



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 723 OF 2016

CHAI HOUSING CO-OPERATIVE SOCIETY LTD APPELLANT

AND

JOHN MARK KARURIA RESPONDENT

BETWEEN

CHAI HOUSING CO-OPERATIVE SOCIETY LTD APPELLANT (sic)

AND

JOHN MARK KARURIA RESPONDENT (sic)

RULING

INTRODUCTION

1. The Respondent's Notice of Motion application dated on 30th January 2018 and filed on 31st January 2018 was brought pursuant to the provisions of Section 1A (1) (2) (3) 1 b (1) (a) (b) (d)(sic), Section 3A, 79B of the Civil Procedure Act and Order 42 Rule 11 and 13 (1) of the Civil Procedure Rules. It sought the following prayers:-

- 1. THAT this Honourable Court be pleased to vacate the stay of execution pending appeal to the Respondent by the Co-operative Tribunal on the 30th May 2017.**
- 2. THAT the Memorandum of Appeal dated 1st December 2016 be struck out.**
- 3. THAT the Applicant be at liberty to execute the decree dated 24th November 2016 together with the accrued interest todate.**
- 4. THAT costs of this application be provided for.**

THE RESPONDENT'S CASE

2. The Respondent's application in support of the present application was sworn by his advocate, Maina Njuguna, on 30th January 2018.
3. His case was that since the Appellant obtained orders for stay of execution pending appeal of the decision that was made by the Co-operative Tribunal on 30th May 2017, it had never taken steps to prosecute its Appeal as a result of which he had been frustrated from reaping the fruits of the judgment that was entered in his favour on 11th November 2016.
4. It was his contention that the Appellant had been indolent since the orders for stay of execution were granted and it was therefore guilty of laches with the Appeal being an abuse of the court process.
5. He therefore urged this court to allow his application as prayed.

THE APPELLANT'S CASE

6. In opposition to the said application, the Appellant's Chairman, Peter Wachira, swore a Replying Affidavit on 13th March 2018. The same was filed on 21st March 2018.

7. The Appellant's case was that it filed its Appeal of the aforesaid judgment on 2nd December 2016 and applied for the certified copies of the proceedings on the said date. It pointed out that the decision of its application seeking a stay of execution of the aforesaid orders was delivered by the Co-operative Tribunal on 30th June 2017 and consequently, the file from the Co-operative Tribunal could not have been transferred to the High Court Civil Division.

8. It contended that it had deposited the decretal sum of Kshs 500,000/= into the court and as a result, the Respondent would not suffer any prejudice if the Appeal proceeded for hearing.

9. It therefore urged this court to dismiss the Respondent's application for being unmeritorious, frivolous and an abuse of the court process.

LEGAL ANALYSIS

10. This court carefully considered the Affidavit evidence and noted that the Co-operative Tribunal delivered its decision on 11th November 2016. Warrants of Attachment were issued on 30th November 2016 and an order for stay of execution of the said judgment was granted on 30th May 2017. The Memorandum of Appeal was filed on 2nd December 2016 and the decretal sum of Kshs 500,000/= was deposited into court on 3rd August 2017.

11. When both parties appeared before this court on 13th June 2018, they indicated that they would not be filing written submissions because the present application was based on facts.

12. It was correct as the Respondent pointed out that there has been no demonstration of efforts by the Applicant in prosecuting the Appeal herein. However, there was also no indication from both parties if certified copies of the proceedings had been typed and if the file from the Co-operative Tribunal had been transferred to the High Court Civil Division for the hearing of the Appeal herein.

13. Notably, Order 42 Rule 35 of the Civil Procedure Rule, 2010 gives the procedure and mode of dismissing appeals. The same provides as follows:-

a) 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.

b) 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.

14. Under Order 42 Rule 35 (1) of the Civil Procedure Rule, an appeal can be dismissed where the following conditions are met:-

a. Directions must have been issued under Order 42 Rule 13;

b. Three (3) months must have lapsed after the issuing of directions;

c. The appeal has been set down for hearing within the said three (3) months after issuing of directions.

15. Under Order 42 Rule 35 (2) of the Civil Procedure Rule, an appeal can be dismissed if an appeal has not been set down for hearing within one (1) year after service of the Memorandum of Appeal. The said provision provides 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.”

16. Notably, the Appeal herein was yet to be admitted for hearing as is required under Section 79 of the Civil Procedure Act. The said Section provides 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 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.”

17. As there was no evidence that the Appeal had been admitted for hearing, it was the considered view of this court that allowing the present application would be clearly shutting out the Appellant from having its Appeal heard on merit.

18. Accordingly, having considered the Affidavit evidence, the Written Submissions and the case law that were relied upon by the parties herein, this court agreed with the Appellant's Submission that as the Appeal herein had not been admitted for hearing and directions had not been given under Order 42 Rule 35 (1) of the Civil Procedure Rules, the Respondent's present application was premature.

DISPOSITION

19. For the reasons foregoing, the upshot of this court's Ruling was that the Respondent's Notice of Motion application that was dated 30th January 2018 and filed on 31st January 2018 was not merited and the same is hereby dismissed with no order as to costs.

20. To avoid further delays in the hearing of the Appeal herein, the Appellant is hereby directed to take steps in filing its Record of Appeal within the next sixty (60) days from the date of this Ruling. The Respondent will be at liberty to move the court appropriately for consideration of dismissal of the Applicant's Appeal herein for want of prosecution, in the event the said Appeal will have been admitted for hearing and the Appellant fails to prosecute its Appeal.

21. It is so ordered.

DATED and DELIVERED at NAIROBI this 27th day of September 2018

J. KAMAU

JUDGE