



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL APPEAL NO. 40 OF 2017

(Appeal from the Judgment of Hon. S. M. Mokua in Kericho CMCC No.378 of 2013

NAZISH MOTORS LTD.....1ST RESPONDENT/1ST APPELLANT

JACKSON OGINDA.....2ND RESPONDENT/2ND APPELLANT

MUHUMED BURALE.....3RD RESPONDENT/3RD APPELLANT

DANIEL ONGERA.....4TH RESPONDENT/4TH APPELLANT

VERSUS

VERONICAH NYAMBURA MAINA.....APPLICANT/RESPONDENT

RULING

1. Before me is an application by way of Notice of Motion dated 13th March 2019 filed by the respondent Veronica Nyambura Maina through counsel M/s Gekong'a & Company. It is an application filed under Order 51 Rule 1 of the Civil Procedure Rules 2010, as well as section 3A of the Civil Procedure Act (Cap. 21)- seeking dismissal of Civil Appeal No.40 of 2017 filed by the appellants herein.

2. The grounds of the application are that 1 year and 3 months had lapsed since the filing of the appeal; that the appellant had lost interest in the appeal; that the pendency of the appeal herein unprosecuted was prejudicial and vexatious to the applicant; that appeals should be disposed of expeditiously without undue delay.

3. The application was filed with a supporting affidavit sworn by Mong'are Gekonga Advocate deponing that the appeal from the judgment in favour of the applicant in Kericho PM CC No.378 of 2013 was filed on 22nd November 2017 and more than 1 year and 3 months had elapsed with no progress being recorded in the appeal; that the appeal was meant to delay the applicant from enjoying the fruits of her judgment; and that in the circumstances of the case the appeal should be dismissed for want of prosecution.

4. In response to the application, a replying affidavit sworn by Kevin Ngunjiri the Claims Manager Direct-Line Assurance Co. Ltd on 7th June 2019 was filed. It is deponed therein that the appellants had written to the Executive Officer for the certified copies of proceedings which had not been supplied, thus the delay in prosecuting the appeal; that the appeal could not be dismissed for want of prosecution under Order 42 Rule 35 (2) of the Civil Procedure Rules as directions had not been given and the procedures laid down thereunder had not been complied with, thus the appeal herein should not be dismissed for want of prosecution.

5. At the hearing of the application, Ms Rameto for the applicant relied on the case of **Ivita vs Kyumba** and stated that justice applied to both the plaintiff and the defendant equally. Counsel also relied on Article 159 (2) (b) of the Constitution which provided that justice should not be delayed, and that the letters by the appellants to the Executive Officer requesting for proceedings were belated, and there was no follow up. Counsel also relied on the case of **K. Ventures Ltd vs Peter Olumati (2018) eKLR** and urged this court to allow the application.

6. Mr. Kemboi for the respondents/appellants in response relied on the replying affidavit filed and stated that the appellants had taken steps to apply for typed proceedings. In addition, Article 159 of the Constitution emphasized that courts should not determine matters by giving undue regard to technicalities. Counsel informed the court also that the appellants had now received the typed proceedings, and urged the court to sustain the appeal for fairness and justice to be seen.

7. I have considered the application and submissions on both sides. I have also perused the documents filed.

8. This court has jurisdiction under Order 42 Rule 35 (2) of the Civil Procedure Rules to dismiss an appeal for want of prosecution. I have seen the reasoning in the case of **K. Ventures Ltd vs Peter Olumati (Supra)**. It is a persuasive authority and I agree with the reasoning

wherein an appeal filed in 2016 was dismissed vide an application for dismissal dated 10th October 2017.

9. In that case the learned Judge stated at page 2 as follows:-

“For an appeal to be liable for dismissal for want of prosecution under the provisions for Rule 35 (1) directions must have been issued under Order 42 Rule 13 and three months lapsed without any action being taken by the appellant. Such directions have not been issued in this matter. That said, it is the duty of the appellant to move the court towards admission of an appeal in order to pave way for the issuance of directions. Rule 11 of Order 42 requires that once an appeal has been filed, the appellant should within 30 days, cause the matter to be listed before a judge for directions under section 79 B of the Act...”

10. Each case has to be considered on its own peculiar facts for justice to be seen to be done. Article 159 (2) (b) of the Constitution of Kenya 2010 enjoins courts not to give undue regard to technicalities in determining legal disputes before the courts. One of the key elements of enabling substantive justice to operate, is to give a chance to parties to be heard in court. The request of the applicant is for dismissal of the appeal before it is heard substantively.

11. In now the case, I will allow the application because, other than the fact that the appellants and their counsel have not taken any steps to fix the appeal for directions before the Judge, they have not stated that they want to do so and when. Though counsel who appeared for them has stated that they had now received the proceedings, he did not inform the court what steps they would now take to progress the appeal. In addition to the above, though the letter dated 15th June 2018 to the Executive Officer of the court asking for certified proceedings, was signed by Fredrick Kariuki for Kariru & McCourt Advocates, who are the advocates for the four appellants herein, the replying affidavit dated 7th June 2019 was sworn by Kelvin Ngure the Claims Manager of Direct-Line Assurance Co. Ltd who are complete strangers to this suit. This in my view adds to the lack of seriousness to pursue the appeal.

12. In those circumstances, I find merits in the application. I thus allow the application and dismiss the appeal herein for want of prosecution with costs to the applicant Veronicah Nyambura.

Dated and delivered at Kericho this 24th September 2019.

GEORGE DULU

JUDGE