**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 92 OF 2013**

**BRUCE MUTIE MUTUKU T/A DIANI TOUR AND TRAVEL CENTER.....APPELLANT**

**-VERSUS-**

**EQUITY BANK LIMITED.....DEFENDANT**

***(Being an appeal against the Ruling of Hon. E. K. Usui Macharia – PM at Kwale in Kwale P.M.C.C No. 213 of 2012 delivered on the 31st July, 2013)***

**RULING**

## INTRODUCTION

1. The Application before court is the Chamber Summons dated 30th April 2014 and filed on 7th May 2014. The Application seeks the following orders:

1. **The appeal filed herein be dismissed for want of prosecution.**
2. **In the alternative, the appeal herein be dismissed for being frivilous vexatious and an abuse of the court process.**
3. **The court file in Kwale PMCC No. 213 of 2011 be forthwith transferred back to Kwale Principal Magistrates Court for hearing and final determination of the suit.**
4. **The appellant to bear the costs of this application and of the appeal.**

2. This appeal was lodged by the Appellant vide his Memorandum of Appeal filed on 5th August 2013. The Appeal is against a ruling delivered on 31st July 2013 by Hon. E.K Usui in **Kwale PMCC No. 213 of 2012**. The heading of Memorandum of Appeal indicates the year of the lower court case as "2011" and the date of the ruling as "31st August 2013" yet the first paragraph indicates the same as "2013" and "31st July 2013" respectively. The mix up is however clarified by the record of appeal and the lower court case file which are both before this court. The lower court case is **Kwale PMCC No. 213 of 2012** and the ruling being appealed from was delivered on 31st July 2013.

3. Briefly, the history of this matter is that on 5th October 2012, the Appellant filed **Kwale PMCC No. 213 of 2012** (hereinafter "the lower court case") against the Respondent in which it accused the Respondent of repossessing motor vehicle Registration Number KBL 467W, Nissan Patrol, which the Respondent had financed the Appellant to purchase. The Appellant sought judgment against the Respondent for return of the repossessed motor vehicle.

4. Alongside the Plaint, the Appellant filed a Notice of Motion application dated 5th October 2012 in which he sought orders to restrain the Respondent from disposing of the said motor vehicle. That application was dismissed by Hon. A.O. Aminga, SRM on 5th December 2012 and the Appellant filed **Mombasa High Court Civil Appeal No. 198 of 2012** against the dismissal. In the said appeal, the Appellant filed an application dated 19th December 2012, in which, on 9th January 2013, he was granted temporary injunction to restrain the Respondent from disposing of the subject motor vehicle pending *inter parties* hearing of that application. None of the parties has made known the status of that appeal or the application to court.

5. On 15th January 2013, judgment was entered for the Appellant in the lower court case against the Respondent in default of appearance and defence. The matter then proceeded on formal proof hearing. On 3rd April 2013, judgment was delivered in favour of the Appellant and against the Respondent as prayed in the Plaint.

6. The Respondent subsequently filed an application dated 22nd April 2013 in which it sought the *ex parte* judgment entered against it and the *ex parte* proceedings be set aside and that it be granted leave to defend the lower court case. That application was heard and by her ruling delivered on 31st July 2013, Hon. E.K. Usui allowed the same. It is that ruling of 31st July 2013 that is being appealed from by the Appellant in this appeal.

7. The Respondent wants this appeal dismissed in its present Application. The Application is brought under **Section 1A, 1B, 3A** and **79B** of the Civil Procedure Act, Cap. 21 and **Order 42 Rules 11** and **12, Order 51 Rule 1** of the Civil Procedure Rules, 2010.

**THE RESPONDENT'S CASE**

8. The Respondent's case is that the Appellant has failed to prosecute the appeal as required by law by failing to cause the appeal to be listed before a judge for directions within 30 days of filing as required by Section 79B of the Civil Procedure Act and Order 42 Rule 11 of the Civil Procedure Rules, 2010.

9. **Section 79B** of the Civil Procedure Act provides that:

> **"Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against he may, notwithstanding section 79C, reject the appeal summarily."**

10. **Order 42 Rule 11** of the Civil Procedure Rules, 2010 provides as follows:

> **"Upon filing of the appeal the appellant shall within thirty days, cause the matter to be listed before a judge for directions under section 79B of the Act."**

11. To demonstrate that it was the duty of the Appellant to cause the appeal to be placed before a judge for directions, the Respondent's counsel relied on the case of **Haron E Ogechi Nyaberi v. British American Insurance Co. Ltd, Nairobi HCCA No. 110 of 2001 [2012] eKLR**, where the High Court held that:

> **"It is however, clear to this court that the Registrar cannot give notice of directions to the parties of an appeal and cannot himself fix an appeal for directions before a judge unless and until the Appellant has caused it by first complying with rule 11 and 13 thereof. Appellant's compliance to those rules is the gate-opening for admission of appeal and for the taking of directions. It is to be observed, therefore, that it will be the Appellant who shall really cause the appeal to be listed for giving directions before a judge by: -**
>
> **a)Serving the Memorandum of Appeal and**

