



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 98 OF 2017

BERNARD MURIGI MAITHIA.....APPELLANT

-VERSUS-

HUSSEIN ABDUL KADIR.....1ST RESPONDENT

MFI OFFICE SOLUTIONS LIMITED.....2ND RESPONDENT/APPLICANT

DIAMOND TRUST BANK KENYA LIMITED.....3RD RESPONDENT

THE REGISTRAR OF MOTOR VEHICLES.....4TH RESPONDENT

THE OFFICER COMMANDING-

CENTRAL POLICE STATION.....5TH RESPONDENT

THE HON. ATTORNEY GENERAL.....6TH RESPONDENT

RULING

1. This ruling is the product of the Notice of Motion dated 18th June, 2018 brought by the 2nd respondent/applicant in which it is seeking for the following orders:

(i) THAT the memorandum of appeal dated 9th March, 2017 be struck out as it is fatally defective.

(ii) THAT this Honourable Court be pleased to dismiss the memorandum of appeal dated 9th March, 2017 for want of prosecution.

(iii) THAT costs of the application be borne by the appellant.

2. The Motion is supported by the grounds set out on its body and the facts deponed in the affidavit of its Director, *Salima Madhani*.

3. The deponent stated that following delivery of the ruling by the trial court on 27th February, 2017 in Chief Magistrate's Case No. 2500 of 2011 the appellant filed his memorandum of appeal dated 9th March, 2017 which memorandum is deemed defective for the reason that the appellant did not attach the decree being appealed from.

4. The deponent further stated that the appellant has neither filed his record of appeal nor taken any active steps towards prosecuting his appeal for over three (3) months, thereby causing the 2nd respondent/applicant to suffer prejudice since it is prevented from enjoying the fruits of its judgment.

5. In opposing the Motion, the appellant put in a replying affidavit explaining that the delay in prosecuting the appeal is through no fault of his own but is the result of delay by the trial court in availing certified copies of the typed proceedings and ruling/order to enable him prepare and file his record of appeal.

6. The appellant further asserted that the 2nd respondent/applicant has not demonstrated the prejudice it stands to suffer if the appeal proceeds, contending that on the contrary, he stands to be gravely prejudiced by virtue of the fact that his suit was dismissed for want of prosecution and he has the right to appeal against the dismissal order.

7. It was also the appellant's averment that directions are yet to be taken on the appeal as set out under Section 79B of the Civil Procedure Act, Cap. 21 (*"the Act"*) hence the appeal has not been admitted. He finally contended that he is still keen on pursuing his appeal.

8. The remaining respondents did not participate at the hearing of the Motion.

9. In that case, the participant parties made oral arguments before this court through their respective advocates. *Miss Makofu* counsel for the 2nd respondent/applicant reaffirmed the averments made in the Motion. She contended that under Order 42, Rule 11 of the Civil Procedure Rules (*"the Rules"*), once an appellant has filed an appeal and record of appeal, he or she is required to cause the appeal to be set down for directions, which provision the appellant has not complied with.

10. The counsel further argued that whereas the Rules provide that an appeal can only be dismissed after directions have been given, it would be proper for this court to exercise its discretion to dismiss the appeal in line with the provisions of Section 3A of the Act. She also emphatically submitted that the appellant has not shown any efforts taken towards following up on the requisite documents to enable him file his record of appeal. The advocate urged this court to consider the analysis in the case of **Haron E Ogechi Nyaberi v British American Insurance Co. Ltd [2012] eKLR** where the court, upon acknowledging that an appeal can only be dismissed under Order 42 Rule 35(1) and (2) of the Rules after the said appeal has been set down for directions, similarly acknowledged that such appeal can also be dismissed for want of prosecution under the original powers and jurisdiction of the courts pursuant to Section 3A of the Act.

11. In reply, *Mr. Nyakiangana* advocate for the appellant similarly chose to rely on the facts presented in the replying affidavit and the annexures thereto. In addition, the advocate faulted the 2nd respondent/applicant for the delay in prosecution of the appeal, arguing that it is the 2nd respondent who filed numerous applications before this court, one of which sought similar orders as those being sought presently but which was later withdrawn.

12. *Mr. Nyakiangana* was careful to mention that he has been following up on the trial court proceedings all along and the delay has been on the part of the trial court in availing the documents and court file. Furthermore, he chose to distinguish the case of **Haron E Ogechi Nyaberi v British American Insurance Co. Ltd [2012] eKLR** cited by the 2nd respondent/applicant for the reasons that the application in that matter was made ex parte and the appeal had not been prosecuted for about 12 years unlike in the present instance.

13. In rejoinder, *Miss Makofu* reiterated *inter alia*, that the appellant was required to specifically show the steps taken in prosecuting the appeal but did not.

14. I have carefully considered the grounds laid out on the body of the Motion; the facts deponed in the affidavits in support of and in opposition thereto; and the rival oral arguments subsequently made.

15. I note that the 2nd respondent's/applicant's Motion raises twin issues. I will therefore first address the issue touching on whether the memorandum of appeal is defective.

