



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL APPEAL NUMBER 16 OF 2017**

**AUGUSTINE MULO ONYANGO.....APPELLANT/RESPONDENT**

**VERSUS**

**MIGOTIYO PLANTATIONS LIMITED.....1<sup>ST</sup> RESPONDENT/APPLICANT**

**LUNGINO MUKOYA.....2<sup>ND</sup> RESPONDENT/APPLICANT**

**RULING**

1. Vide a Notice of Motion dated 22<sup>nd</sup> October, 2020, brought under **Section 1A,1B,3A and 79 of the Civil Procedure Act, Order 42 Rule 2,13,35 and Order 51 of the Civil Procedure Rules, 2010**, the Applicant seeks the orders that:-

**(i) THAT this Honorable court be pleased to strike out the Appellant/respondent Record of Appeal for being incomplete and filed out of time without leave of this Honorable Court.**

**(ii) THAT this Honorable Court be pleased to strike out the Appellant's appeal for want of prosecution.**

**(iii) THAT the costs of this Application be provided for and be borne by the Appellant/Respondent herein.**

2. The Application is premised on the grounds set out on the face of the Application and supported by an Affidavit sworn on 22<sup>nd</sup> October, 2020 by Moses Andama advocate.

3. He deposed that the Appellant's Memorandum of Appeal filed on 10<sup>th</sup> February, 2017 was served upon him on 15<sup>th</sup> of March 2017 and no record of appeal was filed until 11<sup>th</sup> of March 2020 which is beyond the 30 days' requisite period.

4. That on 10<sup>th</sup> October, 2020 he was served with the said Record of Appeal filed in court outside the stipulated time without leave, and without a certificate of delay to explain the delay in filing the said record of appeal beyond 30 days window.

5. He deposed that the Record of Appeal was incomplete not accompanied by a certified copy of the Proceedings and Decree in accordance with **Order 42 Rule 2 and 13 of the Civil Procedure Rules, 2010**. Further that the appellant failed to cause the appeal to be listed for directions after service of the Memorandum of Appeal in accordance with **Order 42 rule 13 of the same Rules**. That more than three (3) years had passed since service of the Memorandum of Appeal yet the Respondents had failed to prosecute the same, conduct that depicts the Respondent's disinterest in prosecuting his Appeal.

6. In addition, that the appellant had not annexed any letters requesting for proceedings and /or certificate of delay to explain the delay in filing the record. That the appellants' conduct in handling this matter had caused undue delay, is an abuse of the court process and is prejudicial to the applicants right to a fair and speedy trial.

7. That it is in the interest of justice that Appellant's appeal be struck out for want of prosecution.

8. The Application is opposed by the Appellant Augustine Mulo Onyango vide his Replying Affidavit sworn on 5<sup>th</sup> November 2021; that the application is bad in law, made in bad faith, inept, malicious, lacking in merit, an afterthought and otherwise an abuse of the court process.

9. That after the delivery of the lower court's Judgment on 11<sup>th</sup> January, 2017 he filed a Memorandum of Appeal within the legal time frames and directions are yet to be issued by the court hence the appeal cannot be struck out. That the application is aimed at denying him the

fruits of his judgment and prayed for its dismissal.

10. The parties neither filed submissions nor orally argued this Application.

### **ISSUES FOR DETERMINATION**

**i. Whether the record of appeal is incompetent and ought to be struck out;**

**ii. Whether the Appellant's Appeal should be dismissed for want of prosecution.**

### **ISSUE NO. 1:**

#### **Whether The Record Of Appeal Is Incompetent And Ought To Be Struck Out**

11. The Supreme Court of Kenya, in the case of **Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others [2015] eKLR** held as follows at **paragraph 41:**

*“Without a record of appeal, a Court cannot determine the appeal cause before it. Thus, if the requisite bundle of documents is omitted, the appeal is incompetent and defective, for failing the requirements of the law. A Court cannot exercise its adjudicatory powers conferred by law, or the Constitution, where an appeal is incompetent. An incompetent appeal divests a Court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues.”*

12. **Order 42 Rule 2 of the Civil Procedure Rules** provides as follows:-

*“Where no certified copy of the decree or order appealed against is filed with the Memorandum of Appeal, the Appellant shall file such certified copy as soon as possible and in any event within such a time as the court may order, and the court need not consider whether to reject the Appeal summarily under Section 79B of Act until a copy is filed.”*

13. **Order 42, Rule 13(4)(f) of the Civil Procedure Rules, 2010** provides;

*“(4) 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 hearing;*

*(d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;*

*(e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;*

*(f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:*

*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).”*

14. According to this rule, at part **f (ii)** thereof before allowing the appeal to go for hearing the judge has discretion to dispense with certain documents but such discretion does not extend to dispensation of **The memorandum of appeal; The pleadings and the judgment, the order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal.**

15. In this case, the Applicants have asked this court to strike out the Record of Appeal for being incompetent on grounds that the Appellant failed to attach a certified copy of proceedings and decree appealed from.

