



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 90 OF 2013

KENNEDY MUSAU KITIA & 2 OTHERS1st APPELLANT

ELIZABETH MWAU.....2ND APPELLANT

ALEXIA A.MANYENZE-.....3RD APPELLANT

VERSUS

PIUS KAVITA KASUVA (Suing as legal Representative of

the estate of ESTHER MINOO KASUVA).....RESPONDENT

RULING

The Respondent herein seeks to have the Appeal filed herein by the Appellants struck out for reasons that since the filing of the Appeal the Appellants have not done anything to have the Appeal heard, and have not moved the Court to have the Appeal admitted under Order 42 Rule 11 of the Civil Procedure Rules.

Further, that it is now more than two years after judgment was delivered by the trial Court, and the Appellants are yet to extract the Decree which they are appealing against. The Respondent claims that the Appellants continue to enjoy stay of execution orders issued by the trial Court, notwithstanding their lack of interest in the Appeal, and that he is greatly prejudiced by the continued delay in prosecuting the Appeal as he cannot fully enjoy the fruits of a judgment lawfully obtained due to existing stay of execution orders.

These prayers are in an application by way of a Notice of Motion dated 11th August 2015 and in the supporting affidavit sworn by the Respondent on the same date.

The Respondent explained that the Memorandum of Appeal herein was filed on 13th May 2013 by the Appellants against a judgment delivered in his favor on 17th April 2013 by the lower Court, and that his Advocates' letters to the Appellants Advocates enquiring on the progress made in setting down the Appeal for hearing have gone unanswered. Further, that despite his Advocates sending the Appellants a draft Decree for approval, the Appellant's Advocates have declined and refused to approve the Decree, a fact which shows that they are not keen to have the Appeal disposed expeditiously. He attached copies of the said letters and draft decree.

It is the Respondent's view that the Appellants' inaction and indolence after obtaining stay of execution orders proves that the Appellants' Appeal was filed purposely to defeat execution and prolong the trial given that the Appellants did not call any witness in support of its Defence in the trial Court. Further, that he has been greatly prejudiced by the continued existence of the Appeal in that part of the decretal

amount has been deposited as security for the Appeal, and his right to enjoy the fruits of a lawful judgment have been curtailed.

The Respondent's learned counsel, Wanaina Ileri & Co Advocates, filed written submissions dated 25th July 2016, wherein this Court was urged to invoke its inherent powers under section 3A of the Civil Procedure Act to bring the abuse of the Court process to an end and dismiss the appeal herein for want of prosecution notwithstanding that directions have not been issued. Reliance was placed on the decisions in **Adnan Karama Petroleum Limited (T/A A. K. Filling Station) vs National Environment Management Authority, Civil Appeal No. 878 of 2005** and **Protein & Fruits Processors Limited & another vs Diamond Trust Bank Kenya Limited, [2015] eKLR** in this regard.

The Response

The application was opposed by the Appellants in Grounds of Opposition dated 22nd February 2016 and in a replying affidavit sworn on 18th July 2016 by Joan Oburu, the Claims Director at Directline Assurance Company Limited, the insurers of motor vehicle registration number KAZ 343Z and at whose instance the Respondent's Claim is being defended.

The grounds raised by the Appellants are that the Appellants' Advocates wrote to the Executive Officer at Machakos Law Courts by a letter dated 16th June 2014 which was annexed, requesting typed proceedings to enable them prepare and file a Record of Appeal, but that to date the said letter has not elicited any response. Therefore, that the delay in prosecuting the appeal was not by fault of the Appellants, as they had already deposited part payment of the decretal sum as ordered by the Court.

Further, that the Application is premature because it contravenes Order 42 Rule 35 (1) of the Civil Procedure Rules which stipulates that directions ought to have been given as provided under Section 79B of the Civil Procedure Act before the Respondent can move the court either to set the Appeal down for hearing, or to apply for dismissal for want of prosecution. In this case no such directions have been issued. It was also contended that an application to dismiss an Appeal where directions under Section 79B of the Civil Procedure Act have not been issued can only be listed by the Registrar before a judge in chambers for dismissal. That since Order 42 Rule 35(2) is couched in mandatory terms, the Applicants herein have no *locus standi* to bring the present Application .

These facts and legal provisions were reiterated by the learned counsel for the Appellants, Kairu & McCourt Advocates, in submissions filed in Court dated 20th August 2016. It was submitted therein that Article 159 of the Constitution of Kenya 2010 requires the court to be more concerned with substance justice where possible instead of giving undue regard to technicalities, and that if this appeal is struck out at this moment the appellant would be denied the benefit of substantive justice. Further, that section 3A of the Civil Procedure Act is usually applied where the Act or the Rules are silent on procedure, and is not available to the applicant since there exists provisions on the matter under consideration, being Order 42 Rule 35 of the Civil Procedure Rules.

