



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL 323 OF 2007

Editorial Summary

1. *Civil Appeal*
2. *Civil Practice & Procedure: Order 42 r 35(2) Civil Procedure Rules.*
3. *Subject of Subordinate Court case*

TORT

- 3.1 *Running down cause.*
- 3.2 *Collusion between two motor vehicles on
22nd October 2001.*
- 3.3 *Fatal accident male adult.*
- 3.4 *Judgment delivered 13th April 2007.*
- 3.5 *Award all inclusive. Ksh. 1,272,060.00*
4. *Appeal filed on 11th May 2007:*
 - 4.1 *Stay of execution granted temporary
11th October 2007, Visram J certified
10th December 2007, Waweru J.*
 - 4.2 *Decretal sum deposited to court within
15 days.*
 - 4.3 *No action taken on appeal.*
 - 4.4 *Deputy Registrar issues notice to parties under
Order 42 r 35(2) Civil Procedure Rules to place*

*file before Hon. Judge for dismissal of appeal for
lack of prosecution (29th June 2012).*

4.5 *Parties submit to court whether appeal be
dismissed or not?*

5. *Submissions:*

5.1 *Delay inordinate to prosecute appeal.*

5.2 *12 months to serve memo of appeal upon
respondent (23rd April 2008).*

5.3 *Proceedings ready for collection
16th July 2009 meaning 3 years ago.*

5.4 *No record of appeal served.*

5.5 *Whereas no decree had been issued by lower
court, no decree could be issued till further
court fees are paid.*

5.6 *Preparation of decree done by advocates
for approval.*

5.7 *As no decree filed Order 42 r 13(4) renders
record of appeal incompleated.*

5.8 *Since 2007, no action taken.*

5.9 *Appeal may be dismissed upon one year of
inactivity of the file.*

6. *Submissions by appellant:*

6.1 *Deputy Registrar unable to confirm if appeal
was admitted.*

6.2 *Deputy Registrar unable to supply decree.*

6.3 *Suit unable to be set down for hearing.*

6.4 *Required fees for payment not done due to
negligence of staff now dismissed.*

VERSUS

PASKALIA NALIAKA KULUNDU

**DENNIS MAKWARA WANGWERI (suing as personal representative of the estate of
the late PATRICK WANGWERO KULUNDU RESPONDENT**

*(Being an appeal against the judgment delivered by Hon. R. Kimingi, Senior Principal Magistrate on
21st May of 2007 in*

CMCC No. 43/2003 at Thika Courts)

RULING

I. INTRODUCTION

1. Order 42 r 32(2) Civil Procedure Rules reads:

“If within one year after service of the memorandum of 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.”

2. The appeal before this court was listed before me on Friday 13th July 2012 for purposes of dismissal by notice dated 29th June 2012 to “show cause why the appeal should not be dismissed” for non prosecution.

3. The appellant filed an affidavit on 12th July 2012 dated the 11th July 2012 to show cause that appeal ought not to be dismissed.

II BACKGROUND

4. The original suit before the subordinate court was a tort case; a running down matter where a collision occurred between two motor vehicles on 22nd October 2001. As a result, a male adult (now deceased) suffered fatal injuries. The trial court delivered a judgment on 13th April 2007 and gave an all inclusive judgment of Ksh. 1,272,060/-.

5. Being dissatisfied with the award, the appellant original defendant filed an appeal on 11th May 2007. On applying for there to be a stay of execution, the appellant was ordered to deposit the said decretal sum to court within 15 days. Temporary stay was given 11th October 2007 by Visram J and confirmed by Waweru J on 10th December 2007.

6. The appellant did deposit the sum to court.

7. No further action was taken on the file. The notice to dismiss the appeal was accordingly issued.

8. Parties submitted before this court as follows:

III SUBMISSION BY THE RESPONDENT/ORIGINAL PLAINTIFF

9. It was submitted herein that delay in prosecuting this appeal was inordinate. The appellant took 12 months to serve the memo of appeal upon the respondent (23rd April 2008). The proceedings had been ready for collection since 16th July 2009. It has now been 3 years and no action had been taken. Further, no record of appeal had been filed.

