



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KAKAMEGA.

CIVIL APPEAL NO. 115 OF 2014.

MUMIAS SUGAR COMPANY LIMITED ::::::::::::::: APPELLANT

VERSUS

JOYCE WERE NGALA ::::::::::::::: 1ST RESPONDENT

JENNIFER ONYANGO OPIMBI ::::::::::::::: 2ND RESPONDENT

R U L I N G.

Background

1. On 17th October, 2011, the 1st respondent was a pillion passenger aboard motor cycle registration No. KMCR 592R TVS Star belonging to the 2nd respondent. Motor vehicle Registration No. KAZ 095G belonging to the appellant was involved in an accident with the 2nd respondent's motor cycle as a result of which the 1st respondent sustained injuries. She filed a suit in the Principal Magistrate's Court at Butere in Civil Case No. 213 of 2013. The said case was heard and judgment was entered at the ratio of 70% and 30% against the appellant and the 2nd respondent respectively.

2. The appellant being dissatisfied with the said judgment filed a memorandum of appeal on 27th October, 2014. On 18th December, 2014, the Advocates for the parties hereto agreed to stay of execution pending the hearing and determination of the appeal herein. A joint interest earning account was opened in the names of the law firms on record wherein the decretal sum awarded by the lower court was deposited pending the hearing and determination of the appeal. The applicant/1st respondent is aggrieved that the appellant has taken no step to list the appeal down for hearing thus this application before me.

The applicants' case

3. The applicant/1st respondent by way of Notice of Motion dated 1st September, 2015 moved this court under the provisions of order 42 rules 11, 13 (1), 35 (1) and order 51 rule 1 of the Civil Procedure Rules 2010, seeking orders for dismissal of Kakamega High Court Civil Appeal No. 115 of 2014, for want of prosecution.

4. The application is premised on the grounds that:-

(a) The appellant has since 27th October, 2014 when it filed the appeal failed to cause the matter to be listed before the Honourable Judge for directions;

(b) The appellant has since 27th October, 2014 when it filed the appeal failed to file and/or cause a record of appeal be filed (sic) and served and have the matter listed for directions to have the appeal to be heard (sic) and be finally disposed off;

(c) It is now well over 30 days when the appellant was supposed to have caused the matter to be listed for directions but failed to do so and well over ten (10) months since the appeal was filed and the appellant has failed to file a record of appeal and move the court to have this appeal heard and determined;

(d) In view of the foregoing the appellant has completely lost interest in this case and/or is not keen to have it heard and determined and the conduct of the appellant is meant to delay the applicant from realizing the fruits of her judgment in terms of the decretal sum that was deposited in a joint interest earning account by consent pending the hearing and determination of the instant appeal; and

(e) The interests of justice dictate so.

5. The application was supported by the affidavit of Charles S. Kweyu the Advocate for the applicant/1st respondent.

Applicant's submissions.

6. Mr. Kweyu, learned counsel for the applicant/1st respondent submitted that the application dated 1st September, 2016, is brought under Order 42 rule 11, rule 13 (1), rule 35 (1) and order 51 rule 1 of the Civil Procedure Rules. He prayed for the instant appeal to be dismissed with costs for want of prosecution. He relied on grounds (a)-(e) on the face of the application which were fortified by his affidavit sworn on 1st September, 2015 and the annexures thereto. Mr. Kweyu submitted that the appeal was filed on 27th October, 2014, but since then, the appellant has failed to file and serve a record of appeal and to have the appeal listed for directions.

7. Mr. Kweyu submitted that under order 42 rule 11, it is mandatory for an appellant to list his appeal for directions under section 79B of the Civil Procedure Act. Under order 42 rule 13 (1), it is mandatory for a Notice to be delivered to the applicant/1st respondent within 21 days after the date of service of the memorandum of appeal. The appellant has not complied with rules 11 and 13 (1) of order 42 of the Civil Procedure Rules.

8. Mr. Kweyu also submitted that pursuant to rule 35 (1) of order 42 of the civil procedure rules, if the appeal has not been set down for hearing, a party is at liberty to apply for dismissal. He submitted that the appellant has lost interest in the instant appeal and is not keen to have it heard yet the applicant/1st respondent consented to the decretal sum being deposited in a joint interest earning bank account pending the hearing of this appeal. Once the above was done there was no further action on the part of the appellant. It was submitted that failure to comply with order 42 rule 13 (1) of the civil procedure rules leads to dismissal of an appeal. Mr. Kweyu invited the court to look at his affidavit at paragraphs 1 to 9 so as to arrive at its decision. He urged the court to reject the replying affidavit dated 5th November, 2015, as it raises no sufficient grounds in opposition of the applicant's application. Furthermore, the letter referred to in paragraph 5 of the replying affidavit is unsigned. There is also no correspondence from the Executive Officer, Butere Law Courts to indicate that the file, the subject of appeal was missing.

