



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 34 OF 2016

ATTORNEY GENERAL.....APPELLANT

VERSUS

LUCY NDUTA NGANGA..... RESPONDENT

RULING

1. The respondent (applicant) through an application by way of Notice of Motion dated 29th November, 2016 brought under the provisions of Sections 1A, 1B, 3A and 63 (e) of the Civil Procedure Act, Order 2 rule 15 (1) (c) and (d) and Order 42 rule 13 and 35 (1) of the Civil Procedure Rules and all other enabling provisions of the law seeks the following orders:-

- (i) That this Honourable Court be pleased to strike out the memorandum of appeal filed herein;
- (ii) That this Honourable court be pleased to dismiss the appeal filed herein for want of prosecution; and
- (iii) That costs of this application and appeal be provided for.

The application is supported by the affidavit of John Gachiri Kariuki sworn on 27th November, 2016 and the grounds in support of the application.

2. The appellant (respondent) filed grounds of opposition on 26th January, 2017 raising the following grounds:-

- (i) That the application is misconceived, frivolous, vexatious and an abuse of the process of the court;
- (ii) The orders sought are untenable and a nullity as there is no appeal that has been admitted capable of being dismissed;
- (iii) That directions have not been given as per civil procedure rules;
- (iv) The applicant is guilty of laches; and
- (iv) The applicants are (sic) the author of their (sic) own misfortunes.

3. Mr. Gachiri Kariuki, Learned Counsel for the respondent submitted that he sought for the striking out of the memorandum of appeal or in the alternative, for the appeal to be struck out for want of prosecution. He also prayed for costs. He referred to the supporting affidavit sworn on 27th November, 2016 wherein he deposes that Judgment was entered on 8th March, 2016 for the applicant. The respondent filed a memorandum of appeal on 5th April, 2016 but no record of appeal has been prepared and no effort has been made to list the matter for directions. He added that the appellant has also shown no interest in prosecuting the appeal.

4. Counsel stated that under Order 42 rule 13 (1) of the Civil Procedure Rules, a party ought to seek directions within 21 days of filing the memorandum of appeal yet no such directions have been taken and no efforts indicate that the respondent is about to do so. He also referred to the provisions of Order 42 rule 35(1) which state that if an appeal has not been listed for hearing within 3 months after the giving of directions under rule 13, a respondent can apply for its dismissal. He argued that no reason has been advanced by the respondent for not complying with the said rules. It was contended that the filing of the memorandum of appeal was an attempt to delay the matter and keep away the fruits of the Judgment from the applicant.

5. Mr. Gachiri further submitted that in the respondent's grounds of opposition, it states that no directions have been taken yet it is their responsibility to seek such directions. He prayed for the application herein to be allowed.

6. Mr. Ngari, Learned Counsel for the respondent submitted that no record of appeal has been filed and therefore no date has been fixed for admission of the appeal by the court and consequently, directions being given. He stated that sections 1A, 1B and 3A of the Civil Procedure Act give a Judge wide discretion on issues raised by litigants. He urged the court not to condemn the respondent with the drastic action of striking out the memorandum of appeal filed. He prayed that they be given time to file a Record of Appeal.

ANALYSIS AND DETERMINATION

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

7. The memorandum of appeal was filed on 5th April, 2016. Since then the only thing that has transpired is the filing of the present application. Order 42 rules, 11, 12 and 13 of the Civil Procedure Rules set out the processes to be followed by an appellant and the court after the filing of an appeal, in the following terms:-

“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.”

8. Section 79B of the Civil Procedure Act provides that:-

“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.”

9. In the case of **Haron E Ogechi Nyaberi v. British American Insurance Co. Ltd** [2012] eKLR, the High Court held that:-

“It is however, clear to this court that the Registrar cannot give notice of directions to the parties of an appeal and cannot himself fix an appeal for directions before a judge unless and until the Appellant has caused it by first complying with rules 11 and 13 thereof. Appellant’s compliance to those rules is the gate-opening for admission of appeal and for the taking of directions. It is to be observed, therefore, that it will be the Appellant who shall really cause the appeal to be listed for giving directions before a judge by:

a) Serving the Memorandum of Appeal; and

b) Filing and serving the Record of Appeal.

