REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei - J

CIVIL APPEAL NO. 98 OF 2018

PANIJ AUTOMOBILES LTD.....APPELLANT/RESPONDENT

-VERSUS-

MATHEKA KALUKU.....1ST RESPONDENT/APPLICANT

ZACHARY MUTURI.....2ND RESPONDENT

RULING

1. The 1st Respondent (Applicant) through an application by way of Notice of Motion dated 10th February, November, 2020 brought under the provisions of Sections 3A of the Civil Procedure Act, Order 42 Rule 35 (2) of the Civil Procedure Rules and all other enabling provisions of the law seeks the following orders: -

> ***a) That this Honourable Court be pleased to dismiss and/or strike out the Appellant's suit for want of prosecution with costs to the Respondent/Applicant.***
>
> ***b) That costs of this application be borne by the Appellant/Respondent.***

2. The application is supported by the affidavit of Stanley Nthiwa Advocate, sworn on 10th February, 2020 and the grounds set out therein. The 1st Respondent's gravamen inter alia is; *that the appellant has not taken any active steps since the suit was last in court; that it is apparent that the appellant is not interested in proceeding with the same; that the pendency of the suit continues to cause prejudice to the 1st Respondent who is unable to enjoy the conclusion of the suit.*

3. The Appellant (respondent) filed grounds of opposition on 2nd November, 2020 raising the following grounds: -

> ***a) That the application is misconceived, frivolous, vexatious and an abuse of the process of the court;***
>
> ***b) The Orders sought are untenable and a nullity as there is no appeal that has been admitted capable of being dismissed;***
>
> ***c) It is in the interest of justice that the Appellants be accorded an opportunity to prosecute the appeal and have the issues captured determined on merit.***

4. The appellant's director Trushar D. Patel swore a replying affidavit sworn on 2.11.2020 in which he deponed inter alia; that the delay has been caused by the failure of the court registry to supply the appellant with copies of the proceedings of the trial court; that the appellant is ready and willing to prosecute the suit; that striking the suit will deny the appellant an opportunity the appeal and to exercise its right to be heard; that the claim of prejudice by the 1st respondent does not arise at all since there are no orders of stay of execution in place; that the application should be dismissed with costs.

5. The 1st Respondent filed a further affidavit in which she averred that the appellant has not availed any evidence of seeking for proceedings from the lower court and that as far as she is concerned, the appellant is not ready to prosecute the appeal and has only been jolted into action by the present application.

6. Parties agreed to canvass the application by way of written submissions. It is only the 1st Respondent's submissions that are on record. Mr. Stanley Nthiwa, Learned Counsel for the respondent submitted that he seeks for the striking out of the memorandum of appeal or in the alternative, for the appeal to be struck out with costs for want of prosecution. He referred to the supporting affidavit sworn on 10th February,

2020 wherein he deposes that Judgment was entered on 18th October, 2017 for the 1st Respondent/Applicant. The Appellant/Respondent filed a memorandum of appeal on 8th August, 2018 but no record of appeal has been prepared and no effort has been made to list the matter for directions. He added that the appellant has also shown no interest in prosecuting the appeal.

7. It was further submitted that under Order 42 rule 35(2) which state that if an appeal has not been set down for hearing within 1 year after the service of memorandum of appeal, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal. He argued that no reason has been advanced by the Respondent/Appellant for not complying with the said rule. It was contended that the filing of the memorandum of appeal was an attempt to delay the matter and keep away the fruits of the Judgment from the Applicant.

8. It was finally submitted that in the Appellant/Respondent's grounds of opposition, it states that no directions have been taken as required under Order 42 Rule 13 (1) of the Civil Procedure Rules 2010 neither has a record of appeal been filed yet it is their responsibility to seek such directions. He prayed for the application herein to be allowed.

9. I have given due consideration to the application, the rival affidavits, grounds of opposition and the submissions. I find the only issue for determination is whether the memorandum of appeal should be struck out and the appeal dismissed for want of prosecution.

