REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCA NO. 227 OF 2017

FORMERLY MACHAKOS HCCA NO. 94 0F 2015

ALFRED MUTUA NDUTU..APPELLANT

VERSUS

PETER MUSAU WAMBUA (suing As The Legal Representative of

MICHAEL NGILA MUSAU (Deceased) ....RESPONDENT

RULING

1. By a Chamber Summons dated 20/02/2018, the Applicant seeks the instant appeal be dismissed for want of prosecution.

2. Same is based on Order 42, 35 (2) CPR and is supported by the grounds that the judgment impugned was delivered on 24/04/2015 and appeal lodged on 25/05/2015 and served upon applicant on 28/05/2015.

3. For over one year, no steps have been taken to prosecute the same.

4. The application is supported by an affidavit sworn by Peter Musau Wambua on 20/02/2018 which reiterates what is set out in the grounds.

5. The same is opposed and a replying affidavit was filed on 04/04/2018 sworn by Pauline Waruhiu on 27/03/2018.

6. The Respondent avers that had written to the Executive Officer of the trial court seeking certified copies of the proceedings and judgment to enable him file record of the appeal vide letter dated 05/01/2017.

7. Further, it is averred that Order 42 and 35(2) CPR are inapplicable in the neither circumstances of the instant matter as appeal has never been admitted nor directions given.

8. The parties agreed to canvass the application via submissions which they filed and exchanged.

APPLICANT’S SUBMISSIONS

9. The delay of over 2½ years has not been explained at all save an allegation that after almost 1½ years, they wrote to the executive officer, lower court to provide them with typed proceedings.

10. They did not follow-up the proceedings and pay for them for they are not given out for free and that is why they are completely unable to explain the delay.

11. It is submitted that the court has the power under Section 3A and 1B of Cap 21 coupled with Order 42 Rule 32 (2) to prevent the abuse of court process and to clear case back-log by dismissing this appeal for want of prosecution.

12. It is contended that filing of the present application is not usurping the powers of the Deputy Registrar but actually helping the office of the Registrar to cope with the big backlog of cases pending due to want of prosecution and it is properly before the judge for dismissal for no good cause has been shown.

13. It is clear that the Appellant did not pay for the proceedings nor pay further court fees to extract the decree for no receipts have been availed and accordingly the proceedings could not be typed or decree processed.

14. The delay from 24/04/2015 to 11/01/2017 has not been explained. From 11/01/2017 to date, nothing in the replying affidavit explains the delay save that they applied for proceedings but did not pay for them.

RESPONDENT SUBMISSIONS

15. It is submitted that, article 159 of the Constitution of Kenya 2010 requires the court to be more concerned with substantive justice where possible instead of giving undue regard to technicalities, if this appeal is struck out at this moment the Appellant would be denied the benefit of substantive justice.

16. It is urged that under under Order 42 Rule 35 (2), only the Registrar can list an appeal before a judge in chambers for dismissal. Under Rule 35 (2) an appeal can be dismissed without directions having been issued by court.

17. In this appeal, the Registrar has not listed the appeal for dismissal and as such the Respondent's Application cannot be based on Order 42 Rule 35 (2)

18. It is therefore submitted that the application is not properly before the court and the same is purporting to usurp the powers of the Deputy Registrar.

19. In this appeal, directions have never been issued by court under Section 79 B and as such the appeal has not been admitted.

20. Indeed, the court has not yet considered this appeal summarily with a view to admitting the same or summarily rejecting the same. The lower court file from Makindu has not also been availed to this court to facilitate the admission process.

21. In the case of **Jurgen Paul Flach vs Jane Akoth Flach, Nakuru civil Appeal no. 119 of 2012**, the court rightly stated that where directions had not been issued dismissal of an appeal for want of prosecution cannot be granted.

22. Section 79 B of the Act is worded in mandatory terms and this means therefore that it is a step which **MUST** be undertaken by the court before the chain of events is triggered under order 42 Rules 12-35. The said provision reads as follows:-

> **79B. 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.**

23. In view of the foregoing, it is the Appellant's submissions that the Respondent's application herein is premature and misconceived as the appeal is not yet ripe for dismissal for want of prosecution since the same has neither been admitted nor directions issued.

