



REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI

APPELLANTE SIDE

CIVIL APPEAL NO. 15 OF 2011

(From the original judgment and decision of the Kadhi Court suit no. 87 of 2008 at Malindi)

FERUZ OMAR MAGHRAM

MALKIA OMAR MAHENDAN

FARIDA OMAR MAHENDAN

ANZUN OMAR MAHENDAN

NURU OMAR MAHENDANAPPELLANTS

VERSUS

AHMED MOHAMED HONEYRESPONDENT

RULING

1. A brief chronology of this appeal is apposite before dealing with application now before me. An appeal against the decision of the Hon. Kadhi in Malindi was lodged in court on 27th May, 2011. The appellants successfully moved the court vide a Notice of Motion filed on 30th May, 2011 and were granted stay of execution on two conditions, namely that they deposit a sum of Shs. 2m as security (the sum was later reduced to Shs. 1m), and on application by the appellants. Secondly that the appeal be prosecuted within six months.
2. No deposit has ever been made and the Record of Appeal was only filed on 13th June, 2014 even though attempts to settle the matter amicably were reported to have failed, as at 7th June, 2012. The third appellant abandoned her appeal.
3. An application was subsequently filed by the Respondent on 28th June, 2012 seeking an injunction against the appellants and orders dismissing the appeal, for reasons that the appellants had failed to comply with the court orders made in two previous rulings. In its ruling delivered on 25th October, 2013, the court stated inter alia:

“...the consequence of failure (by appellants) to deposit such security is that order for stay of execution lapses automatically once the period has expired. In this case the

period expired ten days after the order of 28th February, 2012...In the circumstances, the respondent is at liberty to execute the judgment of the Kadhi's court. His prayer for an injunction against the appellant is superfluous. The judgment of the Kadhi's court has not been set aside."

4. With regard to the failure by the appellants to take steps in the prosecution of their appeal this court stated:

"Finally, I have to state that the appellants have not explained their failure to take the necessary steps to prosecute this appeal. Mere unsupported allegations that the court has not supplied proceedings are only excuses. It is now over two years since the appellants filed their memorandum of appeal. It is true that the appeal cannot be listed for hearing until Order 42 rule 11, 12 and 13 of the Civil Procedure Rules have been complied with. The duty of setting this process in motion has with the appellants by virtue of Orders 42 rule 11 of the Civil Procedure Rules..."

5. The court, rather than dismissing the appeal granted the appellants 30 days within which to comply failing which the respondent was at liberty to move the court as to dismissal. The ruling was delivered on 25th October, 2013. The present application was filed pursuant to that ruling.
6. The grounds on the face of the respondent's application filed on 28th February, 2014 are listed on the face of the application as follows;

"1. The appellants herein preferred an appeal way back in 2011; more than two and a half years ago, yet the appeal has not been even listed for hearing todate.

2. To date a period of more than two and half years has lapsed and the appellants have not taken any practical steps to prosecute their appeal.

3. The appellants have utterly failed to set down the appeal for hearing within six (6) months of the order given by the Hon. Justice Hellen Omondi in 1st November, 2011.

4. The appellant has utterly failed to comply with the mandatory rules laid out in Order 42 of the Civil Procedure Rules relating to the prosecution of an appeal precisely.

5. This honourable court in its ruling dated 25th October, 2013 allowed the respondent to apply for the dismissal of the appeal for want of prosecution.

6. The respondent is suffering detriment arising from the pendency of the appeal as he is being denied the fruits of his victory as per the judgment of the Hon. Kadhi on 27th May, 2011.

7. The respondent is an old man who needs the intervention of this Hon. Court to enjoy his victory before he passes away.

8. The new Civil Procedure Act and Civil Procedure Rules make it incumbent upon this Hon. Court and all litigants to cooperate to ensure just and expeditious resolution of civil disputes.

The application is expressed to be brought under Order 42 rule 35 of the Civil Procedure Rules and is supported by the affidavit of the respondent, Ahmed Mohamed Honey.

7. In opposition to the application, the 2nd appellant swore an affidavit to the effect that the proceedings had been delayed by the court and that she had done all she could. She adverted to

visits to the office of the Deputy Registrar in this regard. The parties agreed to dispose of the application by way of written submissions.

8. I have now considered the affidavit and written submissions filed in respect of the respondent's Notice of Motion. I take the following view of the matter. It is not in dispute that three years after the appeal was filed it has not been set down for hearing. The appellants blame the Lower Court for delayed supply of proceedings. However no correspondence in this regard has been tendered as evidence. Although the appellants filed a memorandum of appeal while this ruling was pending (7days to the ruling date) there is no certificate of delay to confirm the allegations of delayed typing of proceedings. Even after the period of 30 days since the court's ruling of 25th October, 2013 lapsed, the appellants did not approach the court for extension of the period.
9. The record of this matter is replete with evidence of tardiness on the part of the appellants. It would seem that they would prefer to prosecute the appeal at their leisure, court orders notwithstanding. There has been inordinate delay. Their counsel now submits that the appeal has never been admitted yet he is aware that no proceedings, not even the judgment of the Kadhi's court had been placed on the record to facilitate action under Order 42 rule 11 of the Civil Procedure Rules. Neither had he moved the court as required under the said order
10. It is my considered view that the appellants are not keen on prosecuting their appeal and that perhaps the complaint by the respondent that it is a deliberate design to maintain the status quo that favors them, may have merit. A party whose conduct discloses an intention to obstruct or delay court proceedings and who takes court directions as to disposal in a casual manner cannot expect the court to exercise its discretion in their favor.

In the circumstances of this case, I am satisfied that the respondent's application for dismissal of the appeal is merited. The same is allowed with costs.

Delivered and signed at Malindi this 20th day of June, 2014 in the presence of: Mr. Otara for the appellant, Mr. Mwatzogo holding brief for Mr. Mazrui for the respondents.

C. W. Meoli

JUDGE

MR. OTARA – I pray for leave to appeal and proceedings.

C. W. Meoli

JUDGE

COURT – Leave granted and certified copies of proceedings and ruling be supplied. As applied by Mr. Mwatsogo, files be kept under lock and key.

C. W. Meoli

JUDGE