



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**CIVIL APPEAL NO 732 OF 2017**

**ST. BAKHITA DAY CARE & KINDERGARTEN SCHOOL.....1<sup>ST</sup> APPELLANT**

**GEORGE OUMA OBUNGA.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**SBO (MINOR) SUING THRO**

**HIS MOTHER AS NEXT FRIEND NO).....RESPONDENT**

**RULING**

**INTRODUCTION**

1. The Respondent's Notice of Motion application dated and filed on 5<sup>th</sup> March 2019 was brought under Order 42 Rule 2,11,12,13(1) and 35(1) & (2) of the Civil Procedure Rules (2010), Section 1A,1B & 3A and Section 79B of the Civil Procedure Act, Article 159(1)(a)(b) & (d) of the Constitution of Kenya (2010) and all other enabling provisions of the law. It sought the following orders:-

- 1. THAT the Honourable Court be pleased to dismiss the Memorandum of Appeal dated the 29<sup>th</sup> day of March 2018 for want of prosecution.**
- 2. THAT costs of the appeal be granted to the Respondent.**

2. The Respondent's Written Submissions were dated 16<sup>th</sup> April 2019 and filed on 17<sup>th</sup> April 2019 while those of the Appellants were dated 5<sup>th</sup> March 2019 and filed on 7<sup>th</sup> May 2019.

3. Parties asked this court to deliver its decision based on the Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

**THE RESPONDENT'S CASE**

4. The present application was supported by the Affidavit of NO that was sworn on 5<sup>th</sup> March 2019. She swore her Further Affidavit that was filed on 25<sup>th</sup> March 2019 on even date.

5. She contended that although her son SBO (minor) was paid half of the decretal sum, the Appellants had continued to hold the balance of the same thus denying him his fruits of judgment.

6. She stated that since filing the Memorandum of Appeal dated 29<sup>th</sup> March 2018, the Appellants had not taken any step to prosecute their Appeal and that they were using delaying tactics.

7. She therefore urged this court to dismiss the Memorandum of Appeal with costs to her and to order that the minor be paid the balance of the decretal sum.

**THE APPELLANTS' CASE**

8. In response to the present application, on 19<sup>th</sup> March 2019, the advocate for the Appellants' Insurer, Agnes Wangari Gichohi, swore the Affidavit. It was filed on 20<sup>th</sup> March 2015.

9. Her contention was that they had already requested for the typed copies of the proceedings, but that the file had been missing for some time. She added that directions had not been given under Order 42 Rule 35 of the Civil Procedure Rules.

10. She averred that the Respondent had suffered no prejudice because half of the decretal sum was released to her while the other half was in an interest earning account.

11. She therefore pleaded with this court to give the Appellants time to compile the Record of Appeal and list the matter for directions.

### **LEGAL ANALYSIS**

12. The Respondent relied on the cases of **Ventures Ltd vs Peter Omulati [2018] eKLR** and **Jasmiel Ndungu Kangethe [2018] eKLR** where the appeals therein were dismissed for not having been listed for directions and for want of prosecution respectively.

13. On their part, the Appellants relied on the cases of **Morris Njagi & Munyi Alexander vs Mary Wanjiku Kiura [2017] eKLR** and **Attorney General vs Lucy Nduta Ng'ang'a [2017] eKLR** where the courts held that an appeal could not be dismissed if no directions had been given and that an appellant would suffer more prejudice if the appeal was dismissed respectively.

14. Notably, Section 79B of the Civil Procedure Act provides as follows:-

**“Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against he may, notwithstanding section 79C, reject the appeal summarily”.**

15. Order 42 Rule 13 of Civil Procedure Rules provides as follows:-

**1. On notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of appeal the appellant shall cause the appeal to be listed for the giving of directions by a judge in chambers.**

**2. Any objection to the jurisdiction of the appellate court shall be raised before the judge before he gives directions under this rule.**

**3. The judge in chambers may give directions concerning the appeal generally and in particular directions as to the manner in which the evidence and exhibits presented to the court below shall be put before the appellate court and as to the typing of any record or part thereof and any exhibits or other necessary documents and the payment of the costs of such typing whether in advance or otherwise.**

**4. Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—**

**a) the memorandum of appeal;**

**b) the pleadings;**

**c) the notes of the trial magistrate made at the hearing;**

**d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;**

**e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;**

**f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:**

**Provided that—**

**i. a translation into English shall be provided of any document not in that language;**

**ii. the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).**

16. It is evident from the provisions of Section 79B of Civil Procedure Act that a judge has to peruse the appeal before he can summarily reject the same. These are the directions contemplated in Order 42 Rule 11 of the Civil Procedure Rules that states as follows:-

**“Upon filing of the appeal the appellant shall within thirty days, cause the matter to be listed before a judge for directions under section 79B of the Act”.**

17. If the appeal is not summarily dismissed, then the registrar shall notify the appellant who shall then serve the Memorandum of Appeal upon all the respondents within seven (7) days of receipt of the notice from the Registrar in accordance with Order 42 Rule 12 of the Civil Procedure Rules.