24. In **Kirinyaga General Machinery –Vs- Hezekiel Mureithi Ireri (2007) Eklr, Kasango J.** ruled as follows:

> **"It is clearly seen 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 as provided in Rule 8B. Directions have never been given in this matter. Directions having not been given the orders sought by the Respondent cannot be entertained."**

25. Further, in **UAP Insurance Company Limited vs Washington Gatura Kimani (2016) eKLR,** Njuguna J. in following **Kirinyaga General Machinery vs Hezekiel Mureithi Ireri (2007 eKLR** opined as follows:

> **"Order 35(1) provides for a situation where three (3) months after issuance of directions under Order 42 Rule 13, no steps have been taken by the Appellant to fix the appeal for hearing. In such a case, the Respondent can either fix the appeal for hearing or apply by summons for it to be dismissed."**

26. In the case of **Kirinyaga General Machinery vs Hezekiel Mureithi Ireri HCCC NO. 98/2008** the judge observed:-

> **"It is clearly seen from that rule that 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 as provided under Rule 79B."**

27. In **Suresh Ruginath Raniga & Another vs Sagar Mohan S.M. Ram (2012), where A. Mabeya J.** stated as follows;

> **"The Appellants submitted that the instant appeal cannot be dismissed for want of prosecution because directions in respect thereof have not been issued. The Appellant's counsel submitted that until and unless directions are issued, an appeal cannot be dismissed for want of prosecution and that the procedure of dealing with an appeal where directions have not been issued in that contemplated in Order 42 Rule 35 (2) and not Order 42 Rule 35 (1)."**

28. The respondent is in agreement with these aforesaid opinions. In the case of **Kirinyaga General Machinery –Vs- Hezekiel Mureithi Ireri HCCC no. 98 of 2008** while interpreting Order XLI 31 (now Order 42 Rule 35), Kasango J. observed;

> **"It is clearly seen from that Rule that 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 as provided under Rule 8B. Directions**

have never been given in this matter. The directions having not been given the orders sought by the Respondent cannot be entertained.”

29. From the record, it is noted that no directions have been issued in this appeal. Under Order 42 Rule 35 (1),

> **“I see no reason to deviate from the holding in Kirinyaga General Machinery -Vs- Hezekiel Mureithi Ireri. This appeal therefore cannot be dismissed to for want of prosecution under Order 42 Rule 35 (1).”**

30. Similarly, in the **Elem Investment Ltd Vs. John Mokora Otwoma (2015) Eklr** **Aburili J**. noted as follows:

> **“The law concerning dismissal of an appeal for want of prosecution is contained in Order 42 Rule 35 of the Civil procedure Rules. The Rule provides :-….**
>
> **…….a reading of the above provision shows that it is clear that an appeal can be dismissed for want of prosecution in two instances. Firstly, where there has been failure to list the appeal for hearing three months after directions have been given under order Rule 13 of the CPR or, secondly, if after one year of service of the Memorandum of Appeal has not been listed for hearing.**
>
> **In these two scenarios, the procedure is different. In the first scenario, the Respondent is given the option to either list the appeal for hearing or to apply for its dismissal. Under that scenario however, the appeal can only be dismissed if it has been admitted and directions have been given.**
>
> **In the instant case the Respondent, though not expressly citing Rule 35 (1), but it is clear from the application that that is the only express provision under the Rules that permit a party to apply for dismissal of the appeal for want of prosecution. The rest of the cited provisions under the Rules only provide for specific timelines for the taking of certain steps in an appeal but they do not provide for sanctions for the default.**
>
> **The record clearly shows that no directions have been given in this matter. In my view the court will not dismiss an appeal for want of prosecution unless directions are issued. In saying so am in agreement with the holdings in many cases of this court including the case of Suresh Ruginath Raniga & Another v Sagar Mohan S.M. Ram Civil Appeal no. 433 of 2012 where the court held that ….”**

31. From the foregoing, it is clear that the courts have been consistent when interpreting Order 42 Rule 35 and the same principle enunciated in the above case also apply to this appeal as directions have not been issued in this appeal.

32. In view of the foregoing, it is the Appellant’s submissions that the Respondent’s application herein lacks merit, is wholly misconceived and premature since directions have not yet been issued under Section 79 B so as to trigger chain of events under Order 42 of the Rules.

33. Accordingly and on this ground alone, the Appellants pray that the application be dismissed with costs to the Appellants and the Appellants be given an opportunity to prosecute their appeal and to have the same determined on its merits.

