REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Civil Appeal 110 of 2001

HARON E OGECHI NYABERI..... APPELLANT/RESPONDENT

VERSUS

BRITISH AMERICAN INSURANCE CO. LTD..... APPLICANT/RESPONDENT

(An Appeal from the judgment of the SPM Mr. Kanyangi, RMCC No. 4603 of 1994, Milimani Commercial Courts'-Nairobi 5th March 2001)

R U L I N G

The application before the court is the Chamber Summons dated 7th February, 2012 seeking dismissal of this appeal for want of prosecution.

The facts and grounds in support of the application are that this Appeal was filed on 27th March 2001. The Deputy Registrar wrote to the Appellant on 5th August, 2002 informing him that the appeal could not be admitted because the record of appeal which would also invoke and enable the appeal to be fixed for directions before a judge had not been filed by the Appellant.

The record does not show that the Appellant heeded the Registrar's notice abovementioned. There is no evidence on record either that the Appellant has taken any action since the filing of the Appeal to enable any kind of advancement of the appeal towards finalization thereof. Eleven years down the line no Record of Appeal has been filed and therefore, not even a little progress has been made. Hence this application filed on 8th February 2012 to dismiss it.

This application is shown to have been brought under Section 3A of the Civil Procedure Act, Cap 21 of the Laws of Kenya, and Order 42 Rule 35 of the Rules thereof.

Section 3A states: -

"Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court".

Order 35(2) of the Civil Procedure Rules as well provides as follows: -

i) 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 a hearing or to apply by summons for its dismissal for want of prosecution.

ii) If, within one year after the service of the memorandum of appeal, the appeal shall not have been set down for a hearing, the Registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal".

In this case there is no dispute that the appeal has never been placed before a judge to give directions. The reason for that it is that the Appellant has not filed the record of appeal. That is so notwithstanding the fact that the Deputy Registrar had served the Appellant with the Notice to file the said record of appeal on 5th August, 2002. It is not difficult, therefore, to understand the lack of any progress in the matter. So long as the Appellant fails to file the said record of appeal, neither the Deputy Registrar nor the Respondent can be able or be in a position to move the court to take and give directions in the appeal.

Furthermore, it would appear from the proper reading of Order 35 rule 1 that the Respondent can only apply to have the appeal fixed for hearing or apply by summons for the appeal to be dismissed for a want prosecution **only** after the directions have been given. In this case as noted, no such application for dismissal, at least under Order 42 rule 35(1), appears tenable so long as no directions have been given and despite the fact that the law under Order 42 rule 11 and rule 13, the Appellant was under obligation to cause the appeal to be listed before a judge for the taking of directions within 30 days of the filing of appeal. There is no dispute therefore, that unless the Appellant files the Record of Appeal, no directions will be taken and under Order 42 rule 35(1), no dismissal for want of prosecution will be successfully sought.

The Respondent/Applicant must have been alive to the above situation because he did not, in circumstances restrict himself to dismissal under the said rule of procedure. He instead subjected the application to orders that can be issuable under Section 3A of the Civil Procedure Act for the ends of justice or to prevent an abuse of the process of court. He also sought dismissal for want of prosecution under subrule (2) of rule 35 aforestated which authorizes dismissal for want of prosecution if the Appellant within one year after service of the Memorandum of Appeal has not taken steps to fix the appeal for hearing.

Unfortunately for the Applicant, once more, this application for dismissal was not brought as a result of a notice of the Registrar as required under O. 42 rule 35(2), but by the Respondent who only would have brought it under rule 35(1) aforesaid. However, an issue arises as to whether a court, properly seized with jurisdiction to hear an application, such as the one now under consideration, can shrink from dealing with it to issue relevant orders, on the ground only that the application was placed before the court by a different party who under the same rule is also entitled to bring such an application. The court will revert to that point in a moment.

In the meantime, the Appellant opposed the application to dismiss the appeal. He simply argued that since directions, for whatever reasons, had not been given, an application to dismiss the appeal cannot successfully be made under Order 42 rule 35. On the other hand the appellant bluntly stated that the delay for now 11 years, was not intentional although he gave no specific lawful reason for it.

I have carefully considered the arguments. I am persuaded that an application for dismissal of an appeal for want of prosecution under Order 42 Rule 35(1) aforestated, cannot successfully lie unless and until directions have been given by the judge. 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.

In the above circumstances, is the court inept of taking action to rectify the situation and/or make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court?

It is definitely against the ends of justice for an Appellant as in this case, to throw an appeal into court and do nothing about it for a period of eleven (11) years. It is worse where as in this case, the Appellant knew of and applied technicalities under Order 42 Rules 11, 13 and 35, to prevent the Registrar of the Court on the one hand, and the Respondent on the other hand, from taking no further action in the appeal, for a period of 10 – 11 years as earlier hereinabove explained. And finally, it is a clear abuse of the process of the court to obstruct the operation of the process of the court by failing to cause an appeal to be listed for admission as well as directions as happened in this case for whatever reasons on the appellant's part.

I am aware that under Order 42 Rule 35 (2) it is the Registrar who should list an appeal for dismissal for want of prosecution if no action is taken by the Appellant for a period of one (1) year after the Memorandum of Appeal was served. I am also aware that it was the Respondent and not the Registrar who brought and placed the application for dismissal before the court on the same reason of lack of prosecution. The Appellant was not heard to not argue that this court cannot deal with such an application to dismiss, notwithstanding the manner it landed before the court. In particular, the Appellant did not object to this court handling and dealing with the issue of dismissal for want of prosecution which had been placed before this court. In those circumstances this court asserts its original power and jurisdiction to grant an order in the ends of justice and to prevent abuse of the law and the process of the court as provided for under Section 3A of the Civil Procedure Act, aforestated.

I am aware that Section 3A only comes on call where there is no specific law applicable. In this case no such specific rule was cited under which this court could dismiss an appeal for want of prosecution in a case where Order 42 Rule 35(1) and (2) is not applicable. In the circumstances, I hereby dismiss this appeal for want of prosecution under the original powers and jurisdiction of this court as provided under the said Section 3A of the Act. Costs are to the Applicant/Respondent.

Orders accordingly.

Dated and delivered at Nairobi this 15th day of May, 2012.

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D A ONYANCHA
JUDGE