



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEALS DIVISION

CIVIL APPEAL NO. 493 OF 2008

CHETAN LALIT KUMAR VAKHARIA.....1ST APPELLANT

HITEN LALIT KUMAR.....2ND APPELLANT

VERSUS

DR.S.O OWINGA.....RESPONDENT

RULING

1. Through, a Chamber Summons dated 4th March, 2014 and filed on 5th March, 2014, the Respondent prays for the dismissal of this appeal for want of prosecution. The Application is brought under SectionS 1A, 1B and 3A of the Civil Procedure Act together with Order 42 rule 35(1) of the Civil Procedure Rules 2010. The Respondent relied on the grounds on the face of the application and his supporting affidavit sworn on 4th March, 2014.
2. It was contended that Judgement appealed against was entered on 29th August, 2006 in favour of the Plaintiff/Respondent for the sum of Kshs. 219,000/- plus costs and interest being outstanding fees for professional medical services rendered to the 1st Defendant/Appellant. That being dissatisfied with the said Judgement, the Appellants filed a Memorandum of Appeal on 17th September, 2008 and subsequently a Record of Appeal on 18th October, 2010. According to the Respondent, the Appellants have since then, failed to fix the matter for directions despite several reminders to do so. That in the foregoing, the Appellants have failed to prosecute the instant appeal for over three (3) years and three (3) months and have been enjoying stay orders since 1st November, 2008.
3. Ms. Rwangyezi, learned Counsel for the Respondent, submitted that it has been more than four years since the Appellants took any steps in the Appeal. That since the Appellant is still enjoying the stay orders issued by the Lower Court, the Respondent has been prejudiced given that he cannot enjoy his fruits of litigation and the case is still hanging over his head. According to MS. Rwangyezi, the Appellants had not presented any sufficient reason as to why they had not prosecuted their appeal. He further pointed out that even if the Appeal was admitted in January, 2013 as contended by the Appellants, nearly two years have lapsed and the same was yet to be admitted for directions. Citing the Case of **Gateway Insurance –vs- Simon W. Gakuru (2014) eKLR**, learned counsel submitted that the Court can still dismiss the appeal for want of prosecution even where directions have not been issued owing to its inherent jurisdiction under section 1A, 1B and 3A of the Civil Procedure Rules 2010. The Respondent therefore urged the court to allow the application and grant the prayers sought.
4. In response to the application, the 2nd Appellant filed a Replying Affidavit sworn on 1st July,

2014. According to the Appellants, the application before the court lacked merit and was an abuse of the court process. It was contended that the matter was last in court on 25th January, 2013 when the appeal was admitted. That in the foregoing, the same was ready for hearing and the Appellants, through their advocates have been trying to fix the matter for hearing without success. According to the Appellants, the delay was attributed to the fact that court file had gone missing and could not be traced. The Appellants thereby contended that they have not lost interest in the matter and the court can still direct that the matter be disposed in an efficient manner.
5. In his submission, Mr. Mutua, learned counsel for the Appellants contended that the Appeal was admitted on 25th January, 2013. That the delay in fixing the matter for directions was due to the unavailability on the court file and the passing away of the 1st Appellant. That since then, the Appellant's had been trying to apply for the substitution of the 1st Appellant. Relying on the case of **Jurgen Paul Flach –vs- Jane Akoth Flach (2014) eKLR** Mr. Mutua, contended that under order 42 Rule 35 (1) an appeal can only be dismissed where directions have been given. Accordingly, it was the Appellants' submission that they should be given a chance to prosecute the appeal as the same is merited. Mr. Mutua therefore urged the court to dismiss the application with costs.
 6. I have carefully considered Application and the affidavits of the respective parties. I have also considered the submissions of learned Counsel. The sole issue for determination is whether the Respondent has met the conditions for granting an order for dismissal of an appeal for want of prosecution.
 7. The law concerning dismissal of an appeal for want of prosecution is contained in Order 42 Rule 35 of the Civil Procedure Rules. The same states as follows :-

“35. (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 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.”

8. In this matter, the Appellants filed the Memorandum of Appeal on 4th November 2008 and a Record of Appeal on 18th October, 2010. I also note from the court record that the instant Appeal was admitted for hearing on 12th October, 2012. However, the said appeal is yet to be listed for directions. The Appellants' counsel submitted that until and unless directions are issued, an appeal cannot be dismissed for want of prosecution. In **Kirinyaga General Machinery v. Hezekiel Mureithi Ileri HCC No.98 of 2008 Kasango J.**, 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 8B. Directions have never been given in this matter. The directions having not being given the orders sought by the respondent cannot be entertained.”

9. I am in agreement with the above holding. For an appeal to be dismissed, at the instance of a Respondent, directions ought to have been given by the Court. In this case, directions are yet to be given. Be that as it may, I am however of the opinion that the court can still exercise its discretion, considering the special circumstances of the case and invoke Order 42 Rule 35 (2). Has the

Respondent produced enough evidence to persuade this court to exercise its discretion and dismiss the appeal?

10. The record shows that the appeal was filed on 17th September, 2008. The record of appeal was filed on 18th October, 2010. The original case file, proceedings and judgement of the lower court were received by this court on 8th March, 2012. Soon thereafter the appeal was admitted to hearing by **Angawa J** on 12th October, 2012. However, I note that from the affidavit of the 2nd Appellant, it was deponed that the matter was last in court on 25th January, 2013 when the court admitted the Appeal and stated that the same was ready for hearing. Though there are disparities with regard to this disposition and what is on the court record, I find that the Court record is a more accurate account of when the Appeal was admitted.
11. Having noted this, it is clear that a period of over two years has lapsed since the matter was last in court. The Appellants blamed this delay on the fact that the court file had gone missing and could not be traced. They exhibited various letters from their advocates to the Deputy Registrar requesting for assistance in tracing the court file. Those letters are dated 12/4/13, 15/8/13 and 5/10/13. It is however of note that the same do not bear a stamp of receipt from that office. I have perused the court file and the said letters are not on record. There is therefore no evidence to show that the said letters reached the Deputy Registrar. However, since the Court file is now before the Court, I am of the opinion that the matter is now ripe for hearing and the matter can now be set down for hearing to avert any further delays without necessarily dismissing the appeal.
12. With regard to the argument that the Respondent has suffered prejudice due to the delays in prosecuting the Appeal, I note that the Appellants deposited the decretal amount as part of the conditional stay that was granted by the lower court. The same was released to a joint interest earning account in the names of the respective parties' advocates at CFC Stanbic Bank at International Life House Branch as part of a consent order dated 4th November, 2008. Thus the lower court while granting the stay of execution placed the Respondent in a position in which, should the appeal fail, it would be easy for him to realize the fruits of his litigation due to the security ordered in terms of the decretal amount deposited in the joint interest earning account. As such, I find that any prejudice suffered by the Respondent can be adequately compensated by the decretal sum in the interest joint account and an award of costs.
13. The upshot of the foregoing is that the application is dismissed. Under Sections 1A, 1B and 3A of the Civil Procedure Act, I give directions as follows: -

- a. **The appeal be heard at Nairobi by a single judge.**
- b. **The appeal be determined by way of written submissions to be highlighted.**
- c. **The Appellants to file and serve written submission within 30 days of this ruling.**
- d. **The Respondent to file and serve his written submission within 30 days of service.**
- e. **Highlighting on a date to be taken at the registry. That date to be within 90 days of the date hereof in default whereof the appeal shall stand dismissed.**

Dated and deliered at Nairobi this 23rd day of January, 2015.

.....

A MABEYA

JUDGE