According to the Appellants, Order 42 Rule 35 of the Civil procedure Rules provides for two (2) avenues of dismissing appeals for want of prosecution as follows:

a) Under Order 42 Rule 35 (2), it is only the registrar who can list an appeal before a Judge in chambers for dismissal. Under Rule 35 (2) an Appeal can be dismissed without directions having been issued by court. In this Appeal, the Registrar has not listed the Appeal for dismissal and as such the Respondent's Application cannot be based on Order 42 Rule 35 (2).

b) The only other remaining avenue under which the Respondent herein can move the court for dismissal of the Appeal for want of prosecution is Order 42 Rule 35 (1) of the Civil Procedure Rules. However, even then under Order 42 Rule 35 (1) there are several factors which must be established and demonstrated by the Respondent before the court can dismiss an appeal for want of prosecution. The said factor are as follows:

- i. Directions must have been issued under Order 42 Rule 13 of the Civil Procedure Rules;
- ii. Three (3) months must have lapsed after the issuing of directions under Order 42 Rule 13 of the Civil Procedure Rules; and
- iii. The Appeal has not been set down for hearing within the said three (3) months after the issuing of directions under Order 42 Rule 13 of the Civil Procedure Rules.

Further, that, directions have never been issued by Court under section 79B of the Civil Procedure Act and as such the appeal has not been admitted. Reliance was placed on the decisions in **Jurgen Paul Flach Vs Jane Akoth Flach, Nakuru Civil Appeal No.119 of 2012; Kirinyaga General Machinery vs. Hezekiel Mureithi Ileri,[2007] eKLR, and Elem Investment Ltd vs John Mokora Otwoma, (2015) eKLR** in this regard.

It was urged that the Appellants are still keen, willing and ready to prosecute this Appeal and as such should be given an opportunity to do so, and had demonstrated that they have not been indolent having made efforts and/ or steps towards prosecuting the Appeal.

Lastly, the Appellants submitted that the Respondent have not pleaded and/ or demonstrated what prejudice if any he is likely to suffer in the event that the Appellants are given more time to prosecute the Appeal, as half the decretal amount herein was paid to the Respondent, and the other half deposited in a joint interest earning account and can be accessed to the Respondent once the Appeal is heard and determined on its merit. That on the other hand, in the event that Respondent's application is allowed as prayed, the Appellants stand to lose their constitutional right to appeal and the right to have their case heard and determined on its merits as opposed to having the same dismissed for want of prosecution.

The Determination

I have read and carefully considered the pleadings and submissions filed. The issue for determination is whether the appeal herein should be struck out for want of prosecution. The applicable law in this regard is Order 42 Rule 35 of the Civil Procedure Rules which provides as follows:

“(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.

(2) 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.”

The processes of giving directions and service of memorandum of an appeal are provided for in Order 42 Rules 11, 12, and 13 of the same Rules, wherein it is provided as follows:

“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. (1) 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.”

In the present application, the Appellants claim that no directions have been given in this matter because the Record of Appeal has not been filed, for reasons that the Appellants are yet to be furnished with the

certified copies of typed proceedings and judgment of the trial court. The law requires the Appellant to list the appeal for directions within 30 days of filing of the same. There is no requirement for the filing of a record of appeal for such directions to be granted. In this regard the documents that are required when filing of an appeal under Order 42 Rules 1 and 2 of the Civil Procedure Rules are set out as follows:

(1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.

(2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.

2. Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under section 79B of the Act until such certified copy is filed.

The requirements therefore under these rules for directions to be given under section 79B of the Civil Procedure Act is that the Appellants should have filed a memorandum of appeal to which should be attached a certified copy of the decree or order appealed against. The Appellants to this extent have therefore been indolent in listing the appeal herein for directions under section 79B of the Civil Procedure Act.

This finding notwithstanding, it is not disputed that directions have not been given in this appeal, and the appeal cannot therefore be dismissed pursuant to Order 42 Rule 35(1) of the Civil Procedure Rules. The appeal has also not been admitted to hearing, and since Order 42 Rule 12 of the Civil Procedure Rules provide that a memorandum of appeal shall be served after it has been admitted to hearing, this appeal is also therefore not amenable to dismissal under Order 42 Rule 35 (2).

This Court is also persuaded that the Respondent will not suffer prejudice as he did not contest having been paid half of the decretal sum, and since security for the balance has been provided for, the interests of the Appellants in pursuing their appeal ought also to be safeguarded in the circumstances.

I accordingly hereby decline to issue the orders prayed for by the Respondent in his Notice of Motion dated 11th August 2015 for the foregoing reasons. The Respondent shall however be awarded the costs of the said Notice of Motion as it resulted from the delay to act on the part of the Appellants. This Court in addition directs the Appellants to file and serve their Record of Appeal within 60 days after which this appeal shall be mentioned for direction as to its hearing.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 31st day of January 2017.

P. NYAMWEYA

JUDGE