



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

HCCA. NO. 70 OF 2017

(FORMERLY NAKURU HCCA NO 76 OF 2015)

CHARLES MACHARIA MAINA.....APPELLANT/RESPONDENT

VERSUS

JANE WANJIKU NDUNGU.....RESPONDENT/APPLICANT

RULING

By the **Notice of Motion** dated 22/11/2017, the respondent Jane Wanjiku Ndungu seeks the following orders:-

(a) That the appeal be dismissed for want of prosecution;

(b) That costs of the application be provided for.

The application is premised on the following grounds: that the appellant has never complied with **Order 42 Rule 11 Civil Procedure Rules**; that this appeal has never been fixed for directions before a judge and no action has ever been taken by the appellant towards prosecution of the appeal; that the appellant failed to deposit the sum of Kshs 310,000/= as ordered by the court, on 24/11/2015, in an interest earning account; that the appellant has never prepared the record of appeal despite the fact that proceedings and judgment have been available since 11/5/2015; that there has been unreasonable and inordinate delay in prosecuting the appeal and therefore prays for dismissal of the appeal. The applicant swore on affidavit reiterating the same grounds.

The applicant's counsel Mr. Kaburu added that the original file was forwarded to Nakuru High Court on 23/12/2015 for purposes of prosecuting the appeal. He discounted the allegations that the lower court file could not be traced because the letters allegedly written to the court by the appellants and requesting for the lower court file, CGC 2 (a) – (d) do not have the court stamps and are not genuine, save for one letter received at Nakuru on 16/2/2018 CGC (e) written after this application had been filed.

The application was opposed and the appellant filed a replying affidavit dated 5/3/2018 in which he deponed that the application is premature and incompetent as the appeal is yet to be admitted to hearing nor have directions been taken; that the lower court file was forwarded to Nakuru High Court on 23/2/2015 as per forwarding letter CGC 1; that efforts to trace the lower court file were fruitless and by the time this file was transferred to Nyahururu High Court, the lower court file had not been traced; that the appellants are not to blame for the delay in prosecuting the appeal and that the respondent is ready and willing to prosecute the appeal once the subordinate court file is found. Counsel for the appellant, Mr. Chege urged that they have given an explanation for the delay which is reasonable and the court should allow the applicant time to prosecute the appeal. Counsel relied on the decisions in arguing that this court has the discretion of whether or not to grant the application based on principles espoused in these cases;

1. Utalii Transport Co. Ltd & 3 others Vs. NIC Bank Ltd CA 32/2010

2. Nilesh Premchand Mulji Shah & Another t/a` Ketan Emporium v M.D Popat NCC 285/2010

3. Esther Mumbi Thie Vrs John Murungi, Nyahururu ELC App 5/2917.

I have considered the rival pleadings, submissions and authorities relied upon by the parties. The instant application is expressed to be brought under **Order 42 rules 11, 13 and 35 (1)** of the **Civil Procedure Rules** and **Section 3A of the Civil Procedure Act**.

Order 42 Rule 11 Civil Procedure Rules provides for placing of the appeal before a judge for directions within 30 days of filing the appeal. **Rule 13** on the other hand provides for giving of directions by a judge in chambers after service of the memorandum. No directions have been taken in this case because not even the record of appeal has been prepared. None of the above steps have been taken because the record of appeal has not been prepared.

Applications for dismissal of appeals are ordinarily governed by **Order 42 Rule 35 Civil Procedure Rules, 2010**, which provides;

(i) 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.

(ii) 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

It is apparent that directions had not been taken and therefore this application cannot fall under **Order 42 Rule 35 (1)**. Under **Rule 35(2)**, the court can move *suo motto* to have the appeal dismissed for want of prosecution where no steps have been taken to prosecute an appeal including directions. This position was clarified in the case of **Suresh Ruginath & Another Vrs Sagar Mohan SM Ram C.A 433/2012** where the court said

The appellants' 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 is that contemplated in Order 42 rule 35(2) and not Order 42 rule 35 (1). I am in agreement with these submissions.

Order 42 Rule 11, 13 and 35 (1) Civil Procedure Code were therefore not applicable to this case.

The respondent invoked **section 3A of the Civil Procedure Act** which gives the court inherent power to ensure justice is done to all parties that come before it instead of looking at the technicalities. By dint of **Section 3A, Civil Procedure Act**, the court has jurisdiction to consider this application.

Ordinarily, the court will be slow to dismiss a case for want of prosecution without hearing the case on the merits as it is regarded as a harsh and extreme measure. The court will usually encourage all parties to have their day in court so that a fair determination can be made by the court.

In the decision cited to the court, **Utalii Transport and Nilesh Premchand (supra)** the court considered the decision in **Ivita Vrs Kyumbu (1984) KLR 441** where the court adverted to what to consider in such an application for dismissal of a suit/appeal. The court stated as follows:-

“The test applied by the courts in the application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if he court is satisfied with the plaintiff's excuse for the delay, and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of and in the discretion of the court.”

