



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL APPEAL CASE NO.551 OF 2012

FRANCIS KAMAU KANGETHE

PETER MURIITHI KUNGU

SAMUEL KARIUKI MWAURA

JOSEPH MUIGAI KAMAU

PETER NJUGUNA CHOMBA

PATRICK KARIUKI MWANGI

MARGARET WAIRIMU NJAGA

MARY KARUGI T/A

MIRO GENERAL STORES

BIBIAN NJERI CHEGE.....APPELLANTS/RESPONDENTS

VERSUS

MAKENAGIRA FARMER'S TRADING

COMPANY LIMITEDRESPONDENTS/APPLICANTS

RULING

This matter originates from the business Premises Rent Tribunal's Reference and order evicting the appellants from the respondent's premises their tenancy having allegedly expired from 1st November 2012. The appellants are the tenants whereas the respondents are the landlords.

By a ruling dated 11th December 2012, Honourable Mary Angawa J granted to the appellants a stay of execution of the orders of the Chairman, Business Premises Rent Tribunal. She granted an injunction restraining the eviction of the tenants from the premises. She also ordered that the appeal be heard on priority basis and that the record be deposited in court. The record shows that on 13th April 2015 the rent amounting to shs 110,000 was deposited in court by 5 tenants and on 23rd June 2015 the respondent's counsels sought for release of the same.

However, by an application dated 17th February 2015 the respondents had applied under the provisions of Order 42 Rule 35(1) & (2) of the Civil Procedure Rules to have this appeal dismissed for want of prosecution which application was dismissed with costs on 10th July 2015 for being incompetent by Honourable Mabeya J. It was after the said dismissal order that the respondent's counsel wrote to the Deputy Registrar of this court on 14th July 2015 urging the Deputy Registrar to place the file before a Judge for dismissal under Order 42 Rule 35(2) of the Civil Procedure Rule, 2010.

On 23rd July 2015 the Deputy Registrar directed by way of a note that the file be listed before the Judge but on 18th November 2015 the respondent's counsels through a Mr Peter of Wanjama and Company Advocates for the respondents appeared in the registry and fixed this appeal ex parte for mention before court this day 7th December 2015. They did not indicate the purpose of the mention. When the matter was called out today, the respondent's counsel Mrs Githaiga submitted urging the court to dismiss the appeal for want of prosecution because the appellant had not given any reasons why they have not taken any steps to have the appeal prosecuted. She charged that the appellants were enjoying stay orders which stay is prejudicial to the respondents since the appellants were not remitting any rent to the respondent landlords yet they occupy the premises and that they are using this appeal as an excuse not to pay any rent which is due to the respondents. She also disclosed that the respondent has in the past tried to have this appeal dismissed for want of prosecution but that they were not successful and the Deputy Registrar did direct that the matter be listed for dismissal.

In response, Mr Ngare counsel for the appellants lamented that he had been ambushed with an application for dismissal of the appeal for want of prosecution yet he had been served with a mention notice by the respondent's counsel. Further, that attempts to have this appeal dismissed for want of prosecution have not been successful since it is not the appellant's fault that the appeal has not been heard. Mr Ngare submitted that albeit he had not been given notice to show cause, it was mischievous for counsel for the respondents to seek dismissal of the appeal based on no facts at all of the appellants' indolence and that in 2013 Honourable Angawa J made orders that the Chairman of the Tribunal do avail the original file to this court for directions on appeal to be taken, which has never been complied with. Mr Ngare submitted that the Tribunal proceedings are voluminous and that only this court can order for the Tribunal records to be availed for directions to be taken, and not to dismiss this appeal prematurely. In a brief rejoinder, Mrs Githaiga submitted that the provisions of Order 42 Rule 35 of the Civil procedure Rules empower this court to dismiss this appeal for want of prosecution and that there was no evidence that the appellant had written to court or taken any steps to have this appeal heard thereby delaying the process of litigation. She urged the court to dismiss the appeal for want of prosecution.

I have considered the parties' advocates rival submissions on this matter. Article 159(2) (b) of the Constitution calls upon the courts and tribunals in exercising judicial authority to be guided by the principles among them, that "justice shall not be delayed." In addition, Sections 1A and 1B of the Civil Procedure Act oblige the courts to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act. Parties to the civil proceedings or advocates for such party(ies) are under an obligation to assist the court to further the overriding objectives of the Act and, to that effect, to participate in the processes of the court and to comply with the directions and orders of the court.

Section 1B of the Civil Procedure Act calls upon the court to handle all matters presented before it for the purposes of attaining the following aims.

- a. The just determination of the proceedings;
- b. The efficient disposal of the business of the court.
- c. The efficient use of the available judicial and administrative resources.
- d. The timely disposal of the proceedings and all other proceedings in the court, at a cost affordable by the respective parties and
- e. The issue of suitable technology.

