



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC APPEAL NO. E029 OF 2020

**HURLINGHAM GROCERS LIMITED.....APPELLANT/RESPONDENT**

**VERSUS**

**APA INSURANCE LIMITED.....RESPONDENT/APPLICANT**

**RULING**

1. The Respondent's Notice of Motion application dated 1<sup>st</sup> September 2021 sought orders for the dismissal of the Appeal herein for want of prosecution. It is supported by an of **Kennedy Ochieng Advocate** sworn on the even date.

2. In the Affidavit, it pointed out that on 27<sup>th</sup> July 2020, the Appellant herein filed the Appeal pursuant to leave granted by **Hon. Lady Justice Kossy Bor** vide ruling delivered on **20<sup>th</sup> July 2020**. The Appellant was also required to pay the rent arrears of **Ksh 5,653,892.36** as at 23<sup>rd</sup> July 2020. It was also pointed out that the Appellant has not complied and further they have abandoned the premises and in essence have lost interest in the Appeal.

3. He pointed out that there had been inordinate and inexcusable delay in setting down the Appeal herein for hearing which amounted to abuse of the court process. He urged this court to dismiss the Appeal since litigation must come to an end.

4. In opposition to the said application, on 30<sup>th</sup> September 2021, **Firozali Kassam Jaffer**, swore a Replying Affidavit on behalf of the Appellant.

5. He pointed out that the application has been brought under the wrong provision of the law this being an Appeal and hence not a suit. It was stated that the Application ought to have been brought under **Order 42 of the Civil Procedure Rules** dealing with appeals and not **Order 17 of the Civil Procedure Rules**. He added that the Appeal herein was yet to be admitted and that directions on the hearing of the said Appeal had also not been given.

6. I have considered the Application in its entirety. I have also considered the parties' respective submissions, and the respective issues in their respective affidavits. Further, I have considered the relevant law and jurisprudence. The key issue is whether the applicant has demonstrated that this appeal should be dismissed for want of prosecution.

7. Notwithstanding, the Applicants citation of **Order 17 of the Civil Procedure Rules**, I will begin by examining the relevant legal provisions for dismissal of appeals for want of prosecution. **Order 42 Rule 35 of the Civil Procedure Rules**, envisages two (2) scenarios for the dismissal of an appeal for want of prosecution. The first scenario is when an appellant fails to cause the matter to be listed for directions under **Section 79B of the Civil Procedure Act** as is envisaged in **Order 42 Rule 11 of the Civil Procedure Rules**. The second scenario is that if after service of Memorandum of Appeal the appeal would not have been set down for hearing, the registrar shall on notice to the parties list the appeal before the judge for dismissal.

8. **Section 79B of the Civil Procedure Act** provides as follows: -

1) *On notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of appeal the appellant shall cause the appeal to be listed for the giving of directions by a judge in chambers.*

2) *Any objection to the jurisdiction of the appellate court shall be raised before the judge before he gives directions under this rule.*

3) *The judge in chambers may give directions concerning the appeal generally and in particular directions as to the manner in which the evidence and exhibits presented to the court below shall be put before the appellate court and as to the typing of any record or part thereof and any exhibits or other necessary documents and the payment of the costs of such typing whether in advance or otherwise.*

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).*

10. It is evident from the provisions of **Section 79B of Civil Procedure Act** that a judge has to peruse the appeal before he can summarily reject the same. These are the directions contemplated in **Order 42 Rule 11 of the Civil Procedure Rules** that states as follows:

*“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”.*

11. If the appeal is not summarily dismissed, then the registrar shall notify the appellant who shall then serve the Memorandum of Appeal upon all the respondents within seven (7) days of receipt of the notice from the Registrar in accordance with **Order 42 Rule 12 of the Civil Procedure Rules**.

12. After service of the Memorandum of Appeal, on notice to the parties delivered not less than twenty one (21) days, the appellant shall again cause the appeal to be listed before the judge for directions as seen in **Order 42 Rule 13 of the Civil Procedure Rules**.

13. Notably, the procedure for rejection and/or admission of appeal and giving of directions is very well set out in the Civil Procedure Rules. However, this procedure does not seem to be strictly followed and differs from one court to another. The appellant does not seem to have any role in fixing the appeal for directions as contemplated under **Order 42 Rule 11 of Civil Procedure Rules and Order 42 Rule 13 (1) of the Civil Procedure Rules**. It is important to point out that under **Order 42 Rule 13 (4) of the Civil Procedure Rules**, the judge shall not allow a matter to proceed for hearing unless the record of Appeal is duly filed.

14. Once directions are given under **Order 42 Rule 13 of Civil Procedure Rules** and the appellant fails to fix the appeal for hearing, the respondent may fix the same for hearing and/or seek dismissal of the same for want of prosecution under **Order 42 Rule 35 (1) of the Civil Procedure Rules** or the registrar lists the appeal before a judge for dismissal under **Order 42 Rule 35 (2) of Civil Procedure Rules**.

15. **Order 42 Rule 35 (1) of the Civil Procedure Rules** stipulates as follows:-

*“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”.*

16. **Order 42 Rule 35 (2) of the Civil Procedure Rules** stipulates as follows:-

***“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!”***

17. The provisions of the law relating to dismissal cannot be read in isolation. The bottom line is that directions must have been given before an appeal can be dismissed for want of prosecution. Indeed, there does not appear to be any penalty where an appellant fails to proceed as per **Order 42 Rule 11 and Order 42 Rule 13 of the Civil Procedure Rules, 2010**.

18. This court is of the view that an appeal cannot be dismissed before directions had been given. As there was no indication that directions had been given herein, the Appeal herein could not be dismissed under **Order 42 Rule 35 (1) of the Civil Procedure Rules**. In any event, there was also no evidence that the Registrar had issued a notice under **Order 42 Rule 12 of Civil Procedure Rules**.

19. Notably, every person is entitled as envisaged under **Article 50(1) of the Constitution of Kenya, 2010** to have a fair trial. The said provision provides as follows:-

***“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”***

20. It therefore follows that every person ought not to be shut out from accessing court or having his day in court. Indeed, the right of a party to enjoy the fruits of his judgment must be weighed against the right of a party to access court to have his dispute heard and determined by a court or tribunal of competent jurisdiction.

21. It is therefore the considered opinion of this court that allowing the present application would be shutting out the Appellants from accessing the court and would be contrary to **Article 50(1) of the Constitution of Kenya**.

22. This Court is guided by the cases of *Njai Stephen vs Christine Khatiala Andika [2019] eKLR*, *Kirinyaga General Machinery vs Hezekiah Mureithi Ileri [2007] eKLR* amongst other cases where the common holding was that an appeal could not be dismissed if directions had not been given.

### **Disposition**

23. For the foregoing reasons, the upshot of this court’s decision is that the Respondent’s Notice of Motion application dated 1<sup>st</sup> September 2021 is not merited and the same is hereby dismissed. Costs shall be in the cause.

24. However with a view of progressing this matter further, the Appellant is hereby directed to file and serve its Record of Appeal within sixty (60) days from date of this Ruling failure of which the Appeal herein will stand as automatically dismissed.

25. Either party is at liberty to apply.

26. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 20<sup>TH</sup> DAY OF DECEMBER 2021**

**E. K. WABWOTO**

**JUDGE**

**In the presence of: -**

**Mr. Ochieng for the Applicant.**

**N/A for the Respondent.**

**Court Assistant; Caroline Nafuna.**