



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NUMBER 102 OF 2015

DHIRAJLAL V. PATANI. PLAINTIFF

VERSUS

SELINA PATANI.1ST RESPONDENT

ASHIT PATANI. 2ND RESPONDENT

RAMABEN PATANI. 3RD RESPONDENT

RULING

1. The Respondents took out a Notice of Motion dated 17th March, 2016 wherein they have prayed for orders to wit: -

a) That the appeal herein be dismissed for want of prosecution.

b) That the funds held in the Fixed Joint Account No. 030005061428 now held at Paramount Bank Limited, Koinange Branch jointly in the names of Gachie Mwanza & Co. Advocates and Okongo Wandago & Co. Advocates be released to Gachie Mwanza & Co. Advocates.

c) That costs of this application be provided for.

2. The Appellant in response has filed a Replying Affidavit sworn by Amos Ogotu Wandago on the 25th April, 2016. The parties also filed their respective submissions. The Respondents/Applicants submitted that the appeal should be dismissed for want of prosecution since there has been inordinate delay in prosecuting the appeal. They aver that it's been more than one year since the appeal was filed and no steps have been undertaken to prosecute the same. They contended that, under Order 42 Rules 11 and 13 of the Civil Procedure Rules, 2010, it is clear that once an Appellant lodges an appeal, they should cause the appeal to be listed for directions within 30 days so that the court can peruse the appeal and decide whether it is merited or not, in accordance with Section 79B of the Civil Procedure Act. They claimed that since the appeal was lodged on 13th March, 2015, it should have been listed by May, 2015. They also cited Order 42 Rule 35(1) that grants them right to apply for the dismissal of the appeal if there is inaction for a period three months.

3. They further asserted that Appellant had ample time to prosecute the appeal especially after the claim to reach an out of court settlement was clarified by the Respondents which he did not. They further submitted that the appeal is just a means of delaying the enjoyment by the Respondents of their fruits of judgment entered in their favour, and that the long wait for the appeal to be prosecuted is prejudicial to them as anything could happen. They cited the case of **Jurgen Paul Flach Vs Jan Akoth Flach (2014**

eKLR, where the judge dismissed the Appeal as it had been over one year since the appeal was lodged and no directions had been sought to ensure the progress of the matter.

4. The Appellants on the other hand submitted that directions have never been given in this matter thus the Respondents cannot apply to have the appeal dismissed for want of prosecution. He argued that the parties agreed by consent to stay the judgment and decree in Milimani CMCC No. 7365 of 2009 pending the hearing and determination of the appeal on conditions that the Appellant deposits Ksh.1,500,000/- in a joint interest account which was done. He averred that he has made efforts to dispose of this matter expeditiously by reaching out to the Respondents with an effort to reach on out of Court settlement, but he has not been successful. He averred that it would be false to claim that he has gone to sleep. He cited Article 159(2) (d) of the constitution of Kenya and stated that this court has the judicial discretion to weigh the prejudice that is likely to be suffered by the innocent party against the prejudice to be suffered by the offending party if the court strikes out the appeal. He further stated that since the Appellant has already deposited the decretal sum in a joint interest earning account, then the Respondent will not be prejudiced in any way if the appeal is heard and determined on merits. He argued that his appeal has high chances of success.

5. The law on dismissal of an appeal for want of prosecution is contained in Order 42 Rule 35 of the Civil Procedure Rules. This provision reads that: -

“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 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.”

6. According to the above provisions, the Respondent can only move the court to dismiss an appeal, three months after directions have been given under Rule 13. Order 42 Rule 13 (1) of provides that on notice to the parties delivered not less than twenty one days after the date of service of the Memorandum of Appeal, the Appellant is required to cause the appeal to be listed for giving of directions. On the same limb under Order 42 rule 11, which is crafted in mandatory terms, the Appellant is required within thirty days, to cause the matter to be listed before a judge for directions under Section 79B of the Act. This appeal should, therefore, have been listed for directions before a judge latest 13th April, 2015. The Record of Appeal was filed on 24th March, 2016, but the Appellant did not cause the same to be listed before a Judge for directions and was perhaps prompted to action upon receiving the Respondents current application that was filed on 17th March 2016. A period of one year is indeed inordinate delay.

7. Be that as it may, it is noted that the lower court file yet to be availed and as such the court could not peruse the appeal in the spirit of Order 42 Rules 11 and 13 even if the Appellant had moved the court. However, even then, the Appellant ought to have moved the court or the Deputy Registrar who would have hurried the process of obtaining the lower court file.

8. The Appellant in an attempt to explain the delay claims that the parties were discussing a possibility of an out of court settlement, an explanation that the Respondents have refuted. The Appellant has produced evidence to support this by a letter dated 14th July, 2015. However, the Respondents through their advocates responded to that letter vide a letter dated 20th July, 2015 wherein they have refuted any claims to the effect that there were ongoing negotiations. This letter was received by the Appellant on 22nd July, 2015 as per the receipt stamp. Since, that day in July the Appellant has not taken any steps to list the matter for directions. This court, however, has noted that he filed a record of appeal on 24th March, 2016. In the interest of Justice and in furtherance of substantive justice as envisaged under Article 159 (2) (a) of the Constitution which is the supreme law of the law this court will exercise its discretion in favour of the Appellant and allow him time to prosecute this appeal.

9. In the premises foregoing, the application dated 17th March, 2016 is hereby dismissed but with no orders as to costs. In furtherance of justice and for expeditious prosecution of the appeal herein the Appellant is hereby ordered to prosecute the Appeal within 90 days failing which it shall stand dismissed.

Dated, signed and delivered at Nairobi this 29th day of September, 2016.

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L NJUGUNA

JUDGE

In the presence of

..... *for the Appellant.*

..... *for the Respondents.*