**b)Filing and serving the Record of Appeal.**

> **In this case the Appellant admitted that he never filed or served the Record of Appeal within 30 days to enable the appeal to be listed before a judge to admit it to hearing under Section 79B of the Civil Procedure Act as directed by order 42 Rule II. He also admitted or did not deny the fact that he failed to cause the appeal to be listed for the giving of directions by the Judge in Chambers under rule 13 of the above-mentioned Order. And finally, he did not deny the fact that having been served with a notice of the Registrar to file the Record of Appeal which would cause all the relevant acts abovementioned to be undertaken by the Registrar, he ignored the same for all the relevant period. All he could say is that he was not responsible for the delay without supporting such an allegation."**

12. The Respondent further relied on the case of **Justus Gachoki Wachira v. Emma Makena, Embu High Court Civil Appeal No. 142 of 2009 [2011] eKLR,** where the court sated that:

> **"The Appellant deliberately refused to comply with Order 42 rule 11 Civil Procedure Rules. The Appellant had to cause the matter to be listed to enable the Judge give directions under section 79B of the Act. He cannot therefore turn around to blame the court for his own mistakes/carelessness."**

13. The Respondent also argued that the Appellant has failed to prosecute the appeal as required by law by failing to serve the Respondent with the Memorandum of Appeal within seven days of acceptance of appeal as required by **Order 42 Rule 12** of the Civil Procedure Rules, 2010 which provides as follows:

> **"After the refusal of a judge to reject the appeal under section 79B of the Act, the registrar shall notify the appellant who shall serve the memorandum of appeal on every respondent within seven days of receipt of the notice from the registrar."**

14. The Respondent further submitted that the Appellant is using this appeal to delay the hearing of the lower court case because the lower court file has been called for by the High Court for purposes of this appeal and therefore the Respondent is not able to fix the lower court case for hearing of its counterclaim.

15. It is also the Respondent's case that the Appellant is abusing the appellate jurisdiction of this Court by filing a multiplicity of appeals, obtaining *ex parte* orders and not serving the Respondent with any pleadings or orders and generally abandoning his appeals without prosecution. The Respondent specifically cited **Mombasa HCCA No. 198 of 2012** and the temporary injunction obtained by the Appellant in that appeal on 9th January 2013, both of which I have alluded to above.

**THE RESPONSE BY THE APPELLANT**

16. The Appellant filed his Replying Affidavit on 26th May 2013, in person. However, on 27th June 2013, he filed another Replying Affidavit through his advocates on record as well as Grounds of Objection to the Application and stated that his first Replying Affidavit "cannot be filed by myself whilst I have counsel on record". The Appellant indicated that his second affidavit is his formal reply to the Application.

17. The gist of the Appellant's response is that the appeal is yet to be admitted and therefore it would be premature to file the record of appeal or serve the Memorandum and Record of Appeal.

18. The Appellant's Counsel submitted that an appeal can only be summarily rejected by the court under section 79B when on the face of it, it seems not to present any issue requiring adjudication. That once the court has admitted the appeal, the question whether it is frivolous or not can only be determined at the hearing of the appeal. That the law does not contemplate that an appeal would be struck out as sought by the Respondent.

19. Counsel further submitted that it is only after directions have been given that an appeal may be dismissed for want of prosecution, under Order 42 Rule 35 of the Civil Procedure Rules, 2010. That since Order 42 Rule 35 has not been invoked, and since directions in this appeal have not been given, the orders sought do not lie. According to Counsel, the Respondent should have first tried to list the appeal for hearing rather than seeking its dismissal. Order 42 Rule 35 provides that:

> **"(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."**

20. The Appellant denied that it was indolent in pursuing the appeal because he had personally followed up the lower court to ensure it was timeously transmitted to the High Court, and ensured that typed copies of proceedings are certified.

21. The Appellant submitted that Mombasa **HCCA No. 198 of 2012** arose from a ruling by a different court (Hon. Aminga, SRM) and therefore its existence cannot be a basis for rendering the present appeal an abuse of the court process.

**THE ISSUE FOR DETERMINATION AND ANALYSIS**

22. The issue here is for this court to determine if the Respondent/Applicant has established a case to have the Appeal herein dismissed for want of prosecution and for being frivolous, vexatious and an abuse of the court process.

