



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CIVIL APPEAL 56 OF 2010

NOOR SAID SALIM.....APPELLANT

VERSUS

JUMAAN AWADH MBARAK..... RESPONDENT

RULING

1. On 9th March, 2010 in RMCC 2394 of 2002, the Honourable T. Gesora - Senior Resident Magistrate issued a judgment whereby the present Respondent (then Plaintiff) was awarded vacant possession of Plot Number 57/XVII Kaloleni Mombasa. The Appellant herein (Defendant in the lower court) had been divorced from the Respondent in February 2001.
2. The Appellant appealed against the judgment vide a Memorandum of Appeal filed on 25th March, 2010. Appellant also filed a Notice of Motion dated 25th March, 2010 under urgency and was granted interim orders for stay of execution pending inter *partes* hearing. After the inter *partes* hearing, Honourable Justice Ojwang dismissed the application on 8th October, 2010. The Appellant on 28th October, 2010 filed a Notice of Motion seeking to set aside the Court's Ruling of 8th October 2010. Honourable Justice Ojwang issued his Ruling on that application on 24th February, 2012 and granted stay of his Ruling of 8th October, 2010. The Applicant/Appellant was ordered to diligently prosecute her appeal.
3. By a Notice dated 10th May, 2012, the Registrar issued a Notice of dismissal of appeal under Order 42 Rule 35(2) of Civil Procedure Rules. The dismissal date was not indicated in the notice. However, the Court Process Server served the Notice to the Appellant's counsel on 14th May, 2012 according to an Affidavit of service deponed by James Mukuni on 21st May, 2012.
4. The Appellant on 24th May 2012 filed grounds to show that the appeal was active. Respondent filed written submissions on 24th June, 2012 supporting the dismissal notice. On 12th July, 2012 the parties appeared before me to submit on the dismissal. Mr. Gikandi opposed the notice of dismissal stating that the Appellant had appealed to the Court Appeal against the Hon Justice Ojwang's Ruling on 8th October, 2010, and that the appeal was pending. Citing Act 159 of the Constitution and Section 1A, 1B and 3A of Civil Procedure Act, he argued that technicalities of procedure should not be given undue weight. He said the appeal in the High Court should not be struck out on a technicality.

5. Mr. Mwakireti for the Respondent supported the notice of dismissal. He cited Order 42 Rule 1 and Order 42 Rule 5 (2). He pointed out that only a notice of appeal had been filed in the Court of Appeal and, consequently, there was no filed appeal. He also pointed out that the proceedings and judgment of the lower court had been ready within one year of the Appellant requesting them, and hand written copies had been annexed to the Applicant's Notice of Motion dated 25th March, 2008. There was, therefore, no excuse for not filing the record of appeal within the required time frames, and the overriding objectives cannot aid the indolent Appellant.

6. I have carefully considered the matter before me, and the parties submissions. The single question I must address is whether the Registrar's notice of dismissal is competent.

7. By its very nature and character, a dismissal is only capable of being effected in respect of a matter duly before a court. It is not the equivalent of striking out. A case that is before a court may be dismissed, if for example, a party has failed to appeal, or has inordinately delayed to prosecute the cause.

8. As earlier stated, the Registrar's notice of dismissal was issued by the Registrar under Order 42 Rule 35(2) of Civil Procedure Rules. That rule provides:

"if within one year after the 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."

9. The question, therefore, is whether there had been service of the Memorandum of appeal in accordance with the Civil Procedure Rules. The appeal process commences with the filing of an appeal. Upon such filing, the Appellant is required under Order 42 rule 11 to cause the matter to be listed within thirty days before a judge for directions under Section 79 B of the Civil Procedure Act.

10. Next, under Section 79 of Civil Procedure Act the Judge must either admit the matter or summarily reject it if he considers there is no sufficient ground for interfering with the decree or part of it. No time frame is given for the actions to be taken under Section 79 B.

11. Then, under Order 42 Rule A 12, if the Judge refuses to summarily reject the appeal (and it is therefore admitted, the Registrar shall notify the Appellant who shall serve the Memorandum of Appeal on every Respondent. I have perused the file and am satisfied that this process was not followed.

12. Once the parties are notified, the Appellant must, under Order 42 Rule 13(1) and not less than 21 days after the date of service of the Memorandum of Appeal, cause the matter to be listed before a judge in chambers for the giving of directions. This, too, appears not to have been done.

13. It is at this point, after the appeal is in effect admitted and directions given, that the question of dismissal can arise. Order 42 Rule 35 (1) provides as follows:

"Unless within three months after the giving of directions under Rule 13 the appeal shall not 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 the prosecution."

14. I have not seen any evidence from the record that this process under Order 42 Rule 35(1) has been effected.

Accordingly, the notice under Order 42 Rule 35(2), issued by the Registrar is premature, and I so hold. I therefore, direct that the Registrar shall place the file before a judge for formal admission or rejection pursuant to Section 79B, and thereafter, notify the parties with all due despatch.

Orders accordingly.

Dated, signed and delivered this 12th day of October, 2012

R.M. MWONGO
JUDGE
Read in open court
Coram:

Judge: Hon. R.M. Mwongo

Court clerk: R. Mwadime

In Presence of Parties/Representative as follows:

- a).....
- b).....
- b).....
- c).....