



IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO.269 OF 2010

BETWEEN

THE CHAIRMAN, RIOKINDO HIGH SCHOOL APPELLANT

AND

DAVID OGEA OYUGI T/A DAJAN RESPONDENT

(Being an appeal from the whole decision in Kisii CMCC No.112 of 2007

dated 15th September 2010 by Hon. P.L. Shinyada, Esq, RM)

RULING

1. This ruling emanates from the order made by this court on the 13th February 2013 in the following terms:-
2. "By Consent"
1. **The Notice of Motion dated 24/04/2012 be and is hereby withdrawn.**
2. **The appellant shall bear the costs of the said application in the sum of Kshs.5,000/= to be paid within the next 14 days from today's date.**
3. **The appellant shall ensure that the appeal is admitted and fixed for directions within 60 days from today failing which the appeal shall be dismissed with costs to the respondent."**
2. Both counsel representing the parties signed the above consent.
3. The genesis of this case lies in Chief Magistrate's Court at Kisii in **Civil Case No.112 of 2007** where the appellant in this case was the defendant and the respondent was the plaintiff. After filing the plaint and defence, the matter went to formal proof. Viva voce evidence was adduced. After considering the evidence before her, the learned trial magistrate entered judgment on 10th September 2010 for the plaintiff in the sum of Kshs.77,950.00, costs of the suit and interest at court rates from the date of filing suit.
4. After delivery of judgment, the appellant (defendant then) proceeded to apply for a stay of execution. The application for stay was granted until the 12th January 2011, when the matter was heard and reserved for ruling on 2nd March 2011. On 2nd March 2011 the trial court found the applicant/appellant's application not having merit and dismissed the same with costs to the plaintiff/respondent.
5. On 24th April 2012 the respondent/plaintiff filed a notice of motion seeking for orders that the appeal filed on 20th December 2010 be dismissed for want of prosecution. It is that application that was withdrawn by the consent dated 13th February 2013. The appellant was by that consent

required to ensure admission of the appeal and taking of directions within 60 days.

6. From the record, a representative from the firm of Soire & Co. Advocates, counsel for the appellant, appeared at the court registry on 4th April 2013 and fixed the appeal for directions on 18th June 2013. Notice was to issue to the respondent. On the 16th July 2014, the parties filed a consent letter dated 10th July 2014 in the following terms:-
 - a. *The Record of Appeal lodged herein be and is hereby deemed to be complete.*
 - b. *The appeal herein be canvassed by way of written submissions.*
 - c. *Counsel for the parties do lodge their respective written submissions on the appeal within sixty (60) days hereof.*
 - d. *This suit be and is hereby listed for mention with a view to taking a judgment date.*
7. The above stated consent was duly endorsed by the Deputy Registrar of this Honourable Court on the same 16th July 2013. It is to be noted that between 4th April 2013, and 16th July 2013, there was no other activity on the file.
8. On 28th August 2013 an application was filed by the respondents for Bill of Costs. The same was set to be heard before the Deputy Registrar on 23rd September 2013. The hearing on the taxation proceeded before the Deputy Registrar on 23rd September 2013, but counsel for the appellant raised an objection to the taxation of the respondent's Bill of Costs on the ground that the same was premature as the appeal had not yet been determined and as such no costs had been awarded that could be taxed.
9. On the other hand, counsel for the respondent submitted that the appeal was yet to be admitted and since 60 days had lapsed, the appeal had automatically been dismissed with costs to the respondent and as such they were entitled to file their Bill of Costs.
10. After considering the above submissions by learned counsels, the deputy Registrar observed the following:-
 - a. *The record showed that the appellant fixed the matter on 4th April 2013 for directions on 18th June 2013. On 29th May 2013 the Deputy Registrar issued a notice taking out all matters listed before High Court 1 and High Court 2 from the cause list as both courts were to be engaged in hearing Election Petitions. As a consequence, the matter did not proceed for directions on 18th June 2013 as earlier fixed.*
 - b. *On July 16th 2013, parties consented to allowing the record of appeal lodged herein to be deemed as complete. The appeal was to proceed by way of written submissions and the parties agreed to lodge their respective submissions within 60 days from 16th July 2013.*
 - c. *The appeal has never been admitted due to the fact that the lower court file has never been availed to court. Thus the consent dated 16th July 2013 could not have any effect as only the honourable judge can admit or refuse to admit an appeal. Without that being done the parties could not purport to consent on how appeal would be prosecuted. There is no certainty that the appeal will be admitted or refused, and accordingly that the parties' purported consent had no consequence.*
 - d. *No order was ever extracted by counsel that is capable of execution, thus the purported Bill of Costs filed was premature.*
 - e. *Admission is a court process and the failure to have the same admitted cannot be said to be completely the appellant's fault.*
 - f. *The appellant has filed his Record of Appeal which was by consent deemed as complete and has thus taken some steps.*
 - g. *The appellant has however failed to write to the court urging it to order the lower court to forward their record without which the appeal cannot be admitted.*
 - h. *The respondent did not move to seek directions from the honourable judge as to whether the appeal still stands.*
11. From the above, and as noted correctly by the Deputy Registrar, it was not the appellant's fault entirely that his appeal was not admitted within 60 days of 13th February 2013 because:-

- a. *The High Court was engaged in hearing Elections Petitions from May to October 2013.*
- b. *Thereafter the High Court was engaged in the criminal service week as per directions given by the Hon. Chief Justice for one week.*

12. In **Leo Sila Mutiso –vs- Rose C.A. Nai 225 of 1997** (unreported), the court pronounced:-

“It is now settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this court takes into account on deciding whether to grant an extension of time are first the length of delay; secondly the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted.”

13. In the instant case, and as the learned Deputy Registrar correctly noted, it was not entirely the appellant’s fault in not having the appeal admitted within 60 days since the High Court was engaged in election petitions and the criminal service week. However, and also as correctly noted by the Deputy Registrar, the appellant is also guilty of indolence in not making any effort to obtain the proceedings from the lower court to facilitate admission of the appeal. The appellant has not attached any letter addressed to the lower court requesting for proceeding to facilitate admission of the appeal, nor has he sought any assistance from the Deputy Registrar to help him acquire certified copies of the lower court proceedings to facilitate the appeal.
14. In light of all the above factors and findings, this court is inclined to review its orders made on 13th February 2013 by granting the appellant another chance to have the appeal admitted and heard on condition that he obtains the lower court records quickly and proceeds to fix the appeal for directions within 60 days from today, failing which the appeal shall stand dismissed without further order of the court with costs to the Respondent.
15. The costs of this application shall abide the outcome of the appeal.

Dated and delivered at Kisii this 29th day of August, 2014

R.N. SITATI

JUDGE

In the presence of:-

Mr. Omwega for Soire for the Appellant

Mr. Nyamurongi for the Respondent

Mr. Bibu - Court Assistant