



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 184 OF 2014
(From the Original Civil Suit Kiambu
CMCC No. 168 of 2012)

DANIEL NDERITU.....APPELLANT

V E R S U S

RACHEAL NJERI KIMANI

(Suing as the legal representative

of the Estate of ISAAC KIMANI MWANGI)

JOHN MWANGI MUTHONI.....RESPONDENTS

RULING

This is an application by the Respondents, seeking the main order that the appeal be dismissed for want of prosecution. It is expressed to be brought under Section 3A of the Civil Procedure Act (the Act), Order 42 rule 35(2) and Order 51 rule 1 of the Civil Procedure Rules. There is a supporting affidavit sworn by both Respondents.

The Appellant has opposed the application. The grounds of opposition emanating from the replying affidavit filed on 18th April, 2016 and sworn by one Wilson K. Gathogo, Counsel for the Appellant are -

1. That the delay in filing the Record of Appeal is not inordinate and is excusable as it was occasioned by delay in obtaining certified proceedings.
2. That the lower court record was yet to be made available to the High Court registry to enable parties comply with Section 79B of the Civil Procedure Act.
3. That the memorandum of appeal is not admitted to hearing and that it's after admission that the court has to comply with Order 42 Rule 11 and 12 of the Civil Procedure Rules.
4. That the appeal has since been filed and served and therefore can be injected with life by expediting the pending process.
5. That the Appellant undertakes to prosecute and proceed with the hearing of the Appeal without further delay as it will be set down for hearing at the earliest available date.

6. That in spite of delay, justice can still be done if the parties are heard and matter determined on merit.

7. That the Respondents shall suffer no prejudice as the entire decretal amount has been deposited in an interest earning joint account in the names of the Advocates on record.

There is a supplementary affidavit filed on 25th April 2016 which reiterates the contents of the supporting affidavit while insisting that it is this application for dismissal that awoke the Appellants from their slumber, as it has been over two years since the memorandum of appeal was filed and no action has seemingly been taken to have it heard and determined.

I have considered the submissions of the learned counsels appearing. I have also perused the record of the court. The memorandum of appeal dated 15th May 2014 was filed on the same date. The appeal is against the order of the lower court in Milimani CMCC NO. 168 of 2012 (C. Oluoch, PM) dated 2nd April 2014. By that order the Respondent obtained judgment where he was awarded damages plus costs and interest.

Thereafter, stay of execution was sought and granted until appeal is heard and determined upon the condition that the Appellant pays the Respondents Kshs. 600,000/- of the decretal sum and also deposit the balance calculated at Kshs. 1,200,000/= in to an interest earning joint account in the names of both Counsels. This order was made on 18th November 2014. The Appellant seemingly did not take any other action until the current application was filed.

As a certified copy of the decree or order appealed against was not filed with the memorandum of appeal, the Appellants were required to comply with the provisions of Order 42, rule 2 of the rules. That rule requires an appellant to file as soon as possible, where he has not done so with the memorandum of appeal, and in any event within such time as the court may order, a certified copy of the decree or order appealed against.

The court need not consider whether to reject the appeal summarily under Section 79B of the Civil Procedure Act until such certified copy is filed.

It appears that the Appellant only took steps to obtain a certified copy of the order appealed against by paying the lower court fees after the current application was filed. The record of appeal was also filed after the current application was filed. The Appellant has in this regard disclosed that they are doing something towards prosecution of the appeal.

Having said that, it is an Appellant's obligation to ensure that his/her appeal is disposed of as soon as possible. What is a respondent to do where it is apparent that the appellant does not intend to take even the very initial steps, like obtaining and filing a copy of the decree or order appealed against, so that the appeal may be considered for admission? It cannot be forgotten that under sub-rule (1) of rule 35 of Order 42, the option of the respondent to either set down the appeal for hearing or to apply for its dismissal for want of prosecution is available only after directions under rule 13 of the same order have been given. Under sub-rule (2) of rule 35 it is the registrar who may move a judge in chambers for dismissal of the appeal if within one year after service of the memorandum of appeal the appeal shall not have been set down for hearing by the appellant.

Is a respondent then to be held at ransom by the appellant simply because directions under rule 13 have not been given and the registrar has not moved a judge in chambers for dismissal of the appeal? This cannot be allowed to happen because an appeal, in the circumstances, cannot continue to hang indefinitely over the Respondent's head. It's already been over two years since the memorandum was filed. While the Appellant's Counsel has alluded to the fact that the balance of the decretal amount is held in a joint interest earning account by both Counsels, the respondents are still not enjoying the fruits of judgment passed in their favour.

The court has inherent power to order dismissal of an appeal for want of prosecution even where directions under rule 13 have not been given if it is clear that the Appellant has no intention of having the appeal admitted to hearing and thereafter heard or otherwise disposed of. So, a respondent can properly move the court under Section 3A of the Act for dismissal of an appeal for want of prosecution before directions under rule 13 have been given.

In holding that a Respondent can properly move the court under its inherent power to dismiss an appeal even where directions under rule 13 have not been given, he must first expend the available remedies under the Rules before he can so move the court. He can write to the registrar to request that the appeal be placed before a judge in chambers under rule 35(2) for dismissal. He could also seek directions under rule 13, sub-rule (3) where a judge can give directions concerning the appeal generally. The Respondents have not done any of these.

In the event, the Respondents application must fail. It is hereby dismissed. The parties shall bear their own costs of the application.

Orders accordingly.

Dated, signed and delivered at Nairobi this 26th day of September 2016.

A. MBOGHOLI MSAGHA

JUDGE