In this case the Appellant admitted that he never filed or served the Record of Appeal within 30 days to enable the appeal to be listed before a judge to admit it to hearing under Section 79B of the Civil Procedure Act as directed by Order 42 Rule 2. He also admitted or did not deny the fact that he failed to cause the appeal to be listed for the giving of directions by the Judge in Chambers under rule 13 of the above-mentioned Order. And finally, he did not deny the fact that having been served with a notice of the Registrar to file the Record of Appeal which would cause all the relevant acts abovementioned to be undertaken by the Registrar, he ignored the same for all the relevant period. All he could say is that he was not responsible for the delay without supporting such an allegation.”

10. The appellant herein has not explained the reason behind the delay in filing a Record of Appeal as he filed no replying affidavit. Order 42 rule 35(1) of the Civil Procedure Rules provides for the respondent to either set down the appeal for hearing or apply for its dismissal for want of prosecution if within 3 months after the giving of directions under rule 13 of the same Order, the appellant shall not have set the appeal for hearing. Such directions have not been given in this appeal, which has not even been admitted to hearing. The applicant cannot as such invoke the provisions of Order 42 rule 35(1) in her favour.

11. In the case of **Kirinyaga General Machinery vs Hezekiah Mureithi Ileri** HCCC No. 98 of 2008 the Court observed thus:-

“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.”

12. This court is however not powerless when dealing with dismissal of appeals for want of prosecution under the provisions of Order 42 rule 35(2) of the Civil Procedure Rules. This procedure has however not been followed by the applicant to move this court for dismissal of the appeal.

13. In **Abdirahman Abdi v Safi Petroleum Products Ltd & 6 Others** [2011] eKLR, a notice of appeal was served on the respondent out of time and without leave of the court, upon being asked to strike it out, the Court of Appeal (Omolo, Bosire and Nyamu JJ.A) observed that:-

“The overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantive justice...

In the days long gone the court never hesitated to strike out a notice of appeal or even an appeal if it was shown that it had been lodged out of time regardless of the length of delay. The enactment of Sections 3A and 3B of the Appellate Jurisdiction Act, Cap 9 Laws of Kenya, and later, Article 159 (2) (d) of the Constitution of Kenya, 2010, changed the position. The former provisions introduced the overriding objective in civil litigation in which the court is mandated to consider aspects like the delay likely to be occasioned, the cost and prejudice to the parties should the court strike out the offending document. In short, the court has to weigh one thing

against another for the benefit of the wider interests of justice before coming to a decision one way or the other. Article 159 (2) (d) of the Constitution makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. That is not however to say that procedural improprieties are to be ignored altogether. The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the court strikes out its document. The court in that regard exercises judicial discretion." (emphasis added).

14. Although the foregoing case dealt with the striking out of the notice of appeal on the basis that it was served on the respondent out of time and without leave of the court, the jurisprudence it laid out is that the court in exercising its discretion to strike out a document, or like in this case, an appeal, has to weigh the prejudice that is likely to be suffered by the innocent party against the prejudice to be suffered by the offending party.

15. It is barely a year since the appeal was filed. The prejudice that the respondent is likely to suffer if this appeal is dismissed might be graver than the prejudice that the applicant will suffer if the appeal is ordered to proceed. In the interest of justice, this court will give an opportunity to the respondent to ensure that the appeal is set down for directions and hearing.

16. I decline to grant the prayers sought to strike out the memorandum of appeal and to dismiss the appeal for want of prosecution. No order as to costs.

DELIVERED, DATED and SIGNED at MOMBASA on this 20th day of April, 2017.

NJOKI MWANGI

JUDGE

In the presence of:-

Ms Kaguri holding brief for Mr. Gachiri Kariuki for the respondent/applicant

No appearance for the appellant/respondent

Mr. Oliver Musundi - Court Assistant