10. A perusal of the record and pleadings reveals that the memorandum of appeal was filed on 8th August, 2018. An earlier application for stay of execution filed by the appellant was later dismissed by this court on 21.1.2019 for lack of merit. **Order 42 rules, 11, 12 and 13 of the Civil Procedure Rules** set out the processes to be followed by an appellant and the court after the filing of an appeal, in the following terms: -

> *"11.* ***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.***
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> ***12. 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 within seven days of receipt of the notice from the registrar.***
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> *13. 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."***
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> **Section 79B of the Civil Procedure Act** provides that: -
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> ***"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."***

11. In the case of **Haron E Ogechi Nyaberi v. British American Insurance Co. Ltd [2012] eKLR,** the High Court held that: -

> ***"It is however, clear to this court that the Registrar cannot give notice of directions to the parties of an appeal and cannot himself fix an appeal for directions before a judge unless and until the Appellant has caused it by first complying with rules 11 and 13 thereof. Appellant's compliance to those rules is the gate-opening for admission of appeal and for the taking of directions. It is to be observed, therefore, that it will be the Appellant who shall really cause the appeal to be listed for giving directions before a judge by:***
>
> ***a) Serving the Memorandum of Appeal; and***
>
> ***b) Filing and serving the Record of Appeal.***
>
> ***In this case the Appellant admitted that he never filed or served the Record of Appeal within 30 days to enable the appeal to be listed before a judge to admit it to hearing under Section 79B of the Civil Procedure Act as directed by Order 42 Rule 2. He also admitted or did not deny the fact that he failed to cause the appeal to be listed for the giving of directions by the Judge in Chambers under rule 13 of the above-mentioned Order. And finally, he did not deny the fact that having been served with a notice of the Registrar to file the Record of Appeal which would cause all the relevant acts abovementioned to be undertaken by the Registrar, he ignored the same for all the relevant period. All he could say is that he was not responsible for the delay without supporting such an allegation."***

12. The Appellant herein has explained the reason behind the delay in filing a Record of Appeal vide his replying affidavit. Order 42 rule 35(2) of the Civil Procedure Rules provides for the Appellant/Respondent to either set down the appeal for hearing or apply for its dismissal for want of prosecution if within 1 year after the giving of directions under Rule 13 of the same Order, if the Appellant shall not have set the appeal for hearing. Such directions have not been given in this appeal, which has not even been admitted to hearing. The Applicant cannot as such invoke the provisions of Order 42 rule 35(2) in his favour.

In the case of **Kirinyaga General Machinery vs Hezekiah Mureithi Ireri HCCC No. 98 of 2008** the Court observed thus:-

> ***"It is clearly seen from that rule that before the respondent can move the court either to set the Appeal down for hearing or to apply for dismissal for want of prosecution, directions ought to have been given."***

13. This court is however not powerless when dealing with dismissal of Appeals for want of prosecution under the provisions of Order 42 rule 35(2) of the Civil Procedure Rules. This procedure has however not been followed by the Applicant to move this court for dismissal of the Appeal.

14. 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 fail to proceed as per Order 42 Rule 11 and Order 42 Rule 13 of the Civil Procedure Rules, 2010.

15. Looking at all the issues herein, I take the view that an Appeal cannot be dismissed before directions have 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 (2) 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. There was also no indication that the lower court file and proceedings had been forwarded to the High Court for the Registrar to proceed as aforesaid.

16. Notably, every person is entitled as envisaged under Article 50(1) of the Constitution of Kenya, 2010 to have a fair trial. The said Article 50(1) of Constitution of Kenya 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."***

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. The right to be heard is sacrosanct and hence the appellant ought to be given the benefit of doubt regarding the issue of delay of court proceedings. Suffice to add that the Respondents claim to have been prejudiced by the delay is not convincing in view of the fact there are no orders of stay of execution in place. Hence, allowing the present application would be shutting out the Appellant/Respondent from accessing the court and would be a violation of right to fair hearing guaranteed under Article 50(1) of the Constitution.

17. For the foregoing reasons, it is my finding that the 1st Respondent's application dated 10. 02. 2020 lacks merit. The following orders are hereby made:-

> ***a) The application dated 10.2.2020 is dismissed.***
>
> ***b) The Deputy Registrar of this court is directed to call for the record of the lower court and organize for the admission of the appeal.***
>
> ***c) The Appellant is directed to file and serve its record of appeal within sixty (60) days from the date hereof.***
>
> ***d) There will be no order as to costs.***

It is so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 8TH DAY OF MARCH, 2021.

D. K. Kemei

Judge