



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL APPEAL NO 520 OF 2010

SYSTEMS RELIABILITY LIMIT.....1ST APPELLANT/RESPONDENT
HORATIOUS DA GAMA ROSE.....2ND APPELLANT/RESPONDENT
VERSUS
YAYA TOWERS LIMITED.....RESPONDENT/APPLICANT

**(APPLICATION MATTER OF HCC 520 OF 2010 KARIMBUX-EFFENDY COMPANY
ADVOCATES –VS- NGATIA & ASSOCIATES ADVOCATES)**

RULING

The Respondent/Applicant has filed a Notice of Motion dated **3rd May, 2013** under Section 3A, of the Civil Procedure Act, Order 42 Rule 35 and Order 51 Rule 1 of the Civil Procedure Rules seeking the following orders:-

1. The Memorandum of Appeal dated 26th November, 2010 filed by the Appellants against the ruling of the Honourable Chief Magistrate Honourable Riechi delivered on 1st November, be struck out.
2. That costs of the application be provided for.

The application supported by the affidavit of SAADIA KARIMBUX-EFFENDY dated 2nd May 2013, an Advocate practicing in the firm of M/s Karimbux-Effendy & Company Advocates. She depones that the appellant filed an application for stay of execution on 26th November, 2010 pending determination of the appeal. On 25th January, 2011 an order was recorded in Court to the effect that the execution of decree be stayed pending hearing of the appeal and that an amount of Kshs 1,989,995/= be placed in an escrow account to be held by both parties. The amount was placed on fixed deposit in a bank which was acceptable to both parties. Thereafter, the Appellants requested for typed proceedings on **CMCC No. 8207 of 2006** on 7th September, 2010. That by a letter dated 11th July, 2011 from the Judiciary Milimani Commercial Courts, copied to Ngatia and Associates Advocates and themselves, the parties were informed that the proceedings and ruling/judgment were ready for collection. That since then a period of

almost 21 months has lapsed and there is no sign that the appellants have made any effort to file their Record of Appeal as required by law occasioning inordinate delay in prosecution of the appeal. That the Respondent has all the while been denied fruits of judgment, and the appellant is in no hurry to prosecute the Appeal.

The application was opposed. The Respondents /Appellants filed the replying affidavit sworn Felister Munyua dated 22nd May, 2013. She admits that their firm wrote a letter dated 7th November, requesting for Court proceedings and rulings and they filed their Memorandum of Appeal timeously on 26th November, 2010 and served the respondent, thereafter they recorded a consent before Justice Mwilu (as she then was) and awaited the proceedings and the rulings in the trial court which they had paid for. She depones that by a regrettable oversight, preparation of the record was not completed and upon perusal of their file that she found the uncompleted exercise of preparing the record of appeal, hence the appeal has not admitted for hearing. She regrets the inadvertent error that was committed and prays that the same be excused. She depones that the Record of Appeal has now been filed and she prays that the Appeal be processed in the normal manner, that the appeal raises substantial grounds which require to be considered in a regular hearing; that the Respondent has not suffered any prejudice.

A further replying affidavit was filed by Ms Carolyn Nyaga dated 15th July, 2014 an advocate of firm of Ngatia and associates. She gave a history of **CMCC 8207 of 2006** and states that the appellants feeling aggrieved by the Judgment delivered by Hon. Ms. Maina as well the ruling by S. N. Riechi (Mr.) Chief Magistrate, the Appellants decided to appeal against the said decisions. Consequently, the Appellants filed two appeals; Civil Appeal No. 206 of 2010 being an appeal from the Judgment and Decree made on 6th May 2010 by Hon. Ms. Maina at Milimani Commercial Courts in **CMCC No. 8207/2006**. (The Memorandum of Appeal was filed on 4th June, 2010). Civil Appeal No. 520 of 2010 being an appeal from the Ruling and Order made on 1st November, 2010 by Hon. S. N. Riechi (Mr.) at Milimani Commercial Courts in **CMCC No. 8207/2006**. (The Memorandum of Appeal was filed on 26th November, 2010). That the said Appeals involve the same parties and arise from the same subject matter and that due to inadvertent error, the Record of Appeal for the two aforesaid Appeals were filed on 21st May, 2013; that there is no application on record seeking to strike out Civil Appeal No. 206 of 2010, which is the appeal against the Judgment delivered on 6th May, 2010 in **CMCC No. 8207/2006**, despite the Record of Appeal having been filed on the same day as the one in the Appeal herein; that the Appeal herein relates to the perfection of the decree issued on 31st May, 2010. The said decree arising from the Judgment delivered on 6th May, 2010 which has been appealed against. Further that the said decree has always been in the Court file and there was no impediment for any of the parties to fix the Appeal for hearing.

