



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KAKAMEGA

Civil Appeal 104 of 2003

JOSEPH SILIMANI WANJIRI APPELLANT

VERSUS

REMIGIO OMOTO MISIANI RESPONDENT

RULING

The Respondent to this appeal has asked that the appeal be stuck out on two grounds;

- (i) That the appeal was incompetent, for non-compliance with Order 41 rule 8 (b) of the Civil Procedure Rules; and
- (ii) That there has been a failure to prosecute the appeal within 3 months from the date when directions were given.

In relation to Order 41 rule 8B (4) of the Civil Procedure Rules, Mr. Claude Bakhoya, learned advocate for the Respondent, submitted that the Appellant had failed to provide the mandatory documents stipulated.

In response, the Appellant says that although some documents may not yet have been filed by him, the rules do allow him to file such documents within such time as the court may direct.

And, as the court had not yet given directions to the Appellant, concerning the period within which the documents had to be filed, the Appellant submitted that the application herein was premature.

Furthermore, the Appellant pointed out, there had been no directions yet, in this appeal. Consequently, it was the opinion of the Appellant that that was yet another reason why the application herein was premature.

Indeed, as far as the Appellant was concerned, the application for dismissal of an appeal for want of prosecution ought only to be brought after an appeal had been admitted to hearing, and also after directions had been given.

The Appellant also submitted that it is the Deputy Registrar who is supposed to list appeals for directions; and that an appellant has no role in that regard, as he could not direct the Deputy Registrar to act.

For those reasons, Mr. Ondieki, learned advocate for the Appellant, contended that the application ought to be dismissed.

But the Respondent said that there was no way that an appeal could be admitted to hearing if some essential documents had not been lodged by the appellant.

Furthermore, the Respondent was of the view that the court could not be expected to give directions on the basis of only a memorandum of appeal.

If I understood the Respondent correctly, he was saying that an appellant has a role to play in having an appeal listed for directions. In other words, it would not be right for an appellant to simply file a memorandum of appeal, and to thereafter sit back (as the appellant appears to have done), and then expect the Deputy Registrar to list the appeal for directions.

In my considered opinion, Mr. Bakhoya is right to submit, as he did, that an appellant cannot file a memorandum of appeal, and then sit back to wait for the Deputy Registrar to list the appeal for directions. I say so because Order 41 rule 8B (1) of the Civil Procedure Rules stipulates as follows:-

***“On notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of appeal the registrar shall list the appeal for the giving of directions by a Judge in Chambers.*”**

Whilst it is clear that the registrar is required to give notice to the parties that the appeal was scheduled to be listed for directions, he can only do so after not less than 21 days from the date when the memorandum of appeal was served upon the Respondent. That therefore begs the question as to how the registrar would get to know when the appeal had been served.

Of course, if service were effected by the court process server, the said process server would file an appropriate affidavit of service. However, the reality is that in most instances, service is effected through the offices of the advocates acting for appellants. Therefore, the appellant or his advocate would have a duty of informing the registrar about the date when the memorandum of appeal was served.

By virtue of the provisions of Order 41 rule 8A of the Civil Procedure Rules;

“After the refusal of a judge to reject the appeal under section 79B of the Act, the registrar shall notify the appellant who shall serve the memorandum of appeal on every respondent.”

Section 79B of the Civil Procedure Act empowers the High Court to summarily dismiss an appeal from a subordinate court if the Judge considers that there is no sufficient ground for interfering with the decree, part of a decree or the order appealed against.

Having perused the record before me, I failed to find anything to indicate that the appeal had been summarily dismissed.

Indeed, one can assume that the appeal was not summarily dismissed, because had that been the position, the Respondent would not have needed to file an application to strike out the appeal.

I have also failed to find any proof that the memorandum of appeal had been served upon the Respondent. Such service ought to have been made after the Respondent was notified by the registrar, that a judge of the High Court had refused to summarily reject the appeal.

In this case, there is no proof that the Respondent had been served with the memorandum of appeal. Also there is no proof that a Judge of the High Court had refused to summarily reject the appeal. In which case, even if the memorandum of appeal had not yet been served upon the Respondent, that would not render the appeal defective.

Furthermore, there is no evidence that the High Court has given directions.

Pursuant to the provisions of Order 41 rule 31 (1) of the Civil Procedure Rules an application for

dismissal of an appeal for want of prosecution may only be granted if more than 3 months had lapsed from the date when directions were given, in accordance with Order 41 rule 8B.

Therefore, as there is no evidence that directions had been given herein, the application before me was premature.

Meanwhile as regards the documents listed under Order 41 rule 8B (4) of the Civil Procedure Rules, there is no requirement that all of them be filed, before the Judge of the High Court can decide whether to summarily dismiss an appeal or whether to admit the same to hearing.

Sub-rule (4) provides as follows;

“Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say –

- (a) the memorandum of appeal;*
- (b) the pleadings;*
- (c) the notes of the trial magistrate made at the trial;*
- (d) the transcript of any official shorthand or palantypist notes made at the hearing;*
- (e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;*
- (f) the judgement, order or decree appealed from, and where appropriate, the order (if any) giving leave to appeal;*
- (g) where the appeal is from a decision of a*

subordinate court given in the exercise of its appellate jurisdiction, the documents corresponding to those specified in paragraphs (a) to (f) inclusive so far as they relate to the appeal to such subordinate court:

Provided that –

- (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).

Two points emerge from that sub-rule; first that it is at the stage before allowing the appeal to go for hearing that the judge is to be satisfied that the documents listed were on record. Secondly, the judge has discretion to dispense with production of any document which is not relevant, save only that the memorandum of appeal, the pleadings, the judgement, order or decree appealed from, and where appropriate, the order (if any) giving leave to appeal.

The fact that the documents listed in Order 41 rule 8B (4) of the Civil Procedure Rules had not yet been filed by the appellant, at this stage, did not therefore render the appeal defective, as alleged by the Respondent.

In the result, the application dated 12th January 2007 is dismissed with costs.

Dated, Signed and Delivered at Kakamega, this 13th day of October, 2008.

FRED A. OCHIENG

J U D G E