34. Further to the foregoing in their submissions, the Respondent have not pleaded and/or demonstrated what prejudice if any he is likely to suffer in the event that the Appellant is given more time to prosecute the appeal.

35. On the other hand, in the event that Respondent’s application is allowed as prayed, the appellants stand to lose their constitutional right to appeal and the right to have their case heard and determined on its merits as opposed to having the same dismissed for want of prosecution.

36. Indeed the appeal has merits and as demonstrated by the Memorandum of Appeal filed herein, the appeal has high probability of success.

37. On the Elem Investments case, Aburili J. observed as follows (pages 14 of the Appellants Bundle of Authorities):

> **“In addition, the prejudice that the Appellant is likely to suffer if this appeal is dismissed is likely to be graver than the prejudice that the Applicant/Respondent would suffer if the appeal is ordered to proceed, given that the appellant has deposited the decretal amount in court and settled some of the undisputed costs. In arriving at the conclusion, am enjoined by the court of appeal decision in Abdurrahman Abdi vs Safi Petroleum Products Ltd & 6 others (2011)eKLR, Civil Application no. Nai.173 of 2010 where the court stated:** *“The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the court strikes out its document. The court in that regard exercises judicial discretion.* ***I think it would be appropriate and in the wider interest of justice to allow the Appellant a chance to take appropriate steps to ensure the appeal is set down for directions and hearing expeditiously.”***

38. Further, in **Allan Otieno Osula vs Gurdev Engineering & Construction Ltd (2015)eKLR, the court held as follows (page 21) of the Bundle of Authorities annexed thereto**:

> **“It is therefore on the above grounds that I decline to strike out the appeal as prayed. I employ the principle that the right of appeal is constitutional right and in as much as there has been delay which has not been satisfactorily explained by the Appellant, this court has to weigh the cost and prejudice that is likely to be occasioned to the Appellant as well as the respondent, if the appeal is struck out at this stage without according the appellant an opportunity to be heard on the merits**

of the appeal …..

In the circumstances, I shall invoke the overriding objective principle in order to obviate the hardship expense, delay and focus on substantive justice. I find albeit there was delay that it is in the interest of justice that the appeal should not be struck out as the respondent can adequately be compensated by an award of costs.

The appellant is therefore directed to take appropriate proactive steps to have this appeal set down for hearing as appropriate as and in any event not later than 90 days from to date."

39. In view of the above, it is the Appellant's submissions that the hardship and prejudice likely to be occasioned to the Appellants in this matter is greater than the hardship to be occasioned Respondent since the Appellants will lose their opportunity to prosecute their appeal and have the same determined on its merits.

40. It has been submitted that the Appellants have been guilty of delay and indolence in prosecuting the appeal within the prescribed timelines as required by law.

41. It is contended that appellant has demonstrated by a letter to the executive officer annexed to the Appellant's replying affidavit ,that the Appellants has been diligent in prosecuting this appeal and has made all the required efforts to have the appeal heard and determined.

42. From the said correspondence as at the time of hearing of this application on 20th July, 2016 proceedings from the lower court were being finalized on and they were awaiting certification so as to enable the Appellants file the necessary record of appeal and have the appeal listed for directions.

43. In view of the foregoing, the Appellant submits that the delay in prosecuting the appeal was not occasioned by the Appellants who have been diligent enough as demonstrated. The said delay was occasioned by the slow rate at which proceedings are typed at the lower court.

44. Indeed, the Appellants are still very keen on this appeal and are willing and ready to prosecute this appeal and as such should be given an opportunity to do so especially where it has been demonstrated that the Appellants have not been indolent and in fact efforts have been made and/or steps taken towards prosecuting the appeal.

45. In view of the foregoing decisions, it is the Appellant's submissions that they have not been indolent in prosecuting the appeal and this Honorable Court should therefore exercise its discretion and grant the Appellants more time to prepare and file their record of appeal and have the appeal disposed-off on its merits.

46. Further, it is the Appellant's submission that if at all there is any delay, then the same is not so inordinate as to warrant the appeal to be struck out entirely and such delay can always be compensated by an award of costs.

47. In their submissions, the Respondent have not pleaded and/ or demonstrated what prejudice if any he is likely to suffer in the event that the Appellant is given more time to prosecute the appeal.