23. I wish to start with the second ground that the appeal is frivolous, vexatious and an abuse of the court process. Some of the grounds of appeal are that the learned trial magistrate erred in law and fact by allowing the Respondent's application which had been overtaken by event. That the learned trial magistrate erred in law and fact by failing to find that the Respondent had been properly served, filed its memorandum of appearance, replying affidavit but ignored to file its statement of defence. Whether service was effected properly or not is an important factor that a court considers in setting aside *ex parte* judgment. The Appellant's ground of appeal is that the Respondent was not only served but it also entered appearance but failed to file its defence. Without delving into the merits of the grounds of appeal, I do not think the same are frivolous or vexatious. I also do not think that the Appellant is abusing this Court's process simply because he had previously filed Mombasa HCCA No 198 of 2012. That appeal is against the ruling of the lower court that had dismissed the Appellant's application for injunction yet this appeal is against a different ruling that had set aside the Appellant's *ex parte* judgment and granted the Respondent leave to file its defence. Clearly, the Appellant could not file the same appeal against two different rulings, delivered by two different magistrates at different times. The second ground of the Application must therefore fail.

24. I have stated that this appeal was filed on 5th August 2013. On 15th August 2013, the Appellant filed an application dated 14th August 2013 for stay of execution of the impugned ruling of the lower court. That application was however withdrawn by the Appellant on 5th September 2013 for what he now says was to expedite the hearing of the main appeal.

25. On the said date of 5th September 2013, this court requested the Deputy Registrar to avail the lower court file to enable this appeal to proceed. On 9th September 2013, the Deputy Registrar wrote to the Principal Magistrate, Kwale Law Courts, asking for the lower court file to be forwarded to this court. On 1st November 2013, the lower court file was forwarded to this court.

26. **Order 42 Rule 11** of Civil Procedure Rules, 2010 requires the Appellant within 30 days of filing of

the appeal to cause the matter to be listed before a judge for directions under section 79B of Cap 21. This appeal should therefore have been listed for directions latest by 5th September 2012. By that time, the lower court file had not yet been availed to this Court meaning that even if the appeal had been listed for directions, the Court was unable to admit it and set it down for hearing. While it is the duty of the Appellant to cause the appeal to be listed for directions, it was not within the province of the Appellant to avail the lower court record to this court.

27. This appeal was ready for trial from 1st November 2013 when the lower court record was made available to this Court. The present application for dismissal of the appeal was filed five months later, on 7th May 2014. In my view, I do not think a delay of only five months should warrant the striking out of the appeal for want of prosecution. Although there is some delay, the same is not inordinate as to occasion grave prejudice to the Respondent that cannot be compensated by damages should the appeal fail. The trend since the enactment of Sections 1A and 1B of Cap. 21 and Article 159 (2) (d) of the Constitution is that the court is mandated to consider length of the delay, the cost and the prejudice likely to be occasioned. In **Abdirahman Abdi v Safi Petroleum Products Ltd & 6 Others [2011] eKLR, Civil Application No. Nai. 173 of 2010** where a notice of appeal was served on the respondent out of time and without leave of the court, upon being asked to strike it out, the Court of Appeal (Omolo, Bosire and Nyamu JJ.A) observed that:-

> **"The overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantive justice…**
>
> **In the days long gone the court never hesitated to strike out a notice of appeal or even an appeal if it was shown that it had been lodged out of time regardless of the length of delay. The enactment of Sections 3A and 3B of the Appellate Jurisdiction Act, Cap 9 Laws of Kenya, and later, Article 159 (2) (d) of the Constitution of Kenya, 2010, changed the position. The former provisions introduced the overriding objective in civil litigation in which the court is mandated to consider aspects like the delay likely to be occasioned, the cost and prejudice to the parties should the court strike out the offending document. In short, the court has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision one way or the other. Article 159 (2) (d) of the Constitution makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. That is not however to say that procedural improprieties are to be ignored altogether. The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the court strikes out its document. The court in that regard exercises judicial discretion."**

28. Although that case dealt with the striking out of the notice of appeal on the basis that it was served on the respondent out of time and without leave of the court, the jurisprudence it laid is that the court, in exercising its discretion to strike out a document, or like in this case, an appeal, has to weigh the prejudice that is likely to be suffered by the innocent party against the prejudice to be suffered by the offending party if the court strikes out the appeal.

29. It is barely one year since the appeal was filed. The prejudice that the Appellant is likely to suffer if this appeal is dismissed is likely to be graver than the prejudice that the Respondent would suffer if the appeal is ordered to proceed. I think it would be appropriate and in the wider interest of justice to pardon the Appellant's delay and allow him a chance to take appropriate steps to ensure the appeal is set down for directions and hearing expeditiously. I will decline the Respondent's request to dismiss the appeal for want of prosecution.

30. I will therefore dismiss the second ground of the Application dated 30th April 2014 and consequently the Application itself. However, I will not penalize the Respondent to pay the costs of the Application because the Appellant is guilty of some delay even though not inordinate. Each party shall bear own costs.

31. I have perused this appeal as provided under Section 79B. The Appeal is hereby summarily rejected because although the Appellant has grounds in his Memorandum which set out his dissatisfaction with the Ruling of the lower Court of 31st July 2013 the Appellant has no prayer in the Memorandum. It is for that reason that this Appeal is summarily dismissed.

**DATED and delivered at MOMBASA this 28th day of AUGUST, 2014.**

**MARY KASANGO**

**JUDGE**