



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 35 OF 2016

AZHAR ALI.....APPELLANT

VERSUS

SHEIKHA MOHAMED.....RESPONDENT

RULING

1. In an application dated 2nd May, 2018 brought under the provisions of Section 3A of the Civil Procedure Act, Order 17 rule 2(1) and 3 of the Civil Procedure Rules and other enabling provisions of the law, the applicant seeks the following orders:-

(i) That this Honourable court be pleased to dismiss Civil Appeal number 35 of 2016 for want of prosecution; and

(ii) That the costs of this application be borne by the appellant herein.

2. The application is anchored on the grounds in support of it and the affidavit of the respondent (applicant), Sheikha Mohamed sworn on 2nd May, 2017. The applicant's Counsel filed a further affidavit sworn on 8th June, 2018. The appellant's (respondent's) Counsel swore an affidavit on 23rd May, 2017 to oppose the application. He also filed a notice of preliminary objection on 7th July, 2017 which states that the application dated 2nd May, 2017 violates the provisions of Order 42 rule 35(1) of the Civil Procedure Rules. The said notice further states that the further affidavit sworn on 8th June, 2017 and filed in court on 12th June, 2017 should be struck out for having been filed without leave of the court.

3. The applicant's Counsel filed his written submissions on 28th July, 2017 and the respondent's Counsel filed his on 18th August, 2017.

4. With regard to filing of further affidavit by Counsel for the applicant, Order 51 rule 14(3) of the Civil Procedure Rules provides as follows:-

"Any applicant upon whom a replying affidavit or statement of grounds of opposition has been served under subrule (1) may, with the leave of the court, file a supplementary affidavit."

5. Despite this matter having been mentioned on 18th July, 2017, 21st September, 2017 and 30th April, 2018, the Counsel for the applicant never sought leave of this court to have his affidavit being considered as having been properly filed. The applicant's Counsel in his submissions steered clear of addressing the said issue. I therefore strike out the further affidavit filed on 12th June, 2017, without leave of the court.

6. In opposing the preliminary objection raised by the respondent, the applicant's submissions state that Order 42 rule 35(1) of the Civil Procedure Rules provides that 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. The Counsel for the applicant in his submissions delved into matters deposited to in a further affidavit he swore on 8th June, 2017, which this court will not consider.

7. Counsel for the applicant urged the court to balance the right of appeal against the equally weighty right of the applicant to enjoy the fruits of Judgment delivered in her favour, as the respondent went into slumber and failed to prosecute his appeal. The court was urged to take into account that the lower court case giving rise to the present application was filed in the year 2007 and that it has been a long and exhausting journey. He added that money is being held in a joint account in the names of the Advocates on record.

8. In the view of Counsel for the applicant, the respondent will not suffer any prejudice if the appeal is dismissed. He prayed for the notice of

preliminary objection dated 7th July, 2017 to be struck out and the application dated 2nd May, 2017 be allowed as prayed, with costs.

9. In opposing the application dated 2nd May, 2017, Counsel for the respondent submitted that the said application was incompetent as it has been brought under the provisions of Order 17 rule 2(1) and 3 of the Civil Procedure Rules which do not apply to appeals but to suits. He stated that the relevant provisions are Order 42 of the Civil Procedure Rules which provide for applications to be made by Chamber Summons and not by Notice of Motion as the applicant has done.

10. He submitted that the applicant's application was premature as dismissal of an appeal for want of prosecution can only be made after the appeal has been admitted to hearing and directions under Order 42 rule 13 have been given but in the instant case, that has not been done. He indicated that the application has been done in bad faith and is an abuse of the court process.

11. The respondent's Counsel relied on the case of **Elem Investment Limited vs John Mokoro Otwoma**, HCCA No. 308 of 2012 to fortify his argument that the application herein is premature and that an appeal cannot be dismissed for want of prosecution unless and until directions have been issued.

12. The respondent showed that he had made efforts to obtain typed and certified proceedings with a view of compiling a record of appeal by attaching to his affidavit copies of letters requesting for typed copies of proceedings and Judgment. The letters also show attempts made by the Counsel on record to settle the matter out of court.

ANALYSIS AND DETERMINATION

The issue for determination is if the appeal herein should be dismissed for want of prosecution.

13. The provisions of Order 42 rule 13(1) of the Civil Procedure Rules require an appellant to cause the appeal to be listed for the giving of directions by a Judge in chambers, after notice to the parties delivered not less than 21 days after the date of service of the memorandum of appeal.

14. Rule 3 thereof provides as follows:-

(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.

15. In this court's considered view, such directions cannot be given unless an appeal has been admitted to hearing in accordance with the provisions of Section 79B of the Civil Procedure Act which state 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 after 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."

16. In this instance, the appeal has not been considered by a Judge for either summary rejection or admission to hearing. It is only after the admission of the appeal and giving of directions by a Judge that an applicant can move the court for dismissal of an appeal for want of prosecution in line with the provisions of Order 42 rule 35(1) of the Civil Procedure Rules. It states that:-

"(1) 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."

17. The applicant could also have moved the court for dismissal of the appeal for want of prosecution through the Registrar (Deputy Registrar) under the provisions of Order 42 rule 35(2) of the Civil Procedure Rules. The said provisions state 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."

18. In **Rosarie EPZ Limited vs Stanlex Mbithi James** [2015] eKLR, the Court stated thus:-

"Since under order 42 rule 35(1) the appeal cannot be dismissed before directions have been given the applicant should have taken advantage of order 42 rule 35(2) and cause the registrar to list the appeal for dismissal. If there had been such correspondence which the registrar ignored, I would have been inclined to the application. Since however, there is no evidence that the applicant had requested the registrar to list the matter in terms of order 42 rule 35(2) and the latter failed, I find it difficult to accede to the application."

19. The circumstances of this case are clear that the applicant should have moved the court through the provisions of Order 42 rule 35(2) of the Civil Procedure Rules to have the appeal dismissed for want of prosecution, since directions as to the hearing of the appeal had not been given. The applicant anchored her application on Order 17 rule 2(1) and (3) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. I do agree with Counsel for the respondent that the provisions of Order 17 rule 2(1) and (3) address the issue of dismissal of a

suit, and not an appeal, for want of prosecution.

20. Even if the applicant had premised her application under the provisions of Order 42 rule 35(1) of the Civil Procedures Rules, her application would still not have been successful for the reasons already given. The result of the foregoing is that the preliminary objection dated 7th July, 2017 is hereby allowed. The application by way of Notice of Motion dated 2nd May, 2017 is hereby dismissed. Costs are awarded to the appellant/respondent.

DELIVERED, DATED and SIGNED at MOMBASA on this 31st day of July, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

Ms Mbithi holding brief for Mr. Mwinyi for the respondent/applicant

Mr. Gachiri Kariuki holding brief for Mr. Jengo for the appellant/respondent

Mr. Oliver Musundi - Court Assistant