



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 16 OF 2013

KENYA POWER & LIGHTING CO. LTDAPPELLANT

VERSUS

QUENTINE WAMBUA MUTISYA T/A BONDENI WHOLESALERS.....RESPONDENT

RULING

The Application

The Appellant herein filed an appeal by way of a Memorandum of Appeal dated 1st February 2013 which was filed in Court on the same date. The appeal is against the judgment delivered on 9th January 2013 by Hon. L. Simiyu RM in Machakos CMCC No. 504 of 2008. The Appellant also simultaneously filed an application by way of Notice of Motion seeking stay of execution of the said judgment, pending the hearing and determination of his appeal. The parties entered a consent on the said stay of execution on 15th April 2013, and in addition consented that the Appellant deposits the entire decretal sum in a joint interest earning account in the names of both parties' advocates.

On 1st August 2014, the Respondent filed the application that is before this Court for determination by way of a Notice of Motion dated 17th June 2014. The Respondent is seeking orders that:

1. That the plaintiff's suit herein be dismissed for want of prosecution.
2. That stay of execution orders issued on 15th April 2013 to the Appellant be vacated.
3. That the Applicant be allowed to withdraw the sum of Kshs. 480,000/= plus its accrued interest held in a joint interest earning account held by counsels of both parties.

The said application is supported by an affidavit sworn on 17th June 2014 by Janet Mutua, the Respondent's advocate. The grounds for the application are that since the Appellant by consent of both parties obtained stay of execution of the decree in Machakos CMCC NO. 504 of 2008 on 15th April 2014, it has neglected and or failed to fix the appeal for hearing. Further, that 12 months have elapsed since the injunctive order were granted, and that the grant of stay of execution was conditioned on the Appellant depositing the whole decretal sum in a joint interest earning account which was opened thereafter, and the money deposited thereto.

It was contended that the Respondent has been highly prejudiced by the Appellant's inordinate delay which manifests a lack of interest in the prosecution of the suit, and that it is only fair and justifiable for the appeal to be dismissed and the decretal sum deposited in the bank be released to the Appellant.

The Respondent's Advocates, J.M Mutua & Co. Advocates, filed submissions on the application dated 11th May 2015. Reliance was placed on Order 35(2) of the Civil Procedure Rules and the decision in **Nakuru Modern Feeds Ltd vs Benson Kariuki**, HCCC 186 of 2009 for the position that the onus to set an appeal in motion rests with the Appellant, and that the Appellant had not been diligent in prosecuting the appeal which therefore ought to be dismissed.

The Respondent also submitted that the orders of stay of execution are in their operation injunctive orders, and under Order 40 Rule 6 of the Civil Procedure Rules have lapsed as one year had passed since they were granted. The decision in **Eliakim Washington Olweny vs Wilson Kibor Mutai & Another**, ELC 609 OF 2012 was cited in this regard, and the Respondent also submitted that this prayer was not opposed by the Appellant.

The Response

The Respondent's application was opposed by the Appellant in a replying affidavit sworn on 16th December 2014 by its legal officer, Emily Kirui, and in Grounds of Objection on points of law it filed on the same date. It is the Appellant's contention that the Respondent's application is premature as the appeal herein has not been admitted to hearing, nor has it gone for directions pursuant to section 79C of the Civil Procedure Act.

The Appellant deponed that after making its application for stay of execution on 1st February 2013, it applied for certified typed copies of proceedings and the judgment, however that the process of typing proceedings and judgment has never been completed despite several visits to and enquiries in the registry. Further, that on 9th June 2014, the Appellant received a letter from the Deputy Registrar of the High Court at Machakos in which she requested from the subordinate court the original record together with the three certified copies of the proceedings and judgment. It was the Appellant's averment that it has not been possible to prepare the record of appeal without the typed certified proceedings and the judgment, and it attached correspondence on the request for the typed proceedings and judgment, and a copy of a receipt for payment of the same.

The Appellant's advocate Anthony M. Mulekyo Advocates filed written submission on the application dated 26th May 2015. It was submitted therein that the provisions of Order 17 Rule 2 and Order 40 Rules 3, 6 and 7 of the Civil Procedure Rules invoked by the Respondent are not applicable to prosecution of appeals, and that the law concerning dismissal of appeals for want of prosecution is Order 42 Rule 35 of the Civil Procedure Rules.

