



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC APPEAL 30 OF 2019**

**JOSPHAT MWAMBILI MWAKAU ..... APPELLANT**

**-VERSUS-**

**RUTH M. AMBAISI ..... 1<sup>ST</sup> RESPONDENT**

**PETER MWINGA ..... 2<sup>ND</sup> RESPONDENT**

**JANE GICHIEMA ..... 3<sup>RD</sup> RESPONDENT**

**(All suing as officials of Healing and Deliverance Ministry)**

**RULING**

1. The subject of this application is the application by the respondents that is dated and filed on 11<sup>th</sup> December 2020. The respondents seek for orders that the Memorandum of Appeal filed in court on 16<sup>th</sup> July 2019 be dismissed for want of prosecution. The application is supported by the grounds on the face of it and the supporting affidavit of the 1<sup>st</sup> respondent.

2. It is the case of the respondents that the appellant has not taken any steps to have the appeal set down for hearing, and continued delay in the determination of this appeal is prejudicial to them. The respondents claimed that the appellant had obtained an order for stay of execution of the lower court's decision pending the hearing and determination of this appeal. The respondents further claimed that the trial court's decree is of Kshs. 4,000,000/- which the appellant received from the respondent as purchase price for a property that did not go through and the continued delay in the refund is greatly prejudicial to the respondents who are forced to spend a lot of money on account of rent.

3. The application is opposed by the replying affidavit of the appellant. The appellant deposed that he had written three letters requesting for certified copies of the judgment and proceedings but to no avail. He further deposed that further delays have been caused by the COVID-19 pandemic. He deposed that he is ready and willing to fix the appeal for directions as soon as certified copies of proceedings and judgment are supplied.

4. When the matter came for *inter-partes* hearing, I advised that the same be canvassed by way of written submissions.

5. Counsel for the respondent, submitted that the appellant has not met the requirements of Order 42 Rule 35 (1) of the Civil Procedure Rules. Counsel further submitted that the appellant is bent on enjoying the fruits of the aforesaid interim orders of stay of execution, and is not keen on prosecuting the appeal. Counsel further referred me to the case of K. Ventures Limited vs. Peter Olumati (2018) eKLR where the court held that the appellant ought to have listed the appeal for directions within 30 days after filing the appeal. Counsel submitted that the respondent should not pitch tent on Article 159 of the constitution to cover for his indolence and deliberate failure to take steps in prosecuting the appeal as required by the law. Counsel also cited the case of First National Finance Bank Limited vs. Universal Apparels (EPZ) Ltd & 2 others (2017) eKLR, where the court stated that Article 159 ought to be a shield and not a spear. Further to this, counsel submitted that the interim order of stay should be vacated unless the appellant deposits the decretal sum to court. To buttress his point, counsel referred me to the case of Gianfranco Manenthi & another vs. Africa Merchant Assurance Company Ltd (2019) eKLR where the court held that in a money decree, applicants must show and meet payment of security for due performance of the decree.

6. Counsel for the appellant submitted that dismissing the appeal is a drastic step on the appellant's constitutional right of appeal. He submitted that as per Article 159 of the constitution, the case should be decided on merits and not on technicalities. He further submitted that he wrote letters requesting for the certified copies of proceedings and judgment, and this is evidence of effort made in prosecuting the appeal. Counsel also urged the court to take judicial notice of the delays caused by the COVID-19 pandemic. Counsel submitted that he would fix the matter for hearing once the certified copies of the proceedings and judgment are supplied. Counsel further submitted that the issue of depositing the decretal sum is not prayed for in the application, and therefore the authority quoted on the same is irrelevant. Counsel

submitted that he cannot fix the appeal for hearing because he is yet to be notified according to Section 79B of the Civil Procedure Act and Order 42 Rule 3 of the Civil Procedure Rules. To put emphasis on this claim, counsel referred me to the case of HCCA No. 248 of 2017 Njai Stephen vs. Christine Khatiala Andika (2019) eKLR. Counsel further submitted that the application is premature as there is no penalty where an appellant fails to proceed as per Order 42 Rule 11-13 of the Civil Procedure Rules. Counsel further cited the case of HCCA No. 34 of 2016 Attorney General vs. Lucy Nduta Nganga (2017) eKLR where the court stated that in striking out a document, the court has to weigh the prejudice likely to be suffered by the affected party.

