



**REPUBLIC OF KENYA**

**High Court at Nakuru**

**Civil Appeal 186 of 2009**

NAKURU MODERN FEEDS LIMITED.....APPELLANT

**VERSUS**

BENSON KARIUKI.....RESPONDENT

**RULING**

This Ruling relates to an application by Chamber Summons dated 18<sup>th</sup> January 2011, filed on 20<sup>th</sup> January 2011 in which the Respondent seeks the dismissal of the Appellant's Appeal for want of prosecution, and costs for the application and the appeal.

The Application is supported by the Affidavit of John Githui counsel for the Applicant/Respondent and the grounds on the face thereof.

There were neither grounds in opposition nor to Replying Affidavit to the Application by the Appellant/Respondent. I however allowed counsel for the Appellant to reply to the Application on points of law.

The Appellant's contention in reply to the application for dismissal for lack of prosecution was basically that an appeal, unless it is first admitted for hearing cannot be dismissed for lack of prosecution. Counsel for the Respondent/Applicant argued to the contrary an appeal once filed can be dismissed for lack of prosecution. To answer both arguments it is necessary to determine the question when is an appeal filed or deemed to be filed.

It was argued by counsel for the Applicant that an appeal is deemed filed the moment when a Memorandum of Appeal is presented in terms of Order 42, rule 10(2) of the Civil Procedure Rules, and the date of presentation of the Memorandum of Appeal shall be deemed to be the date of filing the appeal (*notwithstanding any dispute as to the amount of the fee payable*).

An appeal is thus deemed to be filed upon presentation thereof, and of course payment of the necessary filing fees. The Appellant is however required within 30 days of filing the appeal, to cause the matter to be listed before a Judge for directions under Section 79B of the Civil Procedure Act, (*Cap. 21, Laws of Kenya*) for perusal, and rejection summarily if there is no sufficient ground for interfering with the decree, part of a decree or order appealed against.

Whereas this rule exists in the law, it is hardly if ever applied/observed until the requirements of Order 42, rule 13(4) have been complied with, that the Record of Appeal has been compiled and filed. The record of appeal comprises -

***(a)the Memorandum of Appeal,***

***(b)the Pleadings,***

***(c)the notes of the trial magistrate made at the hearing,***

***(d)the transcript of any official shorthand, typist notes, electronic recording or palantypist notes made at the hearing,***

***(e)all affidavits, maps and other documents whatsoever put in evidence before the magistrate,***

***(f)the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal -***

**provided**

***(i)a translation into English shall be provided of any document not in that language;***

***(ii)the judge may dispense with the production of any document or part of a document which is not***

**relevant other than those specified in paragraphs (a), (b) and (f).**

In practice, it is the Record of Appeal which may include any Supplemental Record of Appeal, which a Judge examines in chambers in terms of Section 79B of the Civil Procedure Act, and the court need not consider the appeal summarily (*Order 42 rule (2) and 11*) until such record is complete. The Judge will not therefore give any directions on the appeal until the record is complete and filed by the Appellant. So what happens in a situation such as the one in this case where the Memorandum of Appeal has been filed, has been served, but has no record of appeal? Can the Respondent list the appeal for dismissal under Order 42 rule 35(1)? The said rule provides -

***“35(1) Unless within three (3) 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.”***

I think the Rules Committee constituted under Section 81 of the Civil Procedure Act needs to look at the sequence of actions or steps to be taken before the appeal is presented to a Judge for directions. Strictly and technically so, the appeal is not ready for directions under rule 13 aforesaid, and cannot therefore be dismissed for lack of prosecution.

This construction would however lead many idle and frivolous appeals to be filed and remain on record for no useful purpose. Where such appeals are coupled with orders for stay of execution, a deserving judgment creditor or decree-holder would be denied and kept away from the fruits of his judgment.

The matters to be considered by a Judge under Section 79B of the Civil Procedure Act and Order 42, rule 13(3) of the Civil Procedure Rules are those already listed in Rule 13(4)? What useful purpose or value would directions under rule 13(3), add before the Record of Appeal is compiled? The procedure for directions before the Record of Appeal is filed adds no value and adds agony to a decree-holder who wants to enforce his judgment and decree. The procedure only stalls that process. This case is one such example.

The Memorandum of Appeal was filed on 2.09.2009. The application to dismiss it for want of prosecution was filed on 20.01.2011, that is to say, the Appellant took no steps towards the prosecution of its appeal for a period of 2 years. Similarly for the period 20.01.2011 to 26.02.2013, a period of more than 2 years, the Appellant has taken no steps to prosecute its appeal -

***(I) the appellant has failed to list the appeal before a Judge for directions within 30 days of filing of the Memorandum of Appeal (rule 11),***

***(II) the appellant has technically failed to serve the Memorandum of Appeal upon the Respondent (rule 13(1)),***

***(III) the appellant has consequently failed to comply with the requirements of rule 13(3), (the nature of directions) and rule 13(4) – the Record of Appeal.***

In this regard therefore, the power of dismissal under rule 35(1) of Order 42, does not only include the lack of or failure to set down an appeal for hearing, but also total and any failure to take any steps towards actualization of a Record of Appeal as required under Order 42, rules 11, 12, 13(1) and 13(4) of the Civil Procedure Rules.

For those reasons, I would allow the Respondent/Applicant's Chamber Summons dated 18<sup>th</sup> January 2011 and filed on 20<sup>th</sup> January 2011, with costs to the Respondent.

There shall be orders accordingly.

**Dated, signed and delivered at Nakuru this 12<sup>th</sup> day of April, 2013**

**M. J. ANYARA EMUKULE**

**JUDGE**