



REPUBLIC OF KENYA
IN THE ENVIRONMENTAL AND LAND COURT
MOMBASA LAW COURTS

ELC CIVIL APPEAL NO. 37 OF 2019

GERALD OTIENO OMEDO.....APPELLANT/RESPONDENT

- VERSUS -

AMINA MOHAMED SAID.....1ST RESPONDENT/APPLICANT

FATUMA BINTI ALI KHAMIS.....2ND RESPONDENT

RULING

I. Introduction

1. The application for determination by this Honorable Court is the Notice of Motion dated 6th July 2021 by the 1st Respondent/Applicant under the provision of Order 42 Rules 13 and 35 of the Civil Procedure Rules, 2010, Section 3A of the Civil Procedure Act, Cap. 21 and Article 159 (2) of the Constitution of Kenya.

II. The 1st Respondent/Applicant's Case

2. The 1st Respondent/Applicant ought to have the appeal to be dismissed for want of prosecution and be awarded the costs of the appeal. The 1st Respondent/Applicant averred that since the Appellant filed his Memorandum of appeal on 8th August 2019, and obtained orders for stay pending the hearing and determination of the appeal, he has failed to take any action to have the appeal set down for directions. The Applicant urged court to dismiss the appeal for want of prosecution since the stay orders and appeal have been prejudicial and oppressive to the Applicant. The applicant stated that the appellant's failure to prosecute the appeal has deprived her of the right to enjoy the fruits of the lower court judgement.

III. The Appellant's Case.

3. On 22nd October, 2021 the Appellant responded to the application by filing an eight (8) Paragraphed Replying Affidavit sworn by JOEL OBURA, the Advocate for the Appellant. He explained to court that the failure to prosecute the appeal was occasioned by the unavailability of the lower court proceedings. He maintained that they have made numerous request to the registry to avail the same as well as paying a deposit for the typed proceedings but the same are yet to be availed. He pleaded with court not to dismiss the appeal as it would be extremely prejudicial reprimand the Appellant yet the registry is the custodian of the file. He further informed court that the respondent has been aware of the efforts made by the Appellant to follow up on the lower court file.

IV. SUBMISSIONS

4. On 26th October, 2021 while all the parties were in court, they were directed to have the Notice of Motion application be disposed off by way of written submissions. Thereafter, on 25th January, 2022 they had all complied thereof.

A. The 1st Respondent/Applicant's Written Submission.

5. On 26th November 2021, the Learned Counsel for the 1st Respondent/Applicant filed their written submissions. It was submitted that the reason given by the Appellant on why he has delayed in prosecuting his suit is inexcusable. The Counsel argued that the Appellant has not complied with the provisions of Order 42 Rule 35, in that since filing of the memorandum of appeal on 19th July 2019 no positive significant step has been taken to prosecute the appeal. The Counsel submitted that Order 42 Rule 10 and 11 directs the appellant to schedule the appeal for directions within 30 days of filing the appeal, and that the appellant has not complied.

6. The Learned Counsel argued that the appeal has restrained the Applicant from enjoying the fruits of her judgement that was delivered on 19th July 2019. The actions of the Appellant of failing to take any steps to list the matter for directions as provided by Order 42 Rule 35 was argued to be causing miscarriage of justice which has resulted to the applicant suffering prejudice. The Learned Counsel urged court to dismiss the appeal for want of prosecution.

B. The Appellant's Written Submission.

7. On 21st January 2022, the Learned Counsel to the Appellant filed his submissions. Mr. Obura Advocate submitted that the Appellant was ready and willing to prosecute the appeal, save for the unavailability of the court proceedings. He indicated that the Appellant had paid for the court proceedings, from the court registry, the custodian of the court file and therefore should not be punished for if the same was not forthcoming. The Learned Counsel urged court to find that the delay to prosecute the appeal had been adequately explained to and court ought to allow the appellant to prosecute the appeal. He relied on the case of “**Eastern Produce Kenya Limited – Versus - Rongai Workshop & Transporters Limited & another [2014] eKLR** and urged court to disallow the application and compel the lower court registry to avail the file.

V. ANALYSIS AND DETERMINATION

8. I have read and fully considered all the pleadings, written submissions and the cited authorities by the parties herein and the relevant provisions of the law.

9. In order to arrive at an informed decision hereof, I have framed the following issues for determination. These are:-

- a. Whether the Notice of Motion application by the Respondent meets the fundamental requirements for dismissal of an Appeal under the provisions of Order 42 Rules 11, 13, 20 and 35 (1) of the Civil procedure Rules, 2010.**
- b. Whether the Appeal instituted by the Appellant though the Memorandum of Appeal dated 8th August, 2019 should be dismissed for want of prosecution?**
- c. Who will meet the costs of this application.**

ISSUE a). Whether the Notice of Motion application by the Respondent meets the fundamental requirements for dismissal of an Appeal under the provisions of Order 42 Rules 11, 13, 20 and 35 (1) of the Civil procedure Rules, 2010.

10. The 1st Respondent herein has applied to court to dismiss the appeal for want of prosecution under Order 42 Rule 35 (1). The Rule gives two scenarios that may lead to the dismissal of a Memorandum of Appeal for want of prosecution, it provides:-

- 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**

11. It will be noted that the Respondent has brought this application, under Sub rule 2, which makes reference Rule 13 of the same order. Rule 13 provides that:-

- 1. Upon notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of appeal the registrar shall cause the appeal to be listed for the giving of directions by a judge in chambers.**
- 2. Any objection to the jurisdiction of the appellate court shall be raised before the judge before he gives directions under this rule.**
- 3. The judge in chambers may give directions concerning the appeal generally and in particular directions as to the manner in which the evidence and exhibits presented to the court below shall be put before the appellate court and as to the typing of any record or part thereof and any exhibits or other necessary documents and the payment of the costs of such typing whether in advance or otherwise.**
- 4. Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—**

a. the memorandum of appeal;

b. the pleadings;

- c. the notes of the trial magistrate made at the hearing;
- d. the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
- e. all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
- f. the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:

Provided that—

- i. a translation into English shall be provided of any document not in that language;
- ii. the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).

