REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL CASE NO. 664 OF 2012

ALLAN OTIENO OSULA..PLAINTIFF

VERSUS

GURDEV ENGINEERING & CONSTRUCTION LTD....DEFENDANT

RULING

The judgment subject matter of this appeal was delivered on 9th November 2012 in Nairobi CMCC No. 6166 of 2011 by Hon Ole Kelwua Principal Magistrate.

The appellant herein who was the Defendant in the Lower Court being dissatisfied with the judgment and decree of the Subordinate court did on 5th December 2012 file a Memorandum of Appeal which is dated 4th December 2012.

By 26th May 2014, the appellants had not taken the appropriate steps to have the appeal prosecuted, which inaction prompted the Respondent to file an application by way of Notice of Motion dated 24/4/2014, seeking to have the appeal struck out with costs to the respondent on the grounds that:

a. The appeal was filed on 5/12/2012

b. No certified copy of decree has been filed within reasonable time.

c. The appellant has not set down the appeal for directions under Section 79B.

d. Essential steps have not been taken within the prescribed time or within reasonable time.

e. No record of appeal has been filed todate.

The said application is further supported by the annexed sworn affidavit of Nelson Kaburu Felix advocate who deposes that upon filing of this appeal, the appellant sought and obtained stay of execution pending appeal on 12/4/2013 but that contrary to Order42 (2) of the Civil Procedure Rules 2010, the appellant has not filed a certified copy of decree appealed from with the Memorandum of Appeal and where it was not possible, has not filed it “**as soon as possible”** or within such time as the court may order.

In addition, it is deposed that the appellant has failed to comply with Order 42 rule 11 which requires that upon filing of Memorandum of Appeal, the appellant must, within 30 days cause the matter to be listed before a judge for directions under Section 79B of the Civil Procedure Act. In this case, it is deposed that

it is over one year since filing and serving of the Memorandum of Appeal.

That the appeal has not been listed for directions contrary to Order 42 rule 13 (1) and that court documents listed in Order 42 rule 13 (4) have not been filed todate.

That contrary to Order 21 rules 8 (5) and 20 and Order 42 rule (2) the appellant has not obtained decree and certificate of costs in the lower court and no record of appeal has been compiled and filed despite being reminded by the Respondent on 12/11/2013.

That it is now incumbent upon the appellant to take all necessary steps to ready the appeal for hearing unlike in the old rules and finally, that under Order 42 rule 35 (2).

The Registrar ought to have listed the appeal before a Judge for dismissal.

The appellant/Respondent vehemently opposes the Respondents/applicant's application. They filed a replying affidavit on 29/10/2014. The same is sworn by Julia Kariuki advocate on an undisclosed date in October 2014, before T. Nganga Advocate/ Commissioner for Oaths.

She deposes that the delay in taking the necessary steps was due to the Respondent's advocate failing to serve her with the plaintiff's submissions and that she had on several occasions followed up the issue and found the file missing.

That she wrote to the Executive Officer on 5/12/2013 asking for copy of decree and certificate of costs which was issued on 23rd April 2014. That is was not until 8/9/2014 when the lower court confirmed availability of the court file and thereafter the Respondent did get copies of documents and filed a record of Appeal on 6/10/2014 and served it upon the Respondent . Counsel denied that the appellant had lost interest in this appeal and urged the court to find that failure to prosecute the appeal was not deliberate but occasioned by time taken by the registry to trace the missing file and the Respondent failing to provide submissions which were form part of the record of appeal.

Both parties advocates, appeared before me on 4/11/2014 and argued their respective rival positions, basically reiterating what is contained in the supporting and replying affidavits. I have also considered the applicable law and authority relied on by **Mr. Kaburu- HCC 2047/2000- Wilfred Odhiambo Musingo Vs Habo Agencies Ltd** where the court struck out a defence which was not served in 7 days as a consequence of not taking steps within reasonable time.

The issue for determination is whether the respondent warrants grant of Orders sought for striking out of the appeal.

Order 42 of the Civil Procedure Rules makes provision for Appeals and procedures Attendant thereto from the form, filing to dismissals for want of prosecution. On Rule 35 contemplates two different scenarios for the issuance of an order dismissing an appeal for want of prosecution. On the hand, Rules 1,2,11,12,13 make provision for the form and steps that are to be undertaken before an appeal can be set down for hearing.

There is no specific provision that gives the respondent or this court latitude to strike out the appeal for failure to comply with the timelines given, save for Rule 35 which provides for dismissal of an appeal for want of prosecution.