16. Guided by the above **part f (ii)** the court may dispense with certified copy of proceedings but not with an order/judgment appealed from.

17. A perusal of the Record of Appeal shows that the appellant attached a copy of the judgment however, there is no certified copy of the Decree attached as is mandatorily required. Also the appellant did not attach the certified copy proceedings of the lower courts. The appellant did not respond to this issue in his Replying Affidavit meaning it remained uncontroverted. Taking into consideration that the appeal herein is yet to be heard in my view it will be premature and too draconian to strike out the Record of Appeal at this stage.

18. This prayer fails.

**ISSUE NO.2:**

**Whether The Appellant's Appeal Should Be Dismissed/Struck Out For Want Of Prosecution.**

19. There are processes that must precede the dismissal/striking out of an appeal. These are set out in the **Civil Procedure Act and Rules**.

20. There are directions under **Order 42 Rule 11 of the Civil Procedure Rules** which provides that:

**“Upon filing of the appeal the appellant shall within thirty days, cause the matter to be listed before a judge for directions under section 79B of the Act”.**

21. **Section 79B of the Civil Procedure Act** provides for the summary rejection of an appeal:-

**“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”.**

22. **Order 42 Rule 35 (1) of the Civil Procedure Rules** gives the respondent the power to move the court after directions have been given to safe guard her interests in the following terms:-

**“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 hearing or to apply by summons for its dismissal for want of prosecution”.**

23. **Order 42 Rule 35 (2) of the Civil Procedure Rules** empowers the Registrar to deal with dead appeals through dismissals.

**“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”**

24. The subordinate court delivered its Judgement on 11<sup>th</sup> January 2017. The appellant lodged a Memorandum of Appeal in time on 10<sup>th</sup> February, 2017 as by **Section 79 G of the Civil Procedure Act**.

25. The lower court file has not been forwarded to this court.

26. Directions on Appeal have not been issued. Directions must be issued before an Appeal can be dismissed for want of prosecution.

27. This was the position in **Morris Njagi & another vs Mary Wanjiku Kiura [2017] eKLR** where the court held;

*“A party can only apply for dismissal where directions have been given. This is under Order 42 rule 35 (1) Civil Procedure Rules. I have already pointed out that no directions have been given. The appeal has to be admitted first before it can be listed for hearing. The provision under which this appeal could be dismissed for want of prosecution is Order 42 rule 35 (2). This provision could not be invoked by the applicant. The applicant did not write to request the registrar to list the appeal for dismissal.”*

28. In the same vein in the case of **Rosarie (EPZ) Limited -VStanlex Mbithi James (2015) eKLR** the court stated:

*“Since under Order 42 rule 35 (1) the appeal cannot be dismissed before directions have been given the applicant should have taken advantage of Order 42 rule 35 (2) and cause the registrar to list the appeal for dismissal. If there had been such correspondence which the registrar ignored, I would have been inclined to the application. Since however, there is no evidence that the applicant had requested the registrar to list the matter in terms of Order 42 rule 35 (2) and the latter failed, I find it difficult to accede to the application.”*

29. And in **Morris Njagi & another vs Mary Wanjiku Kiura** (supra) the court stated that;

*“I am of the view that since no directions have been issued in the appeal the applicant (respondent) cannot move the court to dismiss the appeal for want of prosecution.”*

30. I am persuaded that these precedents speak the position of the law, hence the appeal is not ripe for dismissal or striking out for want of prosecution.

31. In the upshot the application dated 22<sup>nd</sup> October, 2020 is denied.

32. There will be no order as to costs because the applicant has really dragged his feet in this matter.

33. To ensure that the matter moves the respondent is to file and serve a complete Record of Appeal within 60 days hereof. In default the Deputy Registrar to issue Notice To Show Cause why the appeal should not be dismissed.

34. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 8<sup>TH</sup> DAY OF FEBRUARY, 2022.**

**Mumbua T Matheka**

**Judge**

In the presence of:

CA Edna

Kiplenge & Kurgat Advocates for Applicant

Gekong'a & Co Advocates for Respondent