16. The 2nd respondent/applicant rides on the proviso of Order 42, Rule 2 of the Rules which stipulates thus:

"Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under section 79B of the Act until such certified copy is filed."

17. From my reading and understanding of the above, I am of the view that there is no strict requirement that a certified copy of the relevant decree or order do accompany the memorandum of appeal at the point of filing, as long as the copy is filed as soon as possible.

18. In the premises and having considered that the appellant is yet to file a certified copy of the order, I am of the opinion that it would be untimely to strike out the appellant's memorandum of appeal at this stage.

19. Having settled the above, I now turn to the second issue relating to the dismissal of the appeal for want of prosecution.

20. To begin with, *Order 42, Rule 35(1)* of the Rules expresses the following:

"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."

Rule 35 (2) goes on to stipulate that:

"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."

21. There is no dispute that the impugned ruling was delivered on 27th February, 2017 and soon thereafter, the appellant filed the memorandum of appeal on 9th March, 2017 to challenge the aforesaid ruling. It remains unclear when the memorandum of appeal was served upon the 2nd respondent.

22. That notwithstanding, it is not contested that the appellant has since not compiled or filed his record of appeal and consequently, no directions have been taken on the appeal. There is equally no indication that the Registrar has issued a notice for dismissal of the appeal, which then means that the 2nd respondent cannot seek to have the appeal dismissed within the above-cited Order 42, Rule 35 of the Rules.

23. Nevertheless, **Order 42, Rule 11** of the Rules provides for a mandatory period of 30 days within which an appellant shall cause the appeal to be listed before a judge for directions under section 79B of the Act from the date of filing the appeal.

24. From the foregoing, there is no question that it is the appellant who carries the responsibility of causing the appeal to be set down for directions. The court in **Haron E Ogechi Nyaberi v British American Insurance Co. Ltd [2012] eKLR** cited by both parties' counsels reasoned that an appellant shall cause the appeal to be listed for directions by serving the memorandum of appeal in addition to filing and serving the record of appeal.

25. In the present instance, I have already established that no record of appeal has been filed so as to prompt the taking of directions on the appeal. I have perused the annexures to the replying affidavit and seen a copy of the letter dated 25th August, 2017 drawn by the appellant's advocate and addressed to the Chief Magistrate's Court requesting for certified copies of the proceedings and ruling/order. There is nothing to show that the same elicited a response.

26. More importantly, I have established that the lower court file has not been made available to this court which therefore means that it would not have been possible in any event for the appeal to be admitted and/or set down for directions in absence of the file.

27. While I acknowledge that the appellant is ultimately responsible for hastening the taking of directions leading up to the prosecution of his appeal, I equally acknowledge that it is not within his control to avail the lower court file or proceedings.

28. In any case, I agree with the arguments brought forth by the appellant's counsel that unlike in the case of **Haron E Ogechi Nyaberi (supra)** where the appellant in that case had neither filed a record of appeal 11 years following the institution of the appeal nor shown any attempts made at prosecuting the appeal, the appeal now before me was filed less than three (3) years ago.

29. In that case, while I appreciate that there has been a delay in prosecution of the appeal coupled with the fact that the appellant ought to have shown any further steps taken in following up the typed proceedings, I am satisfied that he has given a reasonable explanation for not preparing and filing a record of appeal and I do not find the delay to be so inordinate as to occasion prejudice to the 2nd respondent/applicant.

30. In any case, I have looked at the memorandum of appeal on record and seen that the same is essentially challenging the trial court's decision to dismiss the appellant's suit for want of prosecution. To my mind, it is thus fair to state that since the suit was summarily dismissed, I am satisfied that the 2nd respondent/applicant should receive adequate compensation by way of costs in the event that the appeal fails.

31. In close reference to the above, I am beckoned to consider substantive justice as opposed to placing too much emphasis on procedural technicalities. It therefore follows that the interest of justice requires me to do justice to both parties without fear or favour. In so reasoning, I am supported by the rendition in the case of **Benson Mang'era & another v Wambua Mbuva [2014] eKLR** attached to the 2nd respondent's/applicant's list and bundle of authorities where the court took into account the wider interest of justice in declining to dismiss an appeal for want of prosecution/non-compliance.

32. It is my conviction that the appellant deserves an opportunity to pursue his appeal in spite of the delay occasioned thus far.

33. Accordingly, the Motion is hereby dismissed and the following orders are made:

- a) *The appellant shall compile, file and serve his record of appeal within 30 days from the date of this ruling.*
- b) *The appeal to be listed for directions within 15 days after filing of the record of appeal.*
- c) *Failure to comply with any of the two orders (above) the appeal shall stand dismissed.*
- d) *Costs of the application shall await the outcome of the appeal*

Dated, signed and delivered at NAIROBI this 19th day of December, 2019.

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L. NJUGUNA

JUDGE

In the presence of:

..... for the Appellant

..... for the 1st Respondent

..... for the 2nd Respondent/Applicant

..... for the 3rd Respondent

..... for the 4th Respondent

..... for the 5th Respondent

..... for the 6th Respondent