



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 1 OF 2017

ROBERT MBURU WACHIRA.....APPELLANT

VERSUS

GETRAY ANYANGO OBUNDE.....1ST RESPONDENT

PROTUS MAKHETI MAKOKHA

(Suing on behalf of the Estate of DAVID WANJALA WEBI...2ND RESPONDENT

(Being an appeal from the Judgment and Decree of Hon M. Obura, Principal Magistrate (PM) at the Chief Magistrate's Court at Milimani CMCC No 4698 of 2011 delivered on 6th December 2016)

RULING

INTRODUCTION

1. The Respondents' Notice of Motion application dated 20th March 2018 and filed on 22nd March 2018 was brought pursuant to the provisions of Section 1A, 1B, 3A, of the Civil Procedure Act, Order 42 Rule 11, 13 & 35 of the Civil Procedure Rules 2010. It sought the following prayers:-

1. THAT the Memorandum of Appeal dated 5th January 2017 and lodged in the High Court of Kenya at Nairobi in the High Court Civil Appeal Case Number 1 of 2017 be struck out.

2. THAT the costs of this Application be awarded to the Applicant.

2. The Respondents filed its Written Submissions dated and filed on 20th June 2018. The Appellant's Written Submissions were dated 29th June 2018 and filed on 6th July 2018.

3. When the matter came before the court on 31st July 2018, the parties requested that the court deliver its decisions based on their respective Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

THE RESPONDENTS' CASE

4. The Respondents' case was that the Appellant had not filed its Record of Appeal within the time prescribed by Civil Procedure Rules, 2010 and/or set his Appeal for directions and/or taken a step to prosecute his Appeal. They said that the Appellant was guilty of laches and had been indolent.

5. They therefore urged this court to allow their application.

THE APPELLANT'S CASE

6. On 5th June 2018, the Appellant filed Grounds of Opposition dated 5th June 2018. The same were as follows:-

1. THAT the Application was incompetent, misconceived, bad in law, incurably defective and devoid of any merit in view of

its own contents together with the Supporting Affidavit.

2. THAT the orders sought under the Application were untenable and the orders sought thereunder were based on a grave misconception of law and fact.

3. The orders sought herein were unsustainable and are therefore unavailable to the Respondent.

4. The Application was tantamount to trifling with the Court and was an abuse of process of this Honourable Court.

LEGAL ANALYSIS

7. In support of their case that the Appellant's Appeal should be dismissed, the Respondents relied on the case of **Ndegwa Kamau t/a Sideview Garage vs Fredrick Isika Kalumbo [2016] eKLR** where an appeal was struck out as there was no evidence to show that the appellant therein had applied for a decree.

8. They also placed reliance on the case of **South Nyanza Sugar Co Ltd vs Samuel Omoke Obage [2009] eKLR** where an appeal was dismissed because the delay in admitting the appeal had been occasioned by the appellant's failure to file a certified copy of the decree.

9. On his part, the Appellant submitted that the application herein was misconceived and premature because the Respondents had not demonstrated that there had been prolonged delay in prosecution his Appeal or that they had suffered any prejudice.

10. He relied on the cases of **Kirinyaga General Machinery vs Hezekiah Mureithi Ileri (KLR Citation not given)**, **Jurgen Paul Flach vs Jane Akoth Flach [2014] eKLR** amongst several other cases, to support his argument that an appeal can never be struck out before directions had been given under Order 42 Rule 35 of Civil Procedure Rules and that an appeal can only be dismissed after it is listed before a judge by the registrar under Order 42 Rule 35(2) of Civil Procedure Rules.

11. A perusal of the file shows that the Appellant filed its Memorandum of Appeal dated 5th January 2017 on the same date. The Respondent filed its present application on 20th March 2018.

12. 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.”

13. Directions under Order 42 Rule 35(1) of the Civil Procedure Rules, 2010 had not been given by the court when the Respondents would have had a right to seek for the dismissal of the Appeal herein within three (3) months of directions having been given by the court.

14. In addition, the provisions of Order 42 Rule 35(2) of the Civil Procedure Rules were not applicable herein. The same 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.”

15. Indeed, allowing the present application would be shutting out the Appellant from accessing the court when the Respondents had not demonstrated that the proceedings of the lower court had been typed and certified and that it was the Appellant who had failed to file a Record of Appeal.

16. Accordingly, having considered the Affidavit evidence, the Written Submissions and the case law that was relied upon by the parties herein, this court agreed with the Appellant's submissions 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 Respondents' application was premature.

DISPOSITION

17. For the reasons foregoing, the upshot of this court's Ruling was that the Respondents' Notice of Motion application dated 20th March 2018 and filed on 22nd March 2018 was not merited and the same is hereby dismissed but with no order as to costs.

18. It is so ordered.

DATED and DELIVERED at NAIROBI this 31st day of October 2018

J. KAMAU

JUDGE