12. While considering to deciding the prayer for dismissal, the court is guided by several cases of:- **“Ivita – Versus - Kyumbu (1984) KLR 441:-**

“The test by the court in an application for the dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus even if the delay is prolonged, if the court is satisfied with the plaintiff’s excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time. It is a matter in the discretion of the court.”

In addition on this issue, I cite the decision of **“Investment Limited –Versus- G4s Security Services Limited (2015) eKLR** where court held:- **“This order is permissive and allows quite significant room for exercise of discretion to sustain the suit. And I think it is so especially when one fathoms the requirements of Article 159 of the Constitution of Kenya and the overriding objective when demands of courts to strive often, unless for very good cause, to serve substantive justice. This is well understood in the legal reality that dismissal of a suit without hearing it on merit is such draconious act comparable only to the proverbial “Sword of the Damocles”. But in reality should be checked against yet another equally important constitutional demand that case should be disposed of expeditiously, which is founded upon the old adage and now an express Constitutional Principle of Justice under Article 159 (2) of the Constitution of Kenya that justice delayed is justice denied. Here I am reminded that justice is to all the parties not only to the Plaintiff. This is the test I shall apply.**

ISSUE b). Whether the Appeal instituted by the Appellant though the Memorandum of Appeal dated 8th August, 2019 should be dismissed for want of prosecution?

13. Under this sub – heading, the Honorable Court has noted that, the Appellant has tried to explain his delay, the lower court file has not been available in the registry. The Appellant wrote to the Executive Officer on 25th August 2020 to raise a complaint that the lower court was missing from the registry. The Appellant has also demonstrated to court that they have been making follow up on the file throughout time. The said Service Requisition Forms are dated 27th January 2020, 7th August 2020, 4th February 2021 and 3rd August 2021. Further, the appellant annexed a receipt of the deposit the appellant made for copies of typed proceedings on 21st January 2020.

14. A party can only apply for dismissal when directions have been given as provided for under Order 42 Rule 35 (1), which the Respondent has approached court under. No directions have been given since the Memorandum of appeal was filed on 8th August 2019. In **“Morris Njagi & another – Versus - Mary Wanjiku Kiura [2017] eKLR**, the court held that where there is no directions given, an appeal can only be dismissed under Order 42 rule 35 (2). The court stated that:-

“The appeal has to be admitted first before it can be listed for hearing. The provision under which this appeal could be dismissed for want of prosecution is Order 42 Rule 35 (2). This provision could not be invoked by the applicant. The applicant did not write to request the registrar to list the appeal for dismissal. I am persuaded to adopt the finding by Aburili J in Rosarie (EPZ) Limited – Versus - Stanlex Mbithi James (2015) EKLR where he stated:

“Since under Order 42 rule 35 (1) the appeal cannot be dismissed before directions have been given the applicant should have taken advantage of Order 42 rule 35 (2) and cause the registrar to list the appeal for dismissal. If there had been such correspondence which the registrar ignored, I would have been inclined to the application. Since however, there is no evidence that the applicant had requested the registrar to list the matter in terms of Order 42 rule 35 (2) and the latter failed, I find it difficult to accede to the application.”

15. Thus, it is the view of this Honorable Court that, no directions have been issued in the appeal under the provisions of Order 42 Rules 11 and 13 of the Civil Procedure Rules, 2010. Therefore, the Respondent cannot move court to dismiss the appeal for want of prosecution. In any case, the Appellant has demonstrated to court that he has actively been pursuing the Magistrate’s civil registry to retrieve the lower court file. In order to do justice and move the appeal forward the lower court file must be retrieved immediately to enable the appellant file the record expeditiously.

ISSUE c). Who will meet the costs of this application.

16. The issue of costs as stated under Section 27 (1) of the Civil procedure Rules, 2010 is at the discretion of the Honorable Court. From the facts, the given circumstances where no directions were taken in tis appeal, and the in depth analysis stated above, it is just fair that each party bears their own costs in the matter so far.

VI. Conclusion and Disposition

17. Consequently, in view of the fore going, I proceed to provide the following direction with very stringent timeframe to be observed strictly as follows:-

a. THAT the Court Administrator, Mombasa Law Courts be and is hereby directed to take all appropriate steps needed to trace the whereabouts and ensure that the file of case “CMCC No. 1544 of 2004, Gerald Omedo – Versus - Amina Said & Fatuma Khamisi” is located. Thereafter, he should report back to this Court within 14 days of this ruling on the status of the lower court file.

b. THAT further, upon the file being located and placed before this Court, I direct the Appellant to forthwith compile, file and serve the Records of Appeal. He should then set down the appeal for taking directions under Order 42 Rules 11 and 13 (1) of the Civil Procedure Rules, 2010 within the twenty One (21) days from the date of this ruling, failure to do so, the appeal shall stand dismissed.

c. THAT for expediency sake, this Appeal should thereafter be heard and finally determined within the next Ninety days from the taking down directions as stated hereof.

d. THAT each party to bear its own costs.

IT ORDERED ACCORDINGLY.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 23RD DAY OF MARCH 2022.

HON. JUSTICE L. L. NAIKUNI (JUDGE)

ENVIROMNENT AND LAND COURT

MOMBASA

In the presence of:

M/s. Yumnah Hassan, Court Assistant.

Mr. Obura Advocate for the Appellants.

Mr. Mutugi Advocate for the espondents/Applicants.