



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 77 OF 2013**

**COAST BUS SAFARIS.....FIRST APPELLANT**

**COASTLINE SAFARI .....SECOND APPELLANT**

**COAST BUS (MOMBASA) LIMITED .....THIRD APPELLANT**

**VERSUS**

**WILLIS OMUSINDE OMBOYO (Suing as the Legal Representative of the Estate of the**

**late HEZRON OCHIENG OMBOYO (Deceased)..... RESPONDENT**

**RULING**

1. Through an application dated 17<sup>th</sup> January, 2017 brought under the provisions of Order 42 rule 35(1) of the Civil Procedure Rules, 2010 and Section 3A of the Civil Procedure Act, the respondent (applicant) seeks the following orders:-

(i) That this Honourable court be pleased to dismiss this appeal for want of prosecution;

(ii) That upon dismissal of this appeal, the appellants' Advocates be ordered to release to the respondent's Advocates the decretal sum of Kshs. 980,542.30 together with interest thereon placed in the joint accounts (sic) of the Advocates for the appellants and respondent at I & M Bank Limited; and

(iii) Costs of the application and the appeal be borne by the appellant.

2. The application is supported by the affidavit of Whyllis Omusinde Omboyo sworn on 19th January, 2017. The appellants filed a replying affidavit on 29th September, 2017 sworn by Daniel Ondego, Advocate to oppose the application. Counsel for the applicant filed his written submissions on 3<sup>rd</sup> August, 2017. Counsel for the respondent filed his submissions on 14<sup>th</sup> December, 2017.

3. Mr. Mutugi, Learned Counsel for the applicant prayed for the application to be dismissed for want of prosecution compounded by the fact that the appellants (respondents) had failed to cause the appeal to be listed for giving of directions within 21 days of service of the memorandum of appeal. It was submitted that it was incumbent on the respondents to move the court to give directions.

4. It was submitted that the Judgment in the lower court was delivered on 28th January, 2013 and the appeal herein was filed in the year 2013, as such, 5 years had elapsed and no effort had been made to show that the respondents were desirous of having the appeal finalized. This court was urged to dismiss the appeal with costs, so as to allow the applicant to enjoy the fruits of his labour.

5. Ms Mutune, Learned Counsel for the respondents submitted that delay in seeking of directions from the court was caused by the lower court which had delayed in availing proceedings, thus it was beyond the respondents' power to move the court adequately.

6. Counsel cited the provisions of Order 42 rule 13(1) of the Civil Procedure Rules which she stated can only apply where proceedings have been availed. It was submitted that it would be prejudicial for the appeal to be struck out in the said circumstances. She indicated that a letter was written on 4<sup>th</sup> June, 2015 to Mr. Sanjeev Khagram of AB Patel & Patel Advocates to request for the lower court proceedings on behalf of the Counsel for the respondents. She urged the court not to dismiss the appeal on technicalities.

7. Mr. Mutugi in responding to the foregoing submitted that Order 42 rule 13 (1) of the Civil Procedure Rules refers to 21 days from the date of the service of the memorandum of appeal. Proceedings are thus not required in order for an appellant to move the court for directions.

## ANALYSIS AND DETERMINATION

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

8. Order 42 rule 1 of the Civil Procedure Rules provides that upon the filing of an appeal, the appellant shall within thirty days, cause the matter to be listed before a Judge for directions under Section 79B of the Act. The said Section provides as follows:-

***“Before the appeal from a subordinate 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.”***

9. The above provisions envisage a situation whereby an appellant will have filed a record of appeal, which has to be duly perused by a Judge before he/she can either reject or admit the appeal to hearing.

10. There is no doubt that the appeal herein had stayed for 4 years without being prosecuted as at the time the applicant filed the present application. The respondents could however not comply with the provisions of Order 43 rule 13(1) of the Civil Procedure Rules without the appeal having been listed for directions.

11. To gain a complete understanding of the import of the foregoing provisions, they must be read together with the provisions of Order 42 rule 12 of the Civil Procedure Rules which state as follows:-

***“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 the receipt of the notice from the registrar.”***

12. The applicant herein has applied for dismissal of the appeal for want of prosecution under the provisions of Order 42 rule 35(1) of the Civil Procedure Rules. It states as follows:-

***“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.”***

13. This court has already stated that no directions have been given by the court for the hearing of the appeal. The respondents have therefore moved this court prematurely for the orders they seek.

14. In **Rosarie (EPZ) Limited vs Stanlex Mbithi James** [2015] eKLR, Aburili J stated thus:-

***“Since under 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.”***

15. In similar vein, the applicant herein cannot succeed in its quest to have the appeal dismissed. It is however evident from the respondents' affidavit in reply to the application that the letter attached thereto was written on 4<sup>th</sup> June, 2015 by the law firm of Archer & Wilcock Advocates addressed to Sanjeev Khagram Advocate requesting him to obtain typed copies of proceedings and decree of the lower court case. It appears that since then, the respondents have been sleeping on their laurels. If they have not, they did not offer evidence to the contrary.

16. The resultant orders are that the respondents are given 60 days to file and serve the record of appeal. They will within 15 days thereafter list the appeal for directions before a Judge.

17. In the event that the respondents fail to comply with the foregoing orders, the applicant will be at liberty to move the Registrar to place the file before a Judge for dismissal of the appeal for want of prosecution.

18. The application dated 17th January, 2017 is hereby dismissed. The costs of the said application are awarded to the applicant due to the respondents' unimpressive efforts to pursue the proceedings of the lower court case.

It is so ordered.

**DELIVERED, DATED and SIGNED at MOMBASA on this 28th day of November, 2018.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Mr. Ondego holding brief for Jan Mohamed for the appellants/respondents

No appearance for the respondent/applicant

Mr. Oliver Musundi - Court Assistant