



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

CIVIL APPEAL NO. 18 OF 2015

MORRIS NJAGI

MUNYI ALEXANDER.....APPELLANTS

-VERSUS-

MARY WANJIRU KIURA.....RESPONDENT

RULING

1. The applicant **Mary Wanjiru Kiura** and the respondent in this appeal by a Notice of Motion dated 24th July, 2016 brought under **Section 1A, 1B and 3A Civil Procedure Act** and **Order 42 rule 35 (2)** and **Order 51 rule 1 Civil Procedure Rules** seeks orders that the appeal be dismissed with costs for want of prosecution. The application is based on three grounds namely:

a. The Respondents have not taken any steps towards the prosecution of this 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 just and fair that the orders sought are granted as it is clear that the respondents are not keen to prosecute the appeal.

The application supported by the affidavit of **Ichaura Wachira**. The applicant is contending that the lack of diligence by the Respondents would prejudice the Respondent.

2. The Respondent opposed the application and filed a replying affidavit sworn by Tina Owuor. The respondents (appellants) Morris Njagi and Munyi Alexander are contending that they instituted this appeal dated 25th May, 2015 against the judgment of Hon. Jalang'o, Magistrate delivered on 7th May, 2015 in **Baricho PMCC No. 48 of 2013, Mary Wanjiru Kiura -V- Morris Njagi & Munyi Alexander**. Subsequently they applied for certified copies of the decree, judgment and typed proceedings to enable them file records of appeal. These have not been availed. That the appeal has not been admitted in accordance with **Section 79B of the Civil Procedure Act**. The applicant can only move the Court to dismiss the appeal for want of prosecution as provided under **Order 42 rule 35**. That is to say it is the registrar who can list an appeal before a Judge in Chambers for dismissal if directions have not been issued. For the applicant to bring the application, she is usurping the duties of the deputy registrar. Their right to fair trial will not be considered. That in the interests of justice the application be dismissed.

3. I have considered the application. The issue for determination is whether the appeal should be dismissed for want of prosecution. From the record, a memorandum of appeal was filed on 5th June,

2015. On 17th March, 2016 the record of the Lower Court was received by the Deputy Registrar. The file was then submitted to the Judge for perusal under **Section 79 B Civil Procedure Act** on 6th May, 2016. Later on 9th May, 2016 the Judge, Justice Limo gave directions that the appeal be admitted to hearing.

4. The Respondent filed this application on 14th July, 2016. This was less than three months from the date the appeal was admitted. No directions had been given under **Order 42 rule 13** which requires that directions be given by the Judge before the hearing.

5. The law relating to dismissal of appeals for want of prosecution is provided under **Order 42 rule 35** of the **Civil Procedure Rules**. It is provided that:

As I have pointed out, from the record the Memorandum of appeal was filed on 5th June, 2015 and the application for dismissal was filed on 21st July, 2016. The appellants had not taken action to close to a year. The appellants claim that they had applied for certified copies of the proceedings, judgment and decree but the said documents had not been availed to them to enable them to prepare a record of appeal and fix the same for directions. They have not attached the letter requesting for the records and it is therefore not clear when they applied if at all they had applied. The certified copies of the proceedings are now on record and the appeal has been admitted to hearing.

6. The Respondent (applicant) cannot seek to dismiss the appeal for want of prosecution before directions under **Order 42 rule 13** are taken. She should have requested the registrar to list the matter for dismissal by the judge under **Order 42 rule 35 (2) Civil Procedure Rules**. She could not bring this application herself under **Order 42 rule 35 (2) Civil Procedure rules**. In the case of **Rosavie (EPZ) LIMITED –v- Stanlex Mbithi eKLR**. The Court in dismissing a similar application stated as follows:

“The law on dismissal of an appeal for want of prosecution is contained in Order 42 Rule 35 of the civil Procedure rules. The rule contemplates two scenarios when an appeal can be dismissed. One is where three (3) months after issuance of directions no steps have been taken to prosecute the appeal i.e. Order 42 Rule 35 (1), and the second is where no steps have been taken to prosecute the appeal within one year after the service of the memorandum of appeal i.e. Order 42 35 (2). Under the first scenario, it is the Respondent to move the Court whilst under the second scenario, the action is by the registrar.

In the instant case, no directions have been taken. The applicable provision therefore is Order 42 rule 35 (2) which specifically provides that:

“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.” (Emphasis own).

From the above provision, it is clear that it is upon the registrar to list the appeal before a judge in chambers for dismissal. I have taken the liberty to read the record, a similar application was on 13th May, 2009 struck out by Lady Justice H. N. Okwengu (as she then was). The reasons advanced then by the Appellant for delay in prosecuting the appeal were similar to the reasons tendered now. 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 accede 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 later failed, I find it difficult to accede to the application.”

7. Further in the case of **UAP Insurance Company Limited v Washington Gaura Kimani [2016] eKLR** The Court in dismissing a similar application stated as follows:

“Order 35 (1) provides for 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 case, the Respondent can either fix the Appeal for hearing or apply by summons for it to be dismissed. In the case of Kirinyaga General Machinery Vs Hezekiel Mureithi Ileri HCCC No. 98/2008 the judge observed:-

“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 79B.”

The second scenario is that contemplated under Order 42 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.

Nothing that no directions have been issued in this Appeal and based on the provisions of Order 42 Rule 35(1), I have no reason to deviate from the holding in Kirinyaga General Machinery Vs Hezekiel Mureithi Ileri (supra).”

This is the law on dismissal of appeals for want of prosecution and I agree with the findings and I have no reason to deviate from it.

8. I have considered the submissions by the applicant that on public policy that the business of the Courts should be conducted with expedition as held in **Mukisa Biscuits Manufacturing Co. Ltd. -V- West End Limited** that:-

“I am of the view that the provisions of Civil Procedure Rules for the dismissal of suits for want of prosecution do not purport to be exclusive and do not fetter the court’s inherent jurisdiction to dismiss suits in circumstances not falling directly within the provisions, if it is necessary to do so to prevent injustice or abuse of process of the Court.....”

I have also considered the case of **Hesbon Amata & Anor V- David Maina Waithaka, Kariby Industries -V- Nemcharnd Anand & Co.** and **Harron E. Ogechi -V- British American Insurance** submitted by the respondents that in suitable circumstances the Court always has jurisdiction to dismiss an appeal which has not been admitted or in respect of which directions have not been given by a judge. These are persuasive decisions. I am of the view that where there is a specific provision the Court will not rely on its inherent jurisdiction. There are provisions with safeguards to ensure that an appellant will not abuse the process to delay the appeal. The applicant will apply for dismissal or request the registrar to place the appeal before the Judge for dismissal. These provisions ensure that where delay may be occasioned by the appellant the registrar will act by placing the file before the Judge with notice to the parties for dismissal.

9. I am of the view that the applicant could not bring the application under **Order 42 rule 35 (2)**. The application lacks merits. I dismiss it with costs.

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

L. W. GITARI

JUDGE

Ruling read out, Mr. Ngigi for applicant.

Mr. Muchira holding brief for Mr. Kariuki for Respondent.

Court Assistant Naomi Murage.

L. W. GITARI

JUDGE

22.9.2017