At hearing of this application Counsels made oral submissions Mrs. Effendy reiterated what is deponed in her affidavit and stated further that the Respondent has admitted the delay in prosecuting the appeal; that they cannot blame the Registrar and that the Court should consider the money that has been held in Court for the last to three years. That the appellant conduct has not shown any concern or diligence on the matter. She submitted that they relied on Order 42 Rule 35 as it was not possible for the Respondent to set down the Appeal for hearing as the Memorandum of Appeal was not filed with the certified copy of the ruling. She relied on two cases namely the case of **South Nyanza Sugar Company Limited Versus Samuel Omoke Obage (2009) Eklr**, where Justice Musinga held that;

“the appellant cannot blame the Court for the delay in admission of the appeal when it is the appellant who had failed to comply with mandatory provisions of the law as aforesaid without which the appeal could not be admitted. This was a clear case of abuse of the Court process. The appellant’s counsel did not have to wait for the Court to write to him and inform him that the appeal had not been admitted because of his failure to file a certified copy of the decree. Counsel for the appellant ought to have been proactive and not only comply with the law as regards filing of appeals but also follow up his client’s appeal to ensure that the same was processed expeditiously”.

Counsel also relied with case of **South Coast Fitness and Sports Centre Limited Versus Clarkson Notcutt Limited C.A No. 311 OF 2009 at MOMBASA; East Africa Law Reports (2000) 1 E A** where

Justice Gicheru, Akiwumi and Shah JJA held that;

“As Clarkson Notcutt Limited sat back and took no affirmative steps to obtain the corrected proceedings for a period of three years and six months, it would be unjust to allow the appeal hang over South Coast Fitness and Sports Centre Limited any longer. The application to strike out would be granted”.

The Respondent’s Counsel Ms. Nyaga relied on the replying affidavits of Ms. Felister Munyua and Carolyne Nyaga. She reiterated what was deponed in the affidavits. she challenged the manner in which the application was brought arguing that the application was brought under Order 42 rule 35 (1) which does not apply to this case; that no directions have been taken in the matter and therefore the Applicant could not rely on the same rule; that under order 42 rule 35 (2) Registrar was the only one empowered to seek dismissal of the suit as per the law, for this argument she cited the case of ***Gerald Muchiri Ndirangu & Another Vs Charles Ndumu Wanyoike , (2005) eKLR***. On the Memorandum of Appeal she submitted that there was an error in filing the Appeal, their clerks did so but the Court is the one who is mandated to decide on this as per Article 159 (2) (d) of the Constitution, for this argument she cited the cases of ***Consolata Ndinda Owira & Others Vs BanuelBovis Omambia (2005) eklr and Joshua Mutoto Werunga Vs Joyce Namunyak & Others (2013) Eklr***. She urged the Court not to lock out the appellant from accessing justice and that they have filed a record of appeal and ready to move to list the matter for directions and that Civil Appeal No. 236 of 2010 had been listed for directions on 17th July, 2014.

I have considered the affidavits, the submissions and the authority cited and also perused the Court file. The issue is whether the Memorandum of Appeal dated 26th November 2010 should be struck out. I have perused the Court record and I have not been able to trace the said Memorandum of Appeal, but I do note that both parties agreed that it was filed. The appellant counsel has raised the issue of the application being brought under Order 42 rule 35. I do agree with Counsel Submission that under the provisions of Order 42 Rule 35(1) the Respondent is at liberty to apply for dismissal of the appeal within 3 months after the giving of directions if the appeal has not been set down for hearing. I also agree with her submissions that under Subrule 2 of the said Order, it is only the Registrar who has the power to serve a notice to the parties if within one year after the service of memorandum the appeal has not been set down for hearing. The provisions of this order are clear. Even though the said provisions are clear on what is to be done once a party files a Memorandum of Appeal , I am of the my view that a party can however move to Court if there has been delay in prosecuting the matter under section 3 which gives this Court the inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process. I note that it is well over 3 three since a Memorandum of Appeal was filed and that the appeal deserves to be struck off, however the appellant admits that there was a delay in preparation of the record. Counsel has taken the blame for the error and delay and has asked this Court to give the appellant a chance to be heard. The appellants have now filed the record of appeal dated the 21st of May 2013and has informed the Court that they are ready to set down the matter for directions. Each case must be considered on its own merit. In the further replying affidavit of Ms. Nyaga she has explained how their firm filed two appeals arising from the same matter. She has also taken the blame and stated that it was an error on their part in not filing the record of appeal even after the registry alerted them that the proceedings will be ready. Although I have the discretion to dismiss the appeal, I give the appellant a chance to prosecute the appeal. The appellant shall fix the matter for directions as provided by under Order 42 Rule 35 within 45 days from the date of this ruling. In default the Memorandum of Appeal dated 26th November 2010 shall be struck off with costs to the respondent. Costs shall be in the cause.

Dated, signed and delivered this 26th day of September 2014

R. E. OUGO

JUDGE

In the presence of:-

.....**Respondent/Applicant**

.....**1st & 2nd Appellants/Respondents**

.....**Court Clerk**