10. No decree had been filed and whereas the same had not been issued, it was because “the further court fees” had not been paid.

11. A decree is prepared by the two advocates exchanging the said draft before submitting it to court.

12. It was the contention of the respondent that the appeal be dismissed for no action since the year 2007.

IV SUBMISSIONS BY THE APPELLANT/ORIGINAL DEFENDANT

13. Before any action can be taken in an appeal file, the deputy registrar is to notify the parties that the appeal had been admitted. Despite numerous letters to the deputy registrar, no response was forthcoming.

14. Whereas it was correct that additional files were required, it had not been done to the negligence of one of their staff who has since been dismissed from employment.

15. The record of appeal was filed now on 16th July 2012.

16. As stay of execution had been granted and decretal sum deposited, then there was sufficient cause to show the appeal should not be dismissed.

17. That there was no admission of the appeal.

18. The appellant referred to the case law of

Eunice Njeri Kimani – Vs –Muiruri Karoka

CA 179/03 (Nakuru)

Musinga J

Where the Hon. Judge declined to dismiss the appeal on grounds that it had never been admitted to hearing.

19. The respondent relied on the case law of:

Kariby Timber Industries

Vs

Nemchand Anand & Co

CA 11/97 (Mombasa)

Maraga J

Where the Hon. Judge dismissed an appeal on grounds that after direction, no action was taken and no decree had been obtained. The argument of the decree being delayed and or not issued at all by the subordinate court was rejected by the Hon. Judge as no exercise to obtain the decree.

20. Should this court dismiss this appeal for non-attendance?

V OPINION

21. It is noted that in the appeal before this court, at no time did the Registrar of the High Court cause the file to be placed before the Hon. Judge, under Section 79B for admissions or rejection of appeal.

22. The subordinate file case was indeed before the High Court.

23. I am persuaded by the authority of Eunice Njeru Kimani case (supra) that the appeal cannot be dismissed when the provisions of Section 79B Civil Procedure Act has never been done, namely that the appeal be admitted or rejected by the Hon. Judge.

24. This process is required to take 30 days after service of the memorandum of appeal.

25. Order 42 rule 11 states:

“Upon filing of the appeal, the appellant shall within 30 days cause the matter to be listed for directions under Section 79B of the Act.”

26. Order 42 rule 12 Civil Procedure Rules states:

“After refusal of a Judge to reject the appeal under Section 79B of the Act, the registrar shall notify the appellant who shall serve the memo of appeal on every respondent within 7 days of receipt of the notice from the registrar.”

27. Order 42 rule 13(1) Civil Procedure Rules states:

“On notice to the parties delivered not less than 21 days after the date of service, the memorandum of appeal, the appellant shall cause the appeal to be listed for the giving of directions in chambers.”

28. This most certainly had not been done due to perhaps the capacity of the deputy registrar and staff in processing a large volume of appeals.

29. The respondent’s authority of **Kariby Timber Industries** (supra) is one in which direction had already been taken. This therefore means that once direction by the Hon. judge has been taken, then under

Order 42 r 35 (1) Civil Procedure Rules, the appeal may be dismissed.

30. Order 42 r 35(1) Civil Procedure Rules reads:

“Unless within 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.”

31. In this case no directions having been taken, the Kariby Timber Industries case law would not apply.

VI CONCLUSION:

32. I hereby find that there has been sufficient cause given by the appellant as to why this appeal should not be dismissed.

33. The registrar is directed to comply with Section 79B Civil Procedure Act by placing this file before Hon. Judge.

34. There will be costs to the respondent herein.

DATED THIS 19th DAY OF JULY 2012 AT NAIROBI

M.A. ANG’AWA

JUDGE

Advocates :

i) *M/s Nyaundi Tuiyott & Co Advocates for appellant/*

original defendant

ii) *M/s Nelson Harun & Co Advocates for respondent /*

original plaintiff