7. I have considered the application and rival submission of the parties. In the present case, the applicable law on the process of appeals is regulated by the Civil Procedure Act and Civil Procedure Rules. The relevant provision on dismissal of an appeal for want of prosecution is provided for under Order 42 Rule 35 which states:

*“(1) Unless within three months, after granting 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.*

*(2) 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.”*

8. In the instant application learned counsel for the respondents submitted that the provisions of Order 42 Rule 35(1) and (2) have not been complied with by the appellant. The arguments by counsel for the respondents are that since filing of memorandum of appeal, the appellant has not made any positive or significant step to prosecute the appeal. On his part Counsel for the appellant contested that the issue is not an omission or negligence but the failure of the court to supply the record in accordance to Section 79G of the Civil Procedure Act.

9. There are two situations relevant to the facts of this case from the reading of Order 42 of the Civil Procedure Act and Rules; first, under Order 42 Rule 10 and 11 the appeal is deemed to be brought and filed before the appellate court when a memorandum of appeal is filed. Secondly, when it is said to be filed and entered in the register the appellant shall within thirty days cause the matter to be listed before a judge for directions under Section 79B of the Act, which is drawn as follows:-

*“Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against he may, notwithstanding section 79C, reject the appeal summarily.”*

10. Going by the provisions of Section 79B the judge is to peruse the memorandum of appeal and the lower court record to infer whether sufficient grounds exist to interfere with the decree. In the event the judge is satisfied that no plausible grounds exist, the appeal is to be summarily dismissed.

11. The relevant aspect of this provision is the requirement for the appellant to schedule the appeal for directions before the court even before the registrar compiles and transmits the record of appeal to the court. The contention by the applicant is that the appellant has not even attempted to comply with Order 42 Rule 10 and 11 of the Civil Procedure Rules.

12. In view of what is stated above, there is no dispute that the appellant has not approached the court since the filing and serving the memorandum of appeal. The manner in which the superior courts have approached the issue on delay has been well captured in the case of Eastern Province Kenya Ltd v Rongai Workshop & Transporters Ltd & Another [2014] eKLR by laying down the test to be applied this.

*“The test to be applied in application for dismissal for want of prosecution is whether the delay is prolonged and inexcusable, and if it is whether justice can still be done despite the delay.*

*Thus, even where the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of the discretion of the court.”*

13. The rationale of this decision is the supremacy of the courts to exercise discretion not to deprive a party to a right to access court to pursue his claim which by reason of delay would not see the light of the day. This principle recognizes the fundamental rights and obligation of court of law to do substantive justice between the parties.

14. In this case, the appellant filed his memorandum of appeal on 16 July 2019. It has been over one and a half years and no directions have been taken before a judge in chambers under section 79B of the Civil Procedure Act. The appellant contended answer to this is that he has not been supplied with certified copies of proceedings and judgment. The appellant has annexed three letters on this. The first letter was filed in court on 1<sup>st</sup> March 2019, the second is dated 15<sup>th</sup> January 2020 and the third is dated 4<sup>th</sup> August 2020. Unlike the first letter, both the second and the third letters are not affixed with the courts stamp to ascertain that it is has been properly received in court. Looking at this, it is apparent that the appellant only requested for the typed copies of proceedings on 1<sup>st</sup> March 2019. It is clear to me that since then, the appellant has not followed up the matter. This to me is undue delay. It is the duty of a litigant to zealously follow up to make sure that his suit is heard and determined. Blame cannot be occasioned to COVID-19. Indeed the pandemic caused some delay, however the court was still working. This delay is causing prejudice to the respondents who want to enjoy the fruits of their litigation. The appellant has urged the court to be guided by Article 159 of the Constitution. I must say, equity aids the vigilant not the indolent.

15. In the result, I dismiss this appeal for want of prosecution. The appellant to pay costs to the application and the appeal.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 29TH DAY OF JULY 2021

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C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

..... for the appellant

..... for the respondents

C.K. YANO