



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL APPEAL NO.16 OF 2015

TAIDYS RESTAURANT.....APPELLANT

VERSUS

GERFAS OTIENO SAMMY T/A NYANGO INVESTMENT

CONTRACTORS.....RESPONDENT

RULING

1. From the few documents presented before the court in this matter, it appears that the applicant/respondent, **Gerfas Otieno Sammy**, was the plaintiff in Kericho CMCC No.199 of 2014. It would appear that he was successful in his claim, and judgment was entered in his favour. The appellant was, however, dissatisfied with the decision of the trial court and filed the present appeal.
2. Pursuant to a consent entered into between the applicant/respondent's then advocate and counsel for the appellant, a consent that the applicant avers he did not agree to, the appellant was granted stay of execution and the decretal amount was deposited in an account in the names of the two counsel.
3. The respondent has now filed the present application dated 6th February 2014 seeking to have the appellant's appeal dismissed for want of prosecution.
4. The respondent argues that the appellant has not taken any steps to have the appeal set down for hearing since it was filed, and after it obtained orders for stay of execution. He argues further that the appellant has not caused the matter to be listed for directions or hearing despite the appeal having been filed 2 years ago. He further argues that the delay in setting down the appeal for hearing is an abuse of the court process and is intended to deny him the fruits of his judgment.
5. The application is brought under Order 42, rules 11, 13 and 35 and is supported by an affidavit sworn by the respondent. The respondent avers that since the filing of the appeal and the deposit of the decretal sum in an interest earning account in the names of Counsel for both parties, no action has been taken by the appellant to prosecute the appeal.
6. In response, the appellant filed an affidavit sworn by its Counsel, Joshua K. Mutai, on 4th April 2017. The respondent annexes to the said affidavit two letters, respectively dated 21st May 2015 and 22nd March 2017. The said letters are addressed to the Deputy Registrar. The appellants' Advocates seek in the said letters certified copies of the proceedings in the lower court to enable them proceed with the appellants' appeal.
7. Both parties made oral submissions at the hearing of the respondent's application on 6th April 2017.

8. I have considered the application and affidavit in support, as well as the appellant's affidavit in reply. I have also considered the respective submissions of the parties.

9. The appellant lays the responsibility for its failure to pursue its appeal on the court, alleging that it has not been supplied with the proceedings. However, I have called for the record of the lower court on this matter. I note that the proceedings are typed and ready, but that since the appellant wrote his letters dated 21st May 2015 and 22nd March 2017, it has not followed up the matter with a view to preparing the record of appeal and proceeding with its appeal. In the circumstances, the applicant's application for dismissal of the appeal for want of prosecution has some merit.

10. However, I have considered the provisions of the law with respect to the dismissal of appeals for want of prosecution, and judicial precedents with respect thereto.

11. The application before me is grounded on Order 42 Rule 35 of the Civil Procedure Rules, which provides as follows with respect to dismissal of appeals for want of prosecution:

35 (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.

12. In her decision in **Nakuru Civil Appeal No. 119 of 2012- Jurgen Paul Flach vs Jane Akoth Flach**, Omondi J stated as follows:

“The law concerning dismissal of an appeal for want of prosecution is contained in Order 42 Rule 35 of the Civil Procedure Rules.

Under Rule 35 aforementioned, the law contemplates two different scenarios for issuance of an order for dismissal of an appeal for want of prosecution. These are:-

A situation where three months after issuance of directions under Order 42 Rule 13, no steps have been taken by the appellant to fix the appeal for hearing. In such a situation, the respondent has two options, one, to fix the appeal for hearing or to apply by summons for the dismissal of the appeal. See Order 42 Rule 35(1).”

13. In **Kirinyaga General Machinery vs Hezekiel Mureithi Ireri HCC No.98 of 2008**, Kasango J, in interpreting Order XLI 31 (now Order 42 rule 35), observed that:

“It is clearly seen from that rule that before the respondent can move the court either to set the appeal down for hearing or to apply for dismissal for want of prosecution, directions ought to have been given as provided under rule 8B. Directions have never been given in this matter. The directions having not being given the orders sought by the respondent cannot be entertained.”

14. The second scenario referred to by Omondi J in **Jurgen Paul Flach vs Jane Akoth Flach (supra)** is set out in Order 42 Rule 35 (2), which I have set out above. The Learned Judge observed with respect to this second scenario as follows:

“Unlike Rule 35(1) which requires directions to have been issued before the appeal can be dismissed for want of prosecution, under sub rule (Rule 35(2), if, within one year after 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. In the present case, directions have never been taken on the appeal. Indeed, it would appear that the

appeal has never been placed before the court for admission or otherwise, let alone for directions. The record of appeal has never been prepared by the appellant, even though a perusal of the lower court file indicates that the proceedings are ready.

16. In the circumstances, notwithstanding the view of the court that the respondent's application is merited, on the basis of the option open to the respondent under Order 42 Rule 35(1), the appellant's appeal cannot be dismissed for want of prosecution at this stage.

17. As I observed in **Civil Appeal No.29 of 2014-Nyamira Luxury Express Company Ltd vs Kiptalam Musa Chebaituk & Another**, the appellant does have an escape hatch in the requirement for directions to have been taken first before a respondent can apply for dismissal of the appeal for want of prosecution.

18. I therefore decline to allow the application for dismissal of the appellant's appeal for want of prosecution. I direct, however, that the appellant prepares and lodges its record of appeal, and takes a date for directions with respect to the hearing of the appeal, within the **next thirty (30) days** from the date of this ruling. I give these directions bearing in mind the provisions of section 1B of the Civil Procedure Code under which the Court is under a duty to do justice and ensure timely and expeditious disposal of cases.

19. Should this order not be complied with in the aforesaid period, then the matter shall be placed before the court for dismissal.

20. The appellant shall bear the respondent's costs of this application assessed at Kshs.10,000.

21. It is so ordered.

Dated, Delivered and Signed at Kericho this 31st day of May 2017.

MUMBI NGUGI

JUDGE