9. Mr. Kweyu submitted that on his part, he applied for certified copies of proceedings for Butere SPMCC No. 213 of 2013 which he obtained on 19th September, 2014 and that the appellant therefore seems not have taken any steps to obtain the same. He submitted that the appeal seems to have been lodged to deny the applicant/1st respondent the enjoyment of the fruits of the judgment.

Mr. Kweyu prayed that the application be allowed as the appeal is an abuse of the court process.

The Respondent's submissions

10. Mr. Maganga learned counsel for the respondent opposed the application. He relied on the replying affidavit of Mitchel J.B Menezes Advocate in responding to the application.

11. Mr. Maganga submitted that the delay in prosecuting the appeal is not intentional in that the appellant has shown proof of efforts it has taken to obtain copies of proceedings and judgment from the lower court but the same have not been availed to the appellant. Mr. Maganga submitted that it is beyond the appellant's control to obtain certified copies of the proceedings as the Butere law courts have not availed the same to date.

12. Mr. Maganga prayed that the application be dismissed with costs. He added that the appellant's appeal raises triable issues and if the same is dismissed, it would stop the appellant from approaching the seat of justice.

Determination of the application

13. Order 42 of the Civil Procedure Rules envisages two situations. The first being under order 42 rule 13 (1) of the Civil Procedure Rules where the appellant is required to cause an appeal to be listed for the giving of directions by a judge after the appellant gives notice to the other parties, of not less than twenty one (21) days after the date of service of the memorandum of appeal.

14. The other situation is as provided under order 42 rule 35 which reads:-

“(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 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. It is evident from the provisions of order 42 rule 13 (1) and order 42 rule 35 (1) that before a respondent can move a court for dismissal of an appeal for want of prosecution, directions must have been given. In the instant appeal, directions have not been given.

16. In addition, the appeal in this matter has not been admitted to hearing pursuant to the provisions of section 79B of the Civil Procedure Act which 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."

17. In the case of **Mini Bakeries Ltd vs. Edward Mbuta Komu HCCA 836 of 2005**, the court held that ***an appeal could not be dismissed for want of prosecution where the appeal had not been admitted to hearing.***

It is therefore apparent that the applicant/1st respondent has come prematurely to the seat of justice.

18. On the part of the appellant, it is my finding that it has been sitting on its laurels. The only action it seems to have taken is by writing to the Butere Senior Resident Magistrate on 17th March, 2015 requesting for certified copies of the lower court proceedings. I will not take any issue with the letter attached to the affidavit of the appellant's counsel being unsigned, for it could have been photocopied from their office file copy. It is however evident that no follow up has been made in writing since 17th March, 2015. This court can therefore not verify the information deposed in the appellant's Advocate's affidavit in paragraph 5 that the delay has been occasioned by the lower court's failure to avail certified copies of the proceedings as the lower court file had gone missing for some time.

19. This court takes cognizance of the fact that the overriding objectives espoused in sections 1A (1) of the Civil Procedure Act (the Act) is to facilitate, the just, expeditious, proportionate and affordable resolution of civil disputes governed under the Act.

Section 1A (3) thereof provides that:-

“A party to civil proceedings or an advocate for such a party is under a duty to assist the court to further the overriding objective of the Act and to that effect to participate in the processes of the court and to comply with the directions and orders of the court.”

20. It therefore follows that litigants, their advocates and the courts have an active role to play in the implementation of the foregoing provisions of the law and in ensuring that disputes in court are dealt with expeditiously. It was therefore incumbent on the appellant to relentlessly follow up on obtaining copies of the lower court proceedings and have the appeal listed down for directions.

21. After consideration of all the facts, submissions of counsel and the applicable law, I make the following orders:-

(i) The appellant is granted 30 days to file and serve his record of appeal;

(ii) The appellant will thereafter, within 21 days cause the appeal to be listed before a judge for directions;

(iii) If orders (i) and (ii) are not complied with by the appellant, the applicant/1st respondent will be at liberty to bring the appeal to the attention of the Registrar to have the appeal placed before a Judge in chambers, for dismissal; and

(iv) Costs to the applicant.

DELIVERED, DATED and SIGNED in open court at **KAKAMEGA** on this**19TH**..... day of**FEBRUARY**,, 2016.

NJOKI MWANGI.

JUDGE.

In the presence of:-

..... **for the Applicant/1st Respondent.**

..... **for the appellant.**

..... **Court Assistant.**