Further, that under Order 42 Rule 35 of the Civil Procedure Rules, an appeal can be dismissed in two instances. The first instance is where no steps have been taken by an Appellant to fix an appeal for hearing after three months of issuance of directions under Order 42 Rule 13 of the Civil Procedure Rules. Reliance was placed on the decision in **Kirinyaga General Machinery vs Hezekiel Mureithi Ileri**, HCCC No. 98 of 2008. The second instance is where after one year of service of the Memorandum of Appeal, an appeal has not been set down for hearing.

The Appellant submitted that no directions have been given in this matter because the Record of Appeal has not been filed, for reasons that the Appellant is yet to be furnished with the certified copies of typed proceedings and judgment of the trial court. Further, that the Appellant has been actively following up on the proceedings and has not been indolent.

It was also submitted that the Respondent's application should be by way of Chamber Summons and not a Notice of Motion, and that the application was therefore fatally defective for want of form. Reliance was placed on the decision in **Bayusuf Brothers & Another vs Mathew Mureithi**, (2005) e KLR in this regard.

The Issues and Determination

I have read and carefully considered the pleadings and submissions made by the parties herein. The issue for determination is whether the appeal herein should be dismissed for want of prosecution, and whether the decretal sum deposited in Court should be released to the Respondent. The applicable law in this regard is Order 42 Rule 35 of the Civil Procedure Rules which provides as follows:

“(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.”

The processes of giving directions and service of memorandum of an appeal are provided for in Order 42 Rules 11, 12, and 13 of the same Rules, wherein it is provided as follows:

“11. Upon filing of the appeal the appellant shall within thirty days, cause the matter to be listed before a judge for directions under section 79B of the Act.

12. After the refusal of a judge to reject the appeal under section 79B of the Act, the registrar shall notify the appellant who shall serve the memorandum of appeal on every respondent within seven days of receipt of the notice from the registrar.

13. (1) On notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of appeal the appellant shall cause the appeal to be listed for the giving of directions by a judge in chambers.”

In the present application, the Appellant claims that no directions have been given in this matter because the Record of Appeal has not been filed, for reasons that the Appellant is yet to be furnished with the certified copies of typed proceedings and judgment of the trial court. The law requires the Appellant to list the appeal for directions within 30 days of filing of the same. There is no requirement for the filing of a record of appeal for such directions to be granted. In this regard the documents that are required when filing of an appeal under Order 42 Rules 1 and 2 of the Civil Procedure Rules are set out as follows:

(1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.

(2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.

2. Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under section 79B of the Act until such certified copy is filed.

The requirements therefore under these rules for directions to be given under section 79B of the Civil Procedure Act is that the Appellant should have filed a memorandum of appeal to which should be attached a certified copy of the decree or order appealed against. The Appellant to this extent has therefore been indolent in listing the appeal herein for directions under section 79B of the Civil Procedure Act.

This finding notwithstanding, it is not disputed that directions have not been given in this appeal, and cannot therefore be dismissed pursuant to Order 42 Rule 35(1) of the Civil Procedure Rules. The appeal has also not been admitted to hearing, and since Order 42 Rule 12 of the Civil Procedure Rules provide that a memorandum of appeal shall be served after it has been admitted to hearing, this appeal is also

therefore not amenable to dismissal under Order 42 Rule 35 (2).

On the second issue of release of the decretal sum, it was argued by the Respondent that the stay of execution orders issued on 15th April 2013 are of an injunctive nature and therefore Order 40 Rule 6 of the Civil Procedure Rules applies. This argument was in support of the prayer that the said stay of execution orders be vacated and the Respondent be allowed to withdraw the decretal sum that was deposited by the Appellant.

I find that this position cannot hold as different provisions of law apply to the grant of stay of execution orders which is Order 42 Rule 6 of the Civil Procedure Rules, and which specifically provides for certain conditions that must be met, which are different from those apply to grant of injunctions. Therefore it must be shown that the conditions for stay of execution are no longer applicable for the orders to be vacated, which has not been demonstrated by the Respondent.

Furthermore the purpose of the two orders are different, with stay execution orders pending appeal meant to preserve the subject matter of litigation in circumstances where rights and duties have accrued to the parties as a result of a substantive judgment or ruling, which is not the case for the temporary injunctions that are governed by Order 40 Rule 6 of the Civil Procedure Rules.

The upshot of the foregoing is that the application by the Respondent in the Notice of Motion dated 17th June 2014 is denied. However, in light of the Appellant's indolence in this matter, the Appellant shall meet the costs of the said application.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 19th day of November 2015.

P. NYAMWEYA

JUDGE