48. Indeed, half the decretal amount herein was paid to the Respondent and the other half deposited in a joint interest earning account and can be accessed to the Respondent once the Appeal is heard and determined on its merit.

49. On the other hand, in the event that Respondent's application is allowed as prayed, the Appellant's stand to lose their constitutional right to appeal and the right to have their case heard and determined on its merit as opposed to having the same dismissed for want of prosecution.

50. Indeed the appeal has merits and as demonstrated by the Memorandum of Appeal filed herein, the appeal has high probability of success.

ISSUES, ANALYSIS AND DETERMINATION

51. After going through the pleadings and submissions, I find the issues are:-

- **Whether the application has merit?**
- **What is the order as to costs?**

52. Under Order 42 Rule 35 (2), the Registrar list appeal before judge for dismissal under Rule 35 (2) an appeal can be dismissed without directions having being issued by the court.

53. The Registrar has not listed the appeal for dismissal, thus it is contended the application cannot be based on Order 42 Rule 35 (2) CPR.

54. See **Jurgen Paul Flach –Vs- Jane Akoth Flach Nakuru Civil Appeal 119 of 2012, Kirinyaga Gen. Machinery –Vs- Hezekiel Mureithi Ireri (2007eKLR, UAP Insurance Co. Ltd –Vs- Washington Gatura Kimani (2016)Eklr, Raninga & Another –Vs- RAM (2012Eklr., Elem Investment Ltd –Vs- Otwoma (2015) Eklr.**

55. In **Kirinyaga General Machinery –Vs- Hezekiel Mureithi Ireri (2007) Eklr, Kasango J**. ruled as follows:

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“The law concerning dismissal of an appeal for want of prosecution is contained in Order 42 Rule 35 of the Civil procedure Rules. The Rule provides :-….

…….a reading of the above provision shows that it is clear that an appeal can be dismissed for want of prosecution in two instances. Firstly, where there has been failure to list the appeal for hearing three months after directions have been given under order Rule 13 of the CPR or, secondly, if after one year of service of the Memorandum of Appeal has not been listed for hearing. In these two scenarios, the procedure is different. In the first scenario, the Respondent is given the option to either list the appeal for hearing or to apply for its dismissal. Under that scenario however, the appeal can only be dismissed if it has been admitted and directions have been given. In the instant case the Respondent, though not expressly citing Rule 35 (1), but it is clear from the application that that is the only express provision under the Rules that permit a party to apply for dismissal of the appeal for want of prosecution. The rest of the cited provisions under the Rules only provide for specific timelines for the taking of certain steps in an appeal but they do not provide for sanctions for the default. The record clearly shows that no directions have been given in this matter. In my view the court will not dismiss an appeal for want of prosecution unless directions are issued. In saying so am in agreement with the holdings in many cases of this court including the case of Suresh Ruginath Raniga & Another v Sagar Mohan S.M. Ram Civil Appeal no. 433 of 2012 where the court held that ….”

58. The court agrees that the Applicant could not move court at the stage the appeal has reached via the cited provisions of law as the same are invoked by the Registrar to have matter dismissed.

59. The admission and directions have to be under taken before Applicant can invoke the provisions for dismissal of appeal for want of prosecution.

60. However in appropriate case the court can use its discretion to dismiss an appeal while so moved if it appears that the Appellant abandoned appeal or has gone into a slumber for a long time without making any move to activate the appeal towards expediting its hearing.

61.In the instant appeal the Applicant could have prompted the registrar via a letter to list appeal before judge for dismissal if the inactivity of the Respondent had met the legal threshold as provided by Order 42 Rule 35 (2) CPR.

62. In the premises, the court finds that the application has no merit and dismisses the same.

63. However, to avoid Applicant going to another bout of slumber, the court makes the following orders:-

1. The Makindu CC 421/09 be forwarded to this court urgently.

2. The Appellant to be supplied with certified copies of the proceedings and judgment in CC 421/09 Makindu urgently.

3. The record of appeal be filed and served within 30 days in default the appeal stand dismissed on lapse of 30 days from dates herein.

4. Costs in the main cause.

SIGNED, DATED AND DELIVERED THIS 27TH DAY OF JUNE 2018, IN OPEN COURT.

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C. KARIUKI

JUDGE