



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

CIVIL APPEAL NO. 17 OF 2015

MORRIS NJAGI.....1ST APPELLANT/Respondent

MUNYI ALEXANDER.....2nd APPELLANT/Respondent

-VERSUS-

MARY WANJIKU KIURA.....RESPONDENT/APPLICANT

RULING

1. The applicant **Beatrice Wanjiku Kiura** who is the respondent in this appeal filed an application dated 14th July, 2016 seeking orders that the appeal filed herein be dismissed for want of prosecution. The application is brought under **Sections 1A, 1B and 3A of the Civil Procedure Act** and **Order 42 rule 35 (2)** and **Order 51 rule 1 of the Civil Procedure Rules**.

2. The applicant based the application on three grounds; namely:

(a) That the respondents have not taken any steps towards the prosecution of the appeal.

(b) That it is now over one year and the respondents have not taken any steps towards the prosecution of this appeal.

(c) That it is only fair that the orders sought are granted as it is clear that the respondents are not keen on prosecuting the appeal.

3. The applicant supported the application with an affidavit sworn by Ichaura Wachira on 14th July, 2016 wherein he reiterates the above grounds and further depones that she continues to suffer prejudice as long as the appeal remains pending.

4. The respondents Morris Njagi and Munyi Alexander opposed the application and filed grounds of opposition. They contend that the application is fatally and incurably defective in form law and substance. That the application is incompetent, bad in law, misconceived and an abuse of the court process. That the appeal has not been admitted as provided under **Section 79B of the Civil Procedure Act** and as such no steps can be undertaken in the appeal. They further argue that directions ought to have been given under **Section 79B Civil Procedure Act** before the applicant could move the Court as provided under **Order 42 rule 35 Civil Procedure Rules**. It is only the Registrar who can list an Appeal before a Judge in chambers for Dismissal if directions under **Section 79B of the Civil Procedure Act** have not been issued. Finally that the application offends the mandatory provisions of the Civil Procedure rules, 2010.

5. The Respondent also relied on the replying affidavit sworn by Allan Ondongo.

6. The application was disposed of by way of written submissions. For the applicant, submissions were filed by Waiganjo Wachira & Co. Advocates while for the respondent submissions were filed by Kairu & McCourt Advocates.

7. I have considered the application. The applicant submits that the respondents never bothered to prepare the record of appeal and have never applied for certified copies of the proceedings. That it was impossible to list the matter for directions since the appellants have never prepared a record of appeal.

8. For the respondents it is submitted that under the provisions of **Order 42 rule 35 (2)** under which the application is brought the order for dismissal is not available as the provision can only be invoked by the Registrar where an appeal has not been set down for hearing. The appellants further state that they had applied for the certified copies of the proceedings, judgment and decree in order to prepare the record of appeal but are yet to be supplied with the same. That delay in prosecuting the appeal was not occasioned by any fault on their part and it is in the interest of justice that they be granted an opportunity to prosecute their appeal.

9. The issue which arises for determination is on the dismissal of appeal for want of prosecution. From the record, the memorandum of appeal was filed on 5th June, 2015. From the record, the appeal has not been admitted as provided under **Section 79B of the Civil Procedure Act**. The section provides:

“Before an appeal from a sub-ordinate 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.”

The applicant brought this application under **Order 42 rule 35 (2)**. **Order 42 rule 35 (1)** and **(2)** provides:

(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 to either set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.

(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.

The rule is clear that there are two situations where an application for dismissal can be made. The respondent can only apply if after directions have been given the appellant has not taken action to set down the appeal for hearing. The second is where the registrar with notice to the parties shall place the appeal before the Judge for dismissal if one year after service of memorandum of appeal the appeal has not been set down for hearing. The applicant is not in order to have brought the application under **Order 42 rule 35 (2)**. Under this provision the respondent should have requested the Registrar to list the matter for dismissal.

10. The respondent (applicant) submits that under **Section 3A Civil Procedure Act** the Court has powers to dismiss an appeal for want of prosecution where an appeal has not been admitted. **Section 3A** provides:

“Nothing in this Act shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”

The applicant cited **Section 3A and Order 42 rule 35 (2)** which is specifically dealing with the issue of dismissal. Where there is a specific provision, the Court will not rely on **Section 3A**. **Order 42 rule 35**

(1) and (2) is open to the applicant to apply for dismissal by herself where directions were given or by writing to the registrar to request that the appeal be placed before the Judge for dismissal. These provisions ensure that where delay may be occasioned by the appellant, the registrar can place the appeal before the Judge for dismissal. The respondent would not suffer prejudice. I have considered the case of **Hesbon Amata & Another -Vs- David Maina Waithaka and Karibu Industries -V- Nemchard Anand & Co.** which are persuasive decisions. It was stated that in proper and suitable circumstances the Court have jurisdiction to dismiss appeal which has not been admitted. I am of the view that the law on dismissal of an appeal for want of prosecution is Order 42 rule 35 Civil Procedure rules. In the case of **Elem Investment Ltd. -Vs- John Mokora Olwoma (2015) eKLR Aburili J** stated:

“a reading of the above provision shows that it is clear that an appeal can be dismissed for want of prosecution in two instances. Firstly where there has been a failure to admit the appeal for hearing three months after directions have been given under Order 42 rule 13 Civil Procedure rules or secondly if after one year of service of memorandum of appeal the appeal has not been listed for hearing.

In these two scenarios, the procedure is different. In the first scenario, the respondent is given the option to either list the appeal for hearing or apply for its dismissal. Under that scenario however, the appeal can only be dismissed if it has been admitted and directions have been given”.....

A party can only apply for dismissal where directions have been given. This is under **Order 42 rule 35 (1) Civil Procedure Rules**. I have already pointed out that no directions have been given. The appeal has to be admitted first before it can be listed for hearing. The provision under which this appeal could be dismissed for want of prosecution is **Order 42 rule 35 (2)**. This provision could not be invoked by the applicant. The applicant did not write to request the registrar to list the appeal for dismissal. I am persuaded to adopt the finding by **Aburili J in Rosarie (EPZ) Limited -V- Stanlex Mbithi James (2015) EKLR** where he stated:

“Since under Order 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.”

11. The applicant is not without an option if circumstances do not allow him to file an application under **Order 42 rule 35 (1)**. To overcome delay and prejudice the applicant can request the registrar to place the appeal before the Judge for dismissal other than move the Court under the wrong provision.

12. I am of the view that since no directions have been issued in the appeal the applicant (respondent) cannot move the court to dismiss the appeal for want of prosecution. In the case of **Kirinyaga Machinery -V- Hezekiel Mureithi Ileri H.C.C.C. No. 98/2008** where it was held:

“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. The directions having not been given, the orders sought by the respondent cannot be entertained.”

The same finding was arrived at in **Jurgen Paul Flach -V- Jane Akoth Flach (2014) eKLR, Justice Omondi**. I find that the law on dismissal of appeal for want of prosecution under **Order 42 rule 35 (1) and (2)** has been interpreted in the above authorities. I am of the view that this application could not be brought under **Order 42 rule 35 (1)** as no directions had been given.

The application is not properly before the Court and lacks merits. I dismiss it with costs.

Dated and delivered at Kerugoya this 22nd day of September, 2017.

L. W. GITARI

JUDGE

Read out in open court, Mr. Ngigi for Applicant, Mr. Muchira holding brief for Mr. Kariuki for Respondent, court assistant Naomi Murage.

L. W. GITARI

JUDGE

22.9.2017