An invitation to dismiss a suit/appeal, is an exercise of the court's discretion grounded on the principles set out in the various decided cases. The discretion must be exercised judiciously. The principles to be ordered can be summoned as follows:-

- (1) Whether there has been inordinate delay in prosecuting the case;**
- (2) Whether the delay is intentional or it is inexcusable**
- (3) What prejudice will either of the parties suffer if any?**
- (4) whether the respondent applicant has offered a reasonable explanation for the delay**
- (5) Even if there is a delay, what does the interest of justice dictate**

On inordinate delay;

The judgment was delivered in favour of the respondent by the trial court on 11/5/2015 and the memorandum of appeal was filed on 28/5/2015. That is about 3 years ago. So far the record of appeal has not been filed nor have any directions been taken. The appeal is still at its inception stage. There is no specific measure of what amounts to inordinate delay. Whether or not 3 years is inordinate delay depends on the circumstances of each case.

In the case of **Naftali Onyango Vs National Bank of Kenya (2005) eKLR, J. Azangalala** cited **Allan Vrs Sir Alfred MC Alphine and sons Ltd (1968) 1 ALL ER 543**, where the court said:

“(i) That there had been inordinate delay. What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case but it should not be too difficult to recognize inordinate delay when it occurs.....”

In the above case, a delay of 14 years was found to be inordinate and inexcusable; in **Agip Kenya Ltd Vs Highlands Tyres Ltd (2001) KLR 630**, a delay of 8 months was considered not to be inordinate delay. In this case, three years have lapsed and so far nothing has been done towards prosecuting of the appeal. The lower court file is not even available. In my view, there has been inordinate delay.

Whether the delay is excusable;

The appellant filed an affidavit opposing the dismissal of the appeal for reasons that the subordinate court file was forwarded to Nakuru vide letter dated 23/12/2015, but efforts to trace the file have been fruitless. The appellant annexed copies of letters addressed to the High Court Nakuru seeking to be supplied with copies of proceedings dated 15/2/2016, 17/6/2016, 21/11/2016,1/7/2017 and 15/2/2018.

However, those letters were never received by the court registry at Nakuru as they do not bear the court stamp. Save for the letter dated 5/2/2018 which bears the court stamp of Nakuru High Court on 16/2/2018. However the said letter was written to Nakuru High Court after this application had been filed. The said letter did not refer to any earlier communication sent Nakuru High Court in regard to the lower court proceedings or file. There is no evidence to prove that the respondent sought the lower court file from Nakuru High Court for purposes of preparing the record of appeal or that he did anything towards prosecuting of this appeal. It seems the respondent was jolted to action upon the filing of this application, seeking dismissal of the appeal. In my view, the delay in prosecuting this appeal is inexcusable .

In his affidavit the respondent deponed that the appellant was ordered to deposit the decretal sum in an interest earning account Kshs 310,000/= on 24/11/2015 but the respondent failed to comply with the said order. Though that was an averment in the applicant’s affidavit, the respondent steered clear of that allegation. There is no explanation why the court order was not complied with and failure to comply with the court’s order is disobedience of court’s orders. In **Utalii Transport case**, (supra) J. Gikonyo observed that an intentional and contumelious delay is for example a case where there is disobedience of a temporary order of the court. It is apparent that the respondent has disobeyed a court’s order and would not be entitled to the exercise of this court’s discretion.

Whether either party will suffer any prejudice if the appeal is dismissed;

The respondent filed the suit in the subordinate court PMC 219/2012 in 2012. Judgment was rendered in favour of the respondent on 11th May 2015, that is 3 years after the filing of the suit. The respondent has been waiting to enjoy the fruits of her judgment for the last 3 years. Despite an order for deposit of the decretal sum in an interest earning account so that the money would earn some interest and the applicant would be assured of her judgment in the event the appeal succeeds, the respondent has failed/neglected to do so. The court has a duty to balance the rights of all the parties appearing before it because justice is indeed justice for both parties. Whereas the respondent has a judgment in her favour, which she should enjoy, yet the applicant has a right to pursue his right of appeal, having been dissatisfied with the trial court’s judgment. I have considered the fact that this appeal was first filed in Nakuru, transferred to this court from Nakuru High court in 2017, when this court was established, and the lower court file has not yet been availed from Nakuru. In exercise of my inherent discretion **under Section 3A Civil Procedure Act**, and in order to be sure that justice is done to both parties, I am hesitant to dismiss the appeal out. The upshot is that, I decline to dismiss the appeal at this stage but I give conditions that the appellant must comply with. I order that

- (1) The appellant do deposit the decretal sum of Kshs 310,000/- with interest at court rates from the date of judgment to date in an interest earning account of both counsel;**
- (2) The deposit should be made within 14 days from today’s date;**
- (3) In default the appeal automatically stands dismissed.**
- (4) If the money is deposited as ordered, the applicant must follow up with the court registry at Nakuru and ensure that the lower court file is found, forwarded to this court and a record of appeal is prepared within 60 days from today’s date in default the appeal will stand dismissed.**

The respondent will have costs of this application.

Dated, Signed and Delivered at Nyahururu this 22nd day of June 2018.

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R.V.P Wendoh

JUDGE

Present:

- No appearance - for the appellant
- Soi - Court Assistant
- Mr. Kaburu - For the respondent