From the above provisions of the Constitution and the Civil Procedure Act, it is clear that the court is called upon to expedite the disposal of disputes before it. It is for that reason that the procedures underpinnings of Order 17 Rule 1 and 2 (applicable for original suits) and Order 42 Rule 35 of the Civil Procedure Rule for appeals were enacted providing the procedure for disposal of suits and or appeals that are archived in court without any action being taken to have the matters disposed of.

This court notes and indeed commends the efforts made by the respondent herein who have incessantly sought to have this appeal out of the courts to enable them execute orders of the Tribunal. On the last occasion, Honourable Mabeya J did on 19th July 2015 dismiss their application dated 17th February 2015 for being incompetent and a few days later, they prompted the Deputy Registrar to list the matter before a judge for dismissal of the appeal. But there is absolutely no evidence that the mention for today as fixed by the respondent's counsel and not the Deputy Registrar, was meant to be a notice to show cause upon the appellant to demonstrate why this appeal should not be dismissed for want of prosecution under Order 24 Rule 35 (2) of the Civil Procedure Rules. It is clear that it is the respondents who moved the court, the same way they did in February 2015 only that this time round, they have approached the court through a mention notice and not a formal application. In my view, that action by the respondent however well intended is an abuse of court process and moreover, the submissions in support on the mention which turned to be an application for dismissal of the appeal for want of prosecution are in essence resjudicata the ruling made by Honourable Mabeya J on 10th July 2015. Trial by ambush is abhorred by the law and the courts cannot encourage it. If a party fixes a matter, say the mention, the purpose thereof must be disclosed. Moreso in the mention notice to the adverse party so that they come to court prepared to respond to any issues that they may be required to respond to. To do otherwise would in essence be denying the appellant a right to fair hearing and therefore ousting them from the judgment seat and access to justice. Courts of law are established to be fair and just and there should be no perception directed at them that they are unfair and or unjust in as much as the decision may go either way. In this case, I have no doubt in my mind that if the Deputy Registrar was to place the file (appeal) herein before a judge for dismissal, the Deputy Registrar would have been put to task to issue notice to show cause to both parties to the appeal as required under Order 42 Rule 35(2) of the Civil Procedure Rules which provide:

(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.

I reiterate that this appeal was listed by the respondent for mention at which stage the respondent turned it into a hearing of an oral application for dismissal for want of prosecution. I must also emphasise that it is not just the provisions of Order 42 Rule 35 of the Civil Procedure Rule that the respondent can seek for dismissal of an appeal for want of prosecution, taking into account the overriding objectives of the Civil Procedure Act and Article 159(2) (b) of the Constitution as well as the procedural steps that ought to be taken by the appellant upon filing of an appeal, as stipulated under Order 42 Rules 2-14 of the Civil Procedure Rules. Under Rule 15 of the said Order 42 "1. when a Memorandum of Appeal is lodged the court to which such appeal is preferred shall send notice of the appeal to the court from whose decree the appeal is preferred.

2. The court receiving such notice shall send with all practicable dispatch all material papers in the suit, or such papers as may be specially called for by the court to which such appeal is preferred.

3. Either party may on application and upon payment of the requisite charges obtain copies of any such papers as aforesaid.

In this matter, the appeal was filed on 23rd October 2012 Honourable Angawa J made an order for the Executive Officer of Business Premises Rent Tribunal case No. 12/2012 Nairobi to avail the original tribunal file. On 13th December 2012 the Deputy Registrar issued notice to show cause upon the Executive Officer of Business Premises Rent Tribunal Nairobi. On 17th September 2014 the record also shows that the Deputy Registrar did issue notice to the Business Premises Rent Tribunal to

avail to this court the tribunals original file as per the order of 11th April 2012 by Angawa J but todate there has been no response from the Business premise Rent Tribunal and neither have they availed the original file to this court to enable this court to consider this appeal for admission under Section 79B of the Civil Procedure Act or for giving of directions as stipulated under Section 79C of the Civil Procedure Act.

For the above reasons which the record bears, I am unable to find that the appellants have procrastinated in having this appeal heard. I do not find any inertia on the part of the appellants disclosed by the respondents and I accordingly dismiss the application seeking to have this appeal dismissed for want of prosecution.

I however make the following orders for expedition:-

That the Executive Officer of the Business Premise Rent Tribunal in Business Premise Rent Tribunal No. 12 of 2012 do appear in this court on 17th December 2015 with or without the original file thereof to explain to this court reasons for delayed submission of the tribunal file to the High Court despite reminders.

This order be extracted by the appellant's counsel and served upon the Executive Officer of Business Premise Rent Tribunal expeditiously and an affidavit of service filed before this ruling is typed.

Costs shall be in the cause.

Dated, signed and delivered in open court at Nairobi this 7th day of December 2015.

R.E. ABURILI

JUDGE

7/12/2015