One scenario contemplated under rule 35 is that:-

(1) Three months after issuance of directions under rule 13, no steps have been taken by the appellant to fix the appeal for hearing, the Respondent can either fix the appeal for hearing or apply by summons for dismissal of the appeal for want of prosecution.

In other words, before the respondent can move the court either to set the appeal down for hearing or

apply for its dismissal for want of prosecution, directions ought to have been given as stipulated in Section 79B of the Civil Procedure Act and Order 42 rule 13 of the Civil Procedure Rules.

The second scenario contemplated in Rule 35(2) is that unlike in Rule 35 (1) which require that directions must have been taken before an appeal can be heard, a judge must pause it and consider whether there is sufficient ground for admitting it to hearing and if there no sufficient ground for interfering with the decree or part thereof as appealed against, he may summarily reject it.

The Respondent's challenge to the appeal is that the appellant has failed in their duty to cause the appeal to be listed before a judge for directions within 30 days of filing as required under Section 79B of the Act and Order 42 Rules 11,12 & 13 of the Civil Procedure Act.

Under Rule 11, an appellant is expected, within 30 days of filing of an appeal, to cause the matter to be listed before a judge for directions under Section 79B of the Act. Counsel for the Respondent has elaborately explained in this replying affidavit and submissions the duty of the appellant to comply with timelines set out in the 2010 Rules as opposed to the old Rules which imposed a duty on the Registrar to process the hearing.

In my previous decision in HCCA 648/2012 **Benson Mangera & Another Vs Wambua Mbira** I referred to the decision in **Haroron E. Ongechi Nyaberi Vs British American Insurance Co Ltd NRB HCCA 110/2001 (2002) eKLR** where it was held that

It is however, clear to this court that the Registrar cannot give notice of directions to the parties of an appeal and cannot himself fix an appeal for directions before a Judge unless and until the appellant has caused it by first complying with rule 11 and 13 thereof.

The appellant's compliance to those rules is the gate opening for admission of an appeal and for the taking of directions. It is to be observed, therefore, that it will be the appellant who shall really cause the appeal to be listed for giving of directions before a judge by:-

a. Serving the Memorandum of Appeal; and

b. Filing and serving the record of appeal.

In other words event he old rules and decisions before 2010 did recognize the duty of the appellant in activating the processes necessary for ensuring that the appeal is prosecuted.

In this appeal, the appellant's counsel admits that they did not extract and file decree together with the Memorandum of Appeal and that they did not file record of appeal for reasons that the court file in the lower court was missing until September 2014 when it was confirmed to be available. They further blame the Respondent's counsel for refusing to supply them with submissions filed in the lower court, which reasons I find scandalous and vexation. There is nothing on record to show that between 5/12/2012 when the appeal was filed, and 26th May 2014 when the application herein was filed, t he appellant even sought for the lower court file or asked for submissions from the Respondent's counsel to enable them compile a record of appeal. Annexture JK 3 dated 4/9/2014 letter to court is clear that "**please note that we have been looking for the above file <u>since 25th June 2014</u> to request for photocopies of the plaintiff/ Respondent submissions for the lower court matter".** Kindly intervene and assist us locate the file to enable us prepare record of appeal noting that the plaintiff has fixed the matter for hearing of an application to strike (sic) out the appeal on 4/11/2014. From the above letter, no doubt, the appellant was woken up from their slumber by the Respondents application herein to strike out the appeal.

Further, as Decree was issued on 23rd April 2014 a day before the Respondent herein lodged this application on 24/4/2014, there is nothing on record to show that after being issued with a decree of the lower court in April, the file went missing until September 2014.

The annextures by the appellant tell a story. Annextures JK I(a) is dated 23rd February 2014 but filed in court on 21/2/2014 but filed in court on 21/2/2014. Annexture JK1b is dated 24th February 2014 but filed in court on 21/3/2014 almost a month later on the other hand, having requested for the availability of the lower court file on 4/9/2014, by 8th September 2014, the court did notify the appellant's counsel that the file was available without any indication that it had been missing. However, the appellant's counsel purportedly received the said letter on 25/8/2014 and took another one month to 25/9/2014 to instruct a Ms. Milka to "**urgently proceed appropriately".**

The telling story from the above exposition is that counsel for the appellant was not diligent in having this appeal reached for prosecution and had, on being served with this application, to look for every available excuse and reasons, including unnecessarily blaming the respondent's counsel for failure to supply her with submissions, without any iota of evidence as to how the 'submissions' would have formed the basis of the appeal or record of appeal.

