judgment delivered by Honorable J. Mwaniki Ag. Principal Magistrate on 28th April 2015)

RULING

1. This is a ruling on application dated 25th February 2019. It seeks the following orders:-

i. To dismiss this appeal for want of prosecution.

ii. That kshs 1,326,929 deposited at NIC Bank, Nakuru Branch in the jointly names of Kanyi Ngure & Co. Advocates and Kairu McCourt Advocates pursuant to consent order dated 21st July 2015 be released to the Applicants Advocates M/S Kimanthi & Associates, Advocates.

2. Grounds on the face of the application are as set out hereunder:-

i. That one of the condition of the consent to deposit the above amount in a joint interest earning account was that the Respondent would pursue this appeal

ii. The respondent has not taken any steps to prosecute the appeal in the High court for over 3 years now.

iii. That it is apparent from the circumstances that the respondent has lost interest in prosecuting the appeal.

3. In response, the appellant filed replying affidavit sworn by **Kelvin Ngure** Claim Manager at Direct line Assurance Company Limited who are the insurers of motor vehicle registration number KBA 302Z.

4. He averred that the appellant instituted this appeal on 4th May 2015 against the whole judgment of the trial magistrate in Nakuru CMCC No.54 of 2014. He further averred that he appellants wrote to executive officer of the lower court asking for copies of decree, judgment, and typed proceedings to enable them file record of appeal but the letter did not elicit any response. He attached a copy of the letter dated 6th August 2015.

5. He averred that the appellants have now obtained certified proceedings and have filed record of appeal. That the delay is not inordinate or unreasonable to prejudice the respondent. Further that this appeal can only be dismissed under **Order 42 Rule 35(2)** of the **Civil Procedure Rules** as directions have not yet been issued; that the appeal is yet to be admitted in accordance with **Section 79B** of the **Civil Procedure Act** and without being admitted, no steps can be taken in the appeal.

6. That under **Order 42 Rule 35 (2)** it is only the registrar who can list the appeal for dismissal if directions under **Section 79** of the **Civil Procedure Act** have not been issued; that a party filing this kind of application will be usurping the powers of the deputy registrar.

7. He averred that the mandatory and relevant steps that should be taken by the appellants before setting the suit down for hearing are

provided under **Section 79B** of the Civil Procedure Act and **Order 42** of the **Civil Procedure Rules**; and that the said provisions cannot be complied with before the appellant obtain typed and certified proceedings.

8. That in the event the application is allowed, the appellants are prevented from ventilating their grievances and will heavily suffer prejudice and hardship because the doctrine of fair hearing will not have been considered.

9. He averred that the appellants have a viable and arguable appeal with high chances of success. Parties agreed to proceed by way of written submissions. Appellant filed submissions dated 7th June 2019.

10. In submissions the appellants denied allegations of inaction on their part and stated that after writing to the executive officer to supply proceedings the appellants made follow-ups and obtained certified copies of proceedings and have filed record of appeal; that the applicant has not pleaded any prejudice it's going to suffer in the event that the appellant is given more time to prosecute the appeal; that the appeal has merits and not yet ripe for dismissal.

11. Appellant submitted that **Article 159** of the **Constitution** require the court to be more concerned with substantive justice where possible instead of giving undue regard to technicalities

12. Appellant restated averments in the replying affidavit. Appellants cited the case of **Jurgen Paul Flach Vs Jane Akoth Flach Nakuru Civil Appeal No.119 of 2012** where the court held that where directions have not been given, appeal should not be dismissed for want of prosecution.

13. Also in **Kirinyaga General Machinery Vs Hezekiel Mureithi Ileri**[2007]eKLR where **Kasango J** ruled as follows:-

“It is clearly seen that from that rule before the respondent can move the court either to set the appeal down for hearing or to apply for dismissal for want of prosecution directions ought to have been given in this matter. Directions having not been given the orders sought by the respondent cannot be entertained.”

14. In **Elem Investment Ltd Vs John Makora Otwoma** [2015] eKLR, under **Order 42 Rule 35** an appeal can be dismissed in two instances. One, if the appeal has not been listed down for hearing 3 months after directions have been given and two if one year after service of memorandum of appearance, the appeal has not been set down for hearing. And in the first scenario, the respondent is given an option to list the appeal for hearing or apply for dismissal. The court agreed with holdings in many other cases including **Suresh Ruginath Raniga & Another Vs Sagar S.M Ram Civil Appeal No.433 of 2012** in holding that the court will not dismiss an appeal for want of prosecution where no directions have been issued.

15. Respondent submitted that the appellant was given half the decretal amount and the rest deposited in joint interest earning account and if the appeal is allowed, the appellant stand to lose its constitutional right of appeal; that the appellant is ready and willing to prosecute the appeal.

ANALYSIS AND DETERMINATION

16. On perusal of the court file, memorandum of appeal was filed on 6th May 2015. By letter dated 6th August 2015 the appellant wrote to the deputy registrar asking for certified copies of proceedings, judgment and decree. I note that the record of appeal was filed on 20th December 2016.

17. One of the terms of consent dated 21st July 2015 was that the defendant/appellant would set down the appeal for hearing within 90 days from the date of filing the consent. It is evident that directions have not been taken in this matter.

18. As interpreted in authorities cited above, an appeal can either be dismissed under **order 42 rule 35 (2)** when one year is gone and appeal has not been set down for hearing. This is done by the registrar placing the file before a judge in chambers for dismissal for want of prosecution. Secondly, under **order 42 rule 35 (1)**, after directions have given and 3 months have passed and appellant has not taken steps to have the matter set for hearing, the respondent may either set it down for hearing or apply for the appeal to be dismissed.

19. There is no doubt that it's over one year since memorandum of appeal was served. The suit is ripe for dismissal under order 42 Rule 35 (2) but the registrar has not placed it before a judge for dismissal. Respondent's option come under order 42 Rule 35(1) which require application to be made for dismissal after appeal has been admitted and directions taken.

20. By letter dated 9th February 2019 appellant's advocate wrote to the deputy registrar asking for a date for directions on the appeal. This application was filed on 25th February 2019. From record deputy registrar has given no date for directions. The appellant filed record of appeal on 20th December 2016. The application herein is therefore premature; it can only be filed after directions have been given.

21. FINAL ORDERS

1. Application dated 25th February, 2019 is hereby dismissed.

2. The appellant to take steps to prosecute this appeal within 30 days from today's date failure which the deputy Registrar to place the file before the judge for dismissal for want of prosecution.

3. Costs in the cause

Ruling dated, signed and delivered at Nakuru this 26th day of Sep. 2019.

RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Jeniffer Court Assistant

Ms. Muthoni holding brief for Mr. Musyoki Counsel for Appellant

Kanyi holding brief for Kariuki Counsel for Respondent