18. After service of the Memorandum of Appeal, on notice to the parties delivered not less than twenty one (21) days, the appellant shall again cause the appeal to be listed before the judge for directions as seen in Order 42 Rule 13 of the Civil Procedure Rules.

19. Notably, the procedure for rejection and/or admission of appeal and giving of directions is very well set out in the Civil Procedure Rules. However, this procedure does not seem to be strictly followed and differs from one court to another. In the Civil Division Milimani Law Courts, the Registrar issues the notice for admission and directions of appeal after the High Court receives the file and lower court proceedings. The appellant does not seem to have any role in fixing the appeal for directions as contemplated under Order 42 Rule 11 of Civil Procedure Rules and Order 42 Rule 13 (1) of the Civil Procedure Rules. It is important to point out that under Order 42 Rule 13 (4) of the Civil Procedure Rules, the judge shall not allow a matter to proceed for hearing unless the record of Appeal is duly filed.

20. Once directions are given under Order 42 Rule 13 of Civil Procedure Rules and the appellant fails to fix the appeal for hearing, the respondent may fix the same for hearing and/or seek dismissal of the same for want of prosecution under Order 42 Rule 35 (1) of the Civil Procedure Rules or the registrar lists the appeal before a judge for dismissal under Order 42 Rule 35 (2) of Civil Procedure Rules.

21. Order 42 Rule 35 (1) of the Civil Procedure Rules stipulates as follows:-

**“Unless within three months after the giving of directions under rule 13 the appeal shall have been set down for hearing by the appellant, the respondent shall be at liberty either to set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution”.**

22. Order 42 Rule 35 (2) of the Civil Procedure Rules stipulates as follows:-

**“If, within one year after the service of the 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”**

23. The provisions of the law relating to dismissal cannot be read in isolation. The bottom line is that directions must have been given before an appeal can be dismissed for want of prosecution. Indeed, there does not appear to be any penalty where an appellant fails to proceed as per Order 42 Rule 11 and Order 42 Rule 13 of the Civil Procedure Rules, 2010.

24. This court took the view that an appeal cannot be dismissed before directions had been given. As there was no indication that directions had been given herein, the Appeal herein could not be dismissed under Order 42 Rule 35 (1) of the Civil Procedure Rules. In any event, there was also no evidence that the Registrar had issued a notice under Order 42 Rule 12 of Civil Procedure Rules. There was also no indication that the lower court file and proceedings had been forwarded to the High Court for the Registrar to proceed as aforesaid.

25. It is important to point out that every person is entitled as envisaged under Article 50(1) of the Constitution of Kenya to have a fair trial. The said Article 50(1) of Constitution of Kenya provides as follows:-

**“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”**

26. It therefore follows that every person ought not to be shut out from accessing court or having his day in court. Indeed, the right of a party to enjoy the fruits of his judgment must be weighed against the right of a party to access court to have his dispute heard and determined by a court or tribunal of competent jurisdiction.

27. It was therefore the considered opinion of this court that allowing the present application would be shutting out the Appellant from accessing the court and would be contrary to Article 50(1) of the Constitution of Kenya.

## **DISPOSITION**

28. For the foregoing reasons, the upshot of this court’s decision was that the Respondent’s Notice of Motion application dated and filed on 5<sup>th</sup> March 2019 was not merited and the same is hereby dismissed. Costs shall be in the cause.

29. To progress this matter further, it is hereby directed that the Deputy Registrar High Court of Kenya Civil Division facilitates the typing of proceedings and the placing of the lower court file in the file herein within the next ninety (90) days from the date of this Ruling. The Appellants are directed to move the court appropriately for assistance to obtain the said documentation failing which the Respondent will be at liberty to move the court appropriately to safeguard her interests.

30. It is so ordered.

**DATED and DELIVERED at NAIROBI this 29<sup>th</sup> day of October 2019**

**J. KAMAU**

JUDGE