



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 43 OF 2010

(Being an appeal from the Ruling of the Senior Resident Magistrates Court at Mombasa Hon. M.K. Mwangi delivered on 15th February 2010 in CMCC No. 7 of 1996)

SAID SHABAN KINUNGU.....APPELLANT

VERSUS

MWATEMO MUNYIKA.....RESPONDENT

RULING

Introduction

1. The Respondent in this appeal beseech the court to dismiss the appeal filed on the 12/3/2010 on the grounds that since filing the appeal there has been failure to file a Record of Appeal for a period in excess of 5 years, there has never been an appeal against the judgment dated 13/8/2015 but only an appeal against an order made against execution which is only calculated to delay finalisation of the matter and intended for keeping away the Respondent from the fruits of his unfairly.
2. To that application was filed a replying affidavit by the appellant whose gist is that he has all along been under the impression that the advocates were working on the appeal only to be made aware that the partnership in the firm of advocates changed in the year 2009 where after the two new partners sued each other in court with the result that the files in the firm were never acted upon and that he was not in control of that state of affairs for which he should not be punished.

Background:

3. The appeal as worded is apparently grounded and geared to challenge a ruling by the lower court. Hon. M.K. Mwangi, dated 15/2/2010 by which it declined to uphold a preliminary objection premised on the allegations that interest on decretal sum is not recoverable after the lapse of six years from the date of the judgment. The Ruling was delivered on the 15/2/2010 and this appeal filed on the 12/3/2010.
4. After filing that appeal it is apparent that no steps have been taken to prosecute the same. Infant there has never been discharged the appellant's obligations under order 42 Rule 11 which enjoins the appellant to move the court within 30 days from the 12.3.2010 and list the matter before a judge for direction under section 79 B. The effect is that the appeal has never been placed before a judge for perusal with a view to it getting admitted or summarily rejected.
5. Even after the present application was filed and served, no attempt has been made in that regard. The consequence is that the matter is stuck and can not move forward.

6. It is the duty of a party and his advocate; that duty to me, is joint on the two, and inseparable.
7. Indeed the litigation belongs to the client and not the advocate. The principle that he acts by an agent acts by himself hold true in this case. That the advocate became indolent or uncaring in prosecuting the appeal is a matter that falls squarely for determination between the litigant and the said advocate but in a different forum to which the Respondent may not be interested at all.
8. I find that the Appellant abdicated his duty to court under section 1A(3) to assist the court in achieving the court's overriding objective to achieve the timely disposal of those proceedings and therefore the other objectives of efficient and just determination of the proceedings have as a consequence been compromised.

That flies in the face of the constitutional dictate that justice shall not be delayed.

9. I find that there is no good explanation and the one offered is an excuse rather than an explanation.
10. Consequently, I am inclined to allow the application which I hereby do with cost to the Respondent:
11. Mr. Ambwere has pleaded that the court should strive to do justice to the parties and refrain from dismissing the appeal on the basis that the litigant is innocent for the delay which is admittedly inordinate. In the circumstances of this case I would go Mr. Ambwere's way if it was demonstrated that at least the principal and costs, leaving aside, the contested interest had been paid or offered for payment. That has not been done and a person who has made such default cannot be seen to invoke justice. He deserves no stretch of that noble name in his favour.

Delay defeats justice

12. Additionally it is conceded that the appellant had no right of appeal and that no leave has been sought nor granted. It therefore follows that even if I decline to dismiss the appeal at this juncture it will still be summarily rejected should it later come for perusal. In that event I shall not have done justice to the parties but only postponed the inevitable.
13. The upshot is that this appeal is dismissed with costs to be agreed or taxed by the court in case of a failure to an agreement.

Dated, signed and delivered at Mombasa this 22nd day of December 2015.

Delivered in the presence of:

No appearance for the Appellant.

Ms. Muyaa for the Respondent.

P.J.O. OTIENO

JUDGE.