The appellant's counsel then procrastinated in filing any replying affidavit to this application until after she had hurriedly compiled a record of appeal dated 2nd October 2014 and find on 6th October 2014, is when she swore an affidavit and filed it on 29th October 2014, and at paragraph 14 "**That the appeal is now properly on record having been filed and served on the Respondent/applicant herein".**

No doubt, the appellant was making every effort to scuttle the application herein.

However owing to the pendence of this application, the appellant has not managed to cause the appeal to be placed before a judge for consideration under Section 79B of the Civil Procedure Act and neither have they sought directions under Order 42 Rule 13 of the Civil Procedure Rules.

As stated earlier, the provision for dismissing an appeal for want of prosecution are clearly set out in order 42 Rule 35 of the Civil Procedure Rules. However, in this case, the respondent sought to be strike out the appeal for non compliance with certain specific procedural steps which have set timelines. For this court to strike out an appeal as a whole, and the Respondent must also demonstrate that there are serious flaws in the appeal that warrant striking out including non compliance with Order 42 Rule 13 (4), on the documents that should be on record and Rule 14 on non compliance with an order for security for costs. The court can also strike out an appeal for being f………or vexation or for being incompetent or being an abuse of the process of the court.

In this case, the Respondent mixed up many grounds for striking out the appeal. He did not seek its dismissal for want of prosecution although among the provision cited, are Order 42 Rule 35 (1) which provides for dismissal of appeal for want of prosecution and deposed at paragraph 13 of the Kaburu's supporting affidavit the "**Under Order 42 rule 35 (2) the Registrar of the court ought to have listed the appeal before a judge for dismissal".**

In my view, albeit the appellant has not been diligent in having this appeal ready for hearing, it is clear from the record that the lower record has never been availed to this court to enable the judge peruse and give directions under Section 79B of the Civil Procedure Act; meaning that even if the record of appeal was ready with all the documents therein, in the absence of the original lower court record as contemplated in Order 42 rule 15 this court would not act in accordance with Section 79B of the Act or Order 42 rule 13 of the Civil Procedure Rules.

While it is the duty of the appellant to cause the necessary steps to be taken to prosecute the appeal, the Law also places a duty on the Register of this court including, calling for the Lower court record which was not done until 9/10/2014 after this application was filed.

Further, nothing prevented the Registrar from listing this appeal before a Judge in chambers under Order 42 rule 35 (2) upon giving notice to the parties, to show cause why it should not be dismissed for want of prosecution.

It is therefore on the above grounds that I decline to strike out the appeal as prayed. I employ the principle that the right of appeal is constitutional right and in as much as there has been delay which has not been satisfactorily explained by the appellant, this court has to weigh the cost and prejudice that is likely to be occasioned to the appellant as well as the respondent, if the appeal is struck out at this stage without according the appellant an opportunity to be heard on the merits of the appeal.

I reiterate that it is the appellant's counsel who has not been diligent and was only awaken by this application to strike out the appeal that she became active. Though belated, she has nonetheless compiled and filed and served a record of appeal, and demonstrated that her client still has an interest in this appeal.

In the circumstances, I shall invoke the overriding objective principle in Order to obviate the hardship expense, delay and focus on substantive justice. I find albeit there was delay that it is in the interest of justice that the appeal should not be struck out as the Respondent can adequately be compensated by an award of costs.

The appellant is therefore directed to take appropriate proactive steps to have this appeal set down for hearing as appropriate and in any event not later than 90 days from todate.

I award costs of this application to the Respondent applicant.

Dated, Signed and delivered at Nairobi this 21st day of April 2015.

R.E. ABURILI

JUDGE

21/4/15

Coram: Aburili J

CC: Kavata

Mr. Kaburu for Respondent/applicant

N/A for appellant/Respondent

Court: This ruling was to be delivered on 19/3/2013 but owing to exigencies of other official work assigned, it was not delivered and parties were served for today.

Ruling Delivered in Open Court in the presence of Mr. Kaburu advocate for the Respondent/applicant and no appearance by the appellant/Respondent.

R.E. ABURILI

JUDGE

21/4/2015

Court: The Ruling to be typed and certified and availed to the parties upon payment of the requisite court fees.

R.E. ABURILI

JUDGE

21/4/2015