



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 88 OF 2015

MEDITERRANEAN SHIPPING COMPANY.....APPELLANT

VERSUS

SAFREIGHT LIMITED.....RESPONDENT

RULING

1. The respondent (applicant) through an application by way of Notice of Motion dated 6th September, 2017 brought under the provisions of Sections 1A, 1B, 3, 3A of the Civil Procedure Act, Order 51 rule (1) and Order 42 rule 35(2) of the Civil Procedure Rules and all other enabling provisions of the law seeks the following orders:-

- (i) That this Honourable court be pleased to dismiss this appeal for want of prosecution; and
- (ii) That costs of this application and the entire appeal be borne by the appellant.

2. The application is supported by the affidavit of Said Noor Nadhir sworn on 6th September, 2017 and the grounds in support of the application. The appellant (respondent) filed grounds of opposition on 12th September, 2017 raising the following issues:-

- (i) That the application herein lacks merit and is a gross abuse of the court process;
- (ii) The application is mischievous and in bad faith;
- (iii) That application herein is premature as directions in this appeal have not been given and the appeal is yet to be admitted; and
- (iii) The application seeks to have the appellant locked out from the seat of justice against the cardinal rule of natural justice.

3. Mr. Shah, Learned Counsel for the applicant in seeking orders for dismissal of the appeal for want of prosecution submitted that the respondent had not filed a replying affidavit to show what had occasioned the delay in the matter.

4. Mr. Wafula, Learned Counsel for the respondent relied on their grounds of opposition filed on 13th September, 2017. He stated that the application had been filed in bad faith as the appeal had not been admitted to hearing and directions had not been given. He submitted that the respondents are trying to circumvent justice by seeking dismissal of the appeal. He prayed for time to file the record of appeal.

ANALYSIS AND DETERMINATION

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

5. The memorandum of appeal was filed on 25th June, 2015. Since then the only thing that has transpired in this appeal is the filing of the present application. Order 42 rules 11, 12 and 13 of the Civil Procedure Rules set out the processes to be followed by an appellant and the court after the filing of an appeal, in the following terms:-

“11. 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.

12. After the refusal of a judge to reject the appeal under section 79B of the Act, the registrar shall notify the appellant who shall serve the memorandum of appeal on every respondent within seven days of receipt of the notice from the registrar.

13) 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.”

6. Section 79B of the Civil Procedure Act provides that:-

“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.”

7. The respondent herein has not explained the reason behind the delay in

filing a Record of Appeal as he filed no replying affidavit. Order 42 rule 35(1) of the Civil Procedure Rules provides for the respondent to either set down the appeal for hearing or apply for its dismissal for want of prosecution if within 3 months after the giving of directions under rule 13 of the same Order, the appellant shall not have set the appeal for hearing. Such directions have not been given in this appeal, which has not even been admitted to hearing. The applicant cannot as such invoke the provisions of Order 42 rule 35(1) in its favour.

8. In the case of **Kirinyaga General Machinery vs Hezekiah Mureithi Ireri** HCCC No. 98 of 2008 the Court observed thus:-

“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.”

9. This court is however not powerless when it comes to dealing with dismissal of appeals for want of prosecution under the provisions of Order 42 rule 35(2) of the Civil Procedure Rules. This procedure has however not been followed by the applicant to move this court for dismissal of the appeal.

10. In the interest of justice, this court will give an opportunity to the appellant/respondent to ensure that the appeal is set down for directions and hearing. I therefore decline to dismiss the appeal for want of prosecution. I make no order as to costs.

DELIVERED, DATED and SIGNED at MOMBASA on this 23rd day of February, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Masila holding brief for Mr. Saad for the respondent/applicant

Mr. Mulali holding brief for Mr. Wafula for the appellant/respondent

Mr. Oliver Musundi - Court Assistant