REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 648 OF 2012

BENSON MANG'ERA …….…….....1ST APPELLANT/RESPONDENT

LOYFORD MUGENDI MATI …….....2ND APPELLANT/RESPONDENT

VERSUS

WAMBUA MBUVA …….....RESPONDENT/APPLICANT

R U L I N G

1. By a notice of motion dated 23rd June 2014 filed on 25th June 2014 brought under the provisions of Order 42 Rules 1 (1), 2, 11, 12, 13 (1), 3 and 35 (1) of the Civil Procedure Rules and Section 79G of the civil Procedure Act, the respondent through his advocates Nelson Kaburu seeks from this court an order striking out the appeal with costs on the grounds that:

a) The appeal was filed on 29th November 2012 and served on 3rd December 2012.

b) No certified copy of decree has been filed within reasonable time.

c) The appellant has not set down the appeal for directions under Section 79B

d) Essential steps have not been taken within the prescribed time or within reasonable time.

2. The application is further supported by the affidavit of Nelson Kaburu Felix advocate for the respondent.

3. Despite service of the application being effected on the appellants, they neither filed any replying affidavit nor grounds of opposition. They also did not attend court at the hearing of the application on 19th November 2014.

4. Mr. Nelson Kaburu advocate for the respondent in the appeal argued the application relying on the grounds on the face thereof and the supporting affidavit sworn by himself on 23rd June 2014, urging the court to grant the orders sought. He further urged the court to apply a strict

interpretation of Order 42 that if the appellant fails to take prescribed steps within the prescribed time frames, then the appeal should be struck out. He cited no cases.

5. I have carefully considered the respondent's application as filed and the oral submissions made by his counsel Mr. Nelson Kaburu, in support thereof.

6. The appeal herein was filed on 29th November 2012 and on 3rd September 2013 the appellant filed an application under certificate of urgency seeking stay of execution of decree pending hearing and determination of the appeal herein.

7. The said application for stay of execution of decree was fixed severally for hearing and on 18th September 2013 BY the appellant's counsel Mr. Ratemo who informed the court that his client was out of the country and sought more time to take instructions on whether the appeal could be compromised as it was against quantum only, involving an award of Sh. 396,000/-

8. On 7th October 2013 the parties recorded a consent releasing Sh. 200,000/- to the respondent towards the decretal sum within 30 days and the balance of Sh. 230,797.00 to be deposited in any joint interest earning account by both counsels and in default stay granted to lapse automatically.

9. On 25th June 2014, the respondent filed the application herein seeking to strike out the appeal with costs on the grounds set out in this ruling.

10. The issue for determination is whether the respondent who is the applicant in this application warrants the orders sought in his application dated 23rd June 2014, which application was unopposed.

11. For the orders sought to be granted, the applicable law must be visited. The relevant provisions are Order 42 Rule 35 of the Civil Procedure Rules.

12. Under the said order and rule, the law contemplates two different scenarios for the issuance of an order dismissing an appeal for want of prosecution. These are:-

i) Three months after issuance of directions under Order 42 rule 13, no steps have been taken by the appellant to fix the appeal for hearing. In such a situation, the respondent has got two options, one, to either fix the appeal for hearing or to apply by summons for the dismissal of the appeal, as per Order 42 Rule 35(1). In **Kirinyaga General Machinery – Vs – Hezekiel Mureithi Ireri HCC 98/2008, Hon.Mary Kasango J** observed, while interpreting the old Order XLI Rule 31 that:-

> ***"It is clearly seen from that rule that before the respondent can move the court either to set the appeal down for hearing or to apply for dismissal for want of prosecution, directions ought to have been given as provided for under Rule 8B. directions have never been given in this matter. The directions having not been given the orders sought by the respondent cannot be entertained."***

13. The old provisions of Order XLI Rule 31 are now Order 42 rule 35 which the respondent herein has relied on in bringing this application.

14. The second scenario contemplated under Order 42 Rule 35 (2) is that unlike Rule 35 (1), which requires that directions must have been taken before the appeal can be dismissed for want of prosecution, under Subrule 35 (2), if within one year after 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.

15. In this appeal, no directions have been taken or given, leave alone the appeal being

considered for admission under Section 79B of the Civil Procedure Act. In addition, and as I have analysed the chronology of events since the filing of the appeal above, it is clear that on 7th October 2013, parties recorded a consent on an application for stay of execution pending appeal and eight months later, the respondent on 25th June 2014 lodged this application seeking to strike out the appeal.

16. 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 within the decree, part of a decree or order appealed against, he may, notwithstanding Section 79C reject the appeal summarily."

17. The respondent's case also rests on the claim that the appellant has a duty and has failed to exercise his responsibility 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, 12 of the Civil Procedure Rules among other enabling provisions.

18. Order 42 Rule 11 of the Civil Procedure rules provides that:

"Upon filing of the appeal the appellant shall within 30 days cause the matter to be listed before a judge for directions under Section 79B of the Act."

19. The applicant/respondent has demonstrated that it was the duty of the appellant to cause the appeal to be placed before a judge for directions. Although he did not rely on any decided authorities, the case of **Harron E. Ogechi Nyaberi – Vs – British American Insurance Co. Ltd Nairobi HCCA No. 110 of 2001 [2002] Eklr** comes alive. The High Court in that case 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.

