



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

HCA 145 OF 2009

KIMARU NJOROGE & ANOTHER.....APPELLANT

VERSUS

MARY MUGURE KAMAU.....RESPONDENT

RULING

1. The application before me seeks dismissal of the appeal for want of prosecution. It is brought under **Order 42 Rule 35** on the grounds that the record of appeal was filed on 21/2/2012 and admitted to hearing on 30/6/2014 and since then the appellants have not taken any action to prosecute it. Other grounds are that the appellants were no longer interested in prosecuting the appeal and that the failure to prosecute was prejudicial to the respondents.

2. The supporting affidavit was sworn by Mary Mugure Kamau who is the respondent in the appeal. Her averments amplify the grounds set out above. In addition, she deposed that her advocates on record had written to the appellants urging them to take necessary steps in the appeal; that the appellants were misusing the court process to delay execution of the judgment which was in her favour while causing her to incur costs and not utilize the suit land; and; that it was fair and just that appeal should be dismissed for want of prosecution.

3. The application is opposed by the appellants. The replying affidavit sworn by their Counsel Charles Gakuhi Chege, deposes *inter alia* on the steps taken to prosecute the appeal. He states that he filed the record of appeal on 21/2/2013; that on 29/11/2013 wrote to the court seeking a date for directions; that he wrote again on 7/2/2014; and; the appeal was fixed for 20/6/2014; that when he appeared before Mshila J for directions, the same could not be taken as the appeal had not been admitted; that he followed up on the admission with a letter on 26/6/2014; that he was not informed of the admission and only became aware of the admission upon being served the present application. Counsel further deposed that the appellants had demonstrated that they were interested in pursuing the appeal; that the appeal be fixed for hearing on merits; that no prejudice would be suffered by the respondents; that the appellants risk eviction if the appeal was dismissed; and, that the delay was not inordinate nor inexcusable and neither would it give rise to a substantial risk to fair hearing of the appeal.

4. Both parties filed submissions as directed by the court (Mshila J.) The respondent/applicants submission were filed on 29/4/2016. The appellant respondent's submission were filed on 25/4/2016.

5. The gist of the applicant's submission is that the appellants have deliberately delayed the appeal to impede the applicant from executing the lower court's judgment which was in her favour. They urge that it was the primary duty of the appellants to take steps to progress their case since they were ones who

dragged the applicant to court. That the action of the appellants ran counter to Section 1A, 1B and 3A of the Civil Procedure Act. The applicant cited the case of **Abdirahman Abdi V Safi Petroleum Products Ltd & 6 others (2011) eKLR** and **Walter Kabetu & 4 others V Hortensiah Millicent Kibinu (2016) eKLR** to buttress the submissions.

6. The appellant's submissions on the other hand centered around the interpretation of **Order 42 rule 2**. The appellant submitted that **Order 42 Rule 2** was not applicable to the present case as the appeal had not been presented before a Judge to give directions. That under the said Order it was only the registrar who can bring notice for dismissal. The respondent further submitted that the delay was not inexcusable. They cited the case of **Utalii Transport Company Ltd & 3 others Vs NIC Bank Ltd & Another (2014) eKLR**, **Ivita Vs Kyumbu (1984) KLR 441** to buttress the submissions.

7. I will begin with the provision of the law under which the application has been brought and which is contested by the respondents. It is true as submitted by the respondent that the applicant has brought the application under the wrong provision. **Order 42 Rule 35 (1) and (2)** states 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 apply by summons for its dismissal for want of prosecution.

(2) If within one year after service of the memorandum of appeal, the court shall not have set down the appeal for hearing, the registrar shall on notice to the parties list the appeal before a Judge in chambers for dismissal”.

8. A plain reading of the Order shows that it is only after the giving of directions that the respondent can either set the appeal for hearing (if the appellant will not have done so) or apply for dismissal. In this particular case both agree that directions have not been given in the appeal. Technically therefore, the applicant who is the respondent in the appeal cannot avail herself of Order 42 Rule 35 to bring the instant application. I would however not strike out the application on account of the wrong provision of the law. Instead I would in the circumstances of his case consider the merits of the application bearing in mind the constitutional dictate of substantive justice under Article 159 (2) (a) and the overriding objective of the Civil Procedure Act Section 1A. What I hear the applicant to be saying in the application is that the appeal has taken too long and should be dismissed for want of prosecution.

9. The principles upon which dismissal for want of prosecution is to be considered have been enunciated in many decisions. In summary they are:-

- i. whether there has been inordinate delay on the part of the plaintiff in prosecuting the case;**
- ii. whether the delay is intentional, contumelious and, therefore inexcusable;**
- iii. Whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the defendant;**
- iv. Whether the plaintiff has offered a reasonable explanation for the delay;**
- v. Even if there has been delay, what does the interest of justice dictate.**

See **Ivita Vs Kyumbu (1984) KLR 441**. See also **Utalii Transport Company Ltd and 3 others Vs NIC Bank Ltd & Another (2014) eKLR**.

11. In the present application, the applicant argues that the appellant in the appeal has done nothing to move the appeal forward. She has displayed correspondence through which they urged the appellant to take the necessary steps. This was way back in 2014 and 2015. The appellants on the other hand argue

that they have not been indolent. They have set out the efforts they have taken since filing the record of appeal on 21/2/2013. They have displayed several letters write to the court seeking admission of the appeal and requesting directions.

12. From my considerations of averments in the Replying Affidavit and my perusal of the file, it is apparent that the appellants initially took active steps to move forward the appeal forward. This was between 2013 and 2014. They seem not to have taken any action in 2015 and 2016. It is however apparent from the record that this was the period that the present application was pending. Under those circumstances, it cannot be said that the delay was occasioned wholly be the appellants. I find the explanation for the delay plausible.

13. The other test that I must apply is whether justice can still be done in this case in spite of the delay. Both parties int his case have demonstrated their individual industry in trying to move the appeal forward. I am persuaded that justice can still be done despite the delay. In the premises, I decline to dismiss the appeal. It shall proceed to be determined on merits. I also decline to award costs to the respondent as to do so would amount to rewarding the appellants for not expeditiously prosecuting their appeal. Finally, I direct that the appeal be set down for hearing on priority basis. It shall stand dismissed if it shall not have been listed for hearing within 45 days.

Orders accordingly.

Ruling delivered, dated and signed in open court this 30th day of March 2017

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R. LAGAT KORIR

JUDGE

In the presence of:

C/A Wanjohi

.....*for applicants*

.....*for respondent*