



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 4 OF 2011

MOHAMED SAID MOHAMED PLAINTIFF/RESPONDENT

V E R S U S

JULIUS MWANGOLO MWATUA DEFENDANT/APPELLANT

RULING

1. The application under consideration is a Notice of Motion dated 22nd January 2013. It was filed by the Respondent in this Appeal. The Respondent seeks the dismissal of this appeal for want of prosecution. It is brought on the ground that it is now a period of two (2) years since the appeal was filed and this appeal has not yet been set down for hearing. The Respondent is therefore of the view that the Appellant is not interested in its appeal and yet the pendency of the appeal is prejudicial to the Respondent.
2. The Respondent was awarded damages against the Appellant by the lower court following a road traffic accident that occurred on 21st February 2010. It is that judgment which is the subject of this appeal. The Respondent deponed that the pending appeal which was filed on 25th January 2011 was causing him untold suffering.
3. The application was opposed on three grounds. Firstly, that the application is incompetent having failed to site the relevant law for such an application. Secondly, that the delay was caused by the Court's failure to avail typed proceedings and decree. Thirdly, that the Respondent's prejudice if any is outweighed by interest of justice.
4. On the first ground, the Appellant faulted the application for having been brought under Order 51 rules 1 & 2 of the Civil Procedure Rules 2010. Those Rules the Appellant argued do not empower this Court to dismiss the Appeal as sought.
5. Is the failure to site the correct law in an application fatal to that application? My answer is in the negative. What is important is to examine whether the opponent to an application is aware of the nature of the application that he is facing. It is also important that such an opponent does not suffer prejudice when the application fails to quote the correct law. An application that fails to site the correct law cannot be defeated merely for such failure. In that regard I am supported by

the holding in the case of **Paul Ojigo Omanga -Vs- Japhetha Angita – Nairobi HCCC No. 1823 of 2000**. The Court in that case stated-

“Although Order XLVI rule 5 has not been referred to in the application it has been relied on in the cause of hearing and this Court has jurisdiction under Order XLVI rule 5(2) to make the orders sought. The Respondent has not been prejudiced by the failure to refer to Order XLVI in the application and the order sought cannot be refused solely on the ground that Order XLVI rule 5(2) was not cited or that no order or wrong order has been cited.”

I am persuaded by that decision and therefore reject the Appellant's said ground of objection.

6. On the second ground I have examined the lower court file and indeed the proceedings were only certified by the lower Court on 24th January 2013, just a few days after the Respondent filed the present application. Contrary to what was submitted by the Respondent the Court that is the High Court and the Magistrate's Court are responsible to ensure firstly that the proceedings are typed and that the lower Court file is brought to the High Court to facilitate the hearing of the appeal. I was able to note in the record of this file that in January 2011 the High Court wrote to the lower Court seeking for the original certified copies of the proceedings and exhibits. The lower Court did not act on that request with diligence and only complied on 24th January 2013. The Appellant cannot be blamed for that failure.
7. On the third ground I find that the scale of justice in respect of the Appellant and the Respondent are equally balanced. The Appellant needs to have the appeal heard on merit and the Respondent needs the appeal to be determined.
8. That the most important issue in respect of the application before Court is the circumstances under which an appeal can be dismissed as set out under Order 42 Rules 35(1) and (2). Rule 35(1) provides that if an appeal is not set down for hearing within three (3) months after the Court has given directions, the Respondent may either set the appeal down for hearing or may seek for its dismissal for want of prosecution. Rule 35(2) provides that after a memorandum of appeal has been served on the Respondent and one year later the appeal has not been set down for hearing the Court can with notice to both parties list the appeal for dismissal.
9. In the case of Rule 35(1) the directions have not yet been given. Indeed this appeal was admitted for hearing on 16th April 2013 after the Respondent had filed the subject application.
10. In the case of Rule 35(2) the Court does not know whether one (1) year has passed since the Respondent was served with the Memorandum of Appeal since there is no evidence of service. If the Court had known that the Memorandum of Appeal was served for more than one (1) year the Court then would have listed the appeal for dismissal with notice to both parties.
11. I am of the view that the order sought by the Respondent cannot be granted because of the issues that are raised in this Ruling. I am however of the view that time is now ripe for directions to be given in this appeal because the lower Court file is now before this Court. I do however note that the lower Court Decree has not been extracted and I do therefore order that the Appellant do extract that Decree within fourteen (14) days from this date hereof. An appeal cannot proceed for hearing in the absence of a decree as clearly stated in Order 42 Rule 3(f).
12. In the end the Court orders as follows-
 - i. **The Respondent's Notice of Motion dated 22nd January 2013 be and is hereby dismissed with no orders as to costs.**
 - ii. **The Appellant shall proceed to have the lower Court's Decree extracted within fourteen (14) days from the date of this Ruling. In default this appeal shall stand as dismissed.**

iii. A mention date shall be given at the reading of this Ruling for the purpose of giving directions for the hearing of this appeal.

Dated and delivered at Mombasa this 20th day of September, 2013.

MARY KASANGO

JUDGE