The appellant's compliance to those rules is the gate opening for admission of an 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 of directions before a judge by:-

a) Serving the memorandum of appeal; and

b) Filing and serving the record of appeal

In this appeal, 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 11. He also admitted or he 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 above mentioned 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."

20. In another decision in **Justus Gachoki Wachira – Vs – Emma Makena, Embu High Court Civil Appeal No. 142/2009** the court stated:-

"The appellant deliberately refused to comply with Order 42 Rule 11 of the Civil Procedure rules. The appellant had to cause the matter to be listed to enable the judge give direction under Section 79B of the Act. He cannot therefore turn around to blame the court for his own mistakes/carelessness."

21. In this case, the appeal was filed within 30 days from the date of judgment of the lower court as required under Section 79G of the Civil Procedure Act. It was also served upon the respondent within 7 days of filing.

22. The said service of the memorandum of appeal therefore preceded Order 42 Rule 12 which provides that,

"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."

23. It is clear that the appellant has not caused the appeal to be placed before a judge for consideration under Section 79b of the Civil Procedure Act, which is his responsibility.

24. No record of appeal has been compiled, filed and served upon the respondent to enable directions thereunder be given.

25. The issue is whether the respondent has made out a case for the appeal herein to be dismissed for want of prosecution and or to be struck out.

26. The provisions for dismissal of an appeal for want of prosecution are clear as set out above. However, for the appeal herein to be struck out as sought by the respondent in his application, he has to demonstrate that it is frivolous, vexatious and an abuse of the process of the court and the provisions of Order 2 Rule 15 of the Civil Procedure Rules come into play. This provision is applicable generally for striking out of pleadings, and in my view, is inapplicable in the circumstances of this appeal.

27. Examining the grounds of appeal as presented in the memorandum of appeal dated 29th November 2012 and filed on the same day, and without delving into the merits thereof, I do not think that the same are frivolous or vexatious. I also do not think that the appellant is abusing the process of the court by filing an appeal which challenges the quantum of damages awarded by the lower court and which is alleged to have been manifestly and inordinately excessive in the circumstances, considering the injuries allegedly sustained by the respondent: This court is therefore unable to strike out the appeal herein on that ground and proceeds to consider other grounds under the quoted provisions of the law.

28. On the other hand, although the appellant has not complied with Order 42 rule 11 of the Civil Procedure Rules which require him to within 30 days of the filing of the appeal to cause the matter to be listed before a judge for directions under Section 79B of the Civil Procedure Act and therefore the appeal should have been so listed for directions latest by 28th December 2012, it is worth noting that by that time, the lower court file had not yet been availed to this court and to date it has not been availed, meaning, that even if the appeal had been listed for directions under Section 79B, within the said 30 days, the court could have been unable to admit it and set it down for directions.

29. While it is the duty of the appellant to cause the appeal to be listed for directions, it was, in my humble view, not within their province to avail the lower court record to this court. Had the lower court record been available this court would have perused it, while considering this application, whether it warrants summary rejection under Section 79B.

30. I accept that there is delay in processing this appeal for hearing, but I do not accept that such

delay has been inordinate to occasion grave prejudice to the respondent and to warrant a striking out or dismissal for want of prosecution. Should the appeal fail, the respondent shall be sufficiently compensated by costs.

31. This court employs the principle that a party who avails themselves to the jurisdiction of this court seeking to ventilate their grievances should not be ousted from the judgment seat. Since the enactment of Section 1A and 1B of the Civil Procedure Act and Article 159 (2) (d) of the Constitution of Kenya 2010, this court is reluctant to strike out suits on procedural technicalities which can be cured by an award of damages or costs. This court is under a duty to consider the length of delay, the cost and the prejudice likely to be occasioned to not only the respondent, but also to the appellant, if this appeal is dismissed. The court of Appeal in **Abdirahman Abdi – Vs – Safi Petroleum Products ltd & 6 Others [2011] eKLR Cr. App No. 173/2010 NRB**, 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 held 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 Section 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 objectives 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 another.

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 all together. 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."

32. Albeit the Court of Appeal was dealing with a case of striking out of a notice of appeal on the basis that it was served on the respondent out of time and without leave of the court, the jurisprudence laid by that court is that the court in exercising its discretion to strike out a document or dismiss pleadings like in this case to dismiss or strikeout the appeal for failure to take certain prescribed steps within the prescribed time limits, 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/dismisses the appeal.

33. It was barely one year since the parties hereto recorded a consent which gave the respondent an opportunity to benefit from part of the fruits of his lawfully obtained judgment subject matter of this appeal.

34. I think that it will be in the wider interest of justice to pardon the appellants' delay and allow them a chance to take appropriate steps to ensure the appeal is set down for hearing as appropriate.

35. I therefore decline to dismiss this appeal for want of prosecution and or striking out for non compliance with the laid down procedural requirements under the Civil Procedure Act. I direct the Deputy Registrar of this court to call for the lower court file with immediate effect to facilitate the expeditous disposal of the appeal herein.

36. I order that each party shall bear their own costs of this application.

Dated, signed and delivered at Nairobi this 11th Day of December, 2014.

R.E. ABURILI

JUDGE