



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CIVIL APPEAL NO. 15 OF 2015

(CORAM: F.M. GIKONYO J.)

(Appeal from the Judgment of Hon T. Sitati (S.R.M) delivered on 6th November 2015 in Narok CMCC No. 70 of 2012)

ANNAH MORAA.....APPELLANT

-VERSUS-

OKUMU CONSTANCE.....1ST RESPONDENT

SAMMY MUTUNGA MAINGI.....2ND RESPONDENT

RULING

[1] Before me is a Notice of Motion expressed to be brought under Order 42 Rules 10, 11,12,13,17 and 35; Order 17 rule 2 and Order 51 rule 1 of the Civil Procedure Rules, 2010; Section 1A, 1B and 3A of the Civil Procedure Act and Article 159 (2) (a), (b) and (d) of the Constitution of Kenya 2010. The application is seeking the following orders:

a. That this honourable court be pleased to strike out the memorandum of appeal and the record of appeal and consequently dismiss the appeal.

b. That the costs of this application be borne by the Appellant in any event.

[2] In support of the application, the Respondents contend that, although the appellant filed the memorandum of appeal way back on 04/12/2015, she never served it upon the Respondents until the evening of 01/02/2021. According to them, no further or other steps have been taken to prosecute the appeal since 04/12/2015. A period of five years has lapsed since the memorandum of appeal was filed. The appellant was awakened by the notice to show cause scheduled for hearing on 4/02/2021.

[3] On the basis of the foregoing, the Respondents argue that the delay is inordinate, unreasonable and inexcusable. The respondents were never notified of the existence of this appeal. The Respondents further state that the appellant has never set down the appeal for directions. There is another appeal namely ***Narok High Court Civil Appeal No. 8 of 2016; Okumu Constance & Sammy Mutunga Maingi Vs Annah Moraa*** being an appeal from the impugned judgment dated 5/11/2015 from ***Narok Cmcc No. 70 Of 2012***.

[4] That the appellant has been actively participating in that appeal and have never brought to light the existence of this appeal to either the honourable court or the Respondents herein which is prejudicial to the Respondents who have never been notified of this appeal.

[5] The appellant instituted a declaratory suit in ***Nairobi CMCC No. 4201 Of 2018 Annah Moraa Vs Jubilee Insurance Co. Ltd*** seeking to enforce the impugned judgment dated 06/11/2015 arising from ***Narok Cmcc No. 70 of 2012***.

[6] That the declaratory suit ***Nairobi CMCC No. 4201 of 2018 Annah Moraa Vs Jubilee Insurance Co. Ltd*** gave rise to ***Nairobi HCCA No. 129 Of 2019- Jubilee Insurance Co. Ltd Vs Annah Moraa*** arising an interlocutory application.

[7] That the appeal namely ***Nairobi HCCA no. 129 of 2019*** is still pending in court and the appellant has never disclosed the existence of this appeal.

[8] That in the circumstances the appellant herein is trying to concurrently enforce as well as appeal against the impugned judgment. The instant appeal therefore is an abuse of the court process and *mala fides*.

[9] That the appellant's hands are soiled and she deserves no discretionary or equitable orders for failing to serve the memorandum of appeal

within reasonable time. That it is only fair and just that this appeal be dismissed with costs.

[10] Subsequent to the filing of the notice of motion, the Respondents also supported it by the sworn supporting affidavit of their advocate **GEORGE KARANJA** reiterating the grounds in the body of the notice of motion and blamed the appellant for the delay in prosecuting the appeal.

[11] The Appellant's replying affidavit to the notice to show cause dated 3rd December 2020 set out the grounds which have made it impossible to prosecute the appeal. A perusal of the replying affidavit shows that the delay has been occasioned by the fact that the appeal herein was never placed before the honourable judge for admission under the provisions of Section 79B nor has the appellant been served with any notice by the registrar in accordance with Order 42 rule 12 of the civil procedure rules 2010. based on the foregoing the notice to show cause is pre mature.

[12] That the appellant has been pro- active and undertook requisite steps in the disposal of the appeal in following up the listing of this matter for directions and lower court for certified proceedings and judgment. The appellant's advocate's firm applied and paid for certified proceedings and judgment and sent reminders to the chief magistrate's court on; 7th December 2016, 9th October 2017, 27th March 2018, 8th March 2019 and 22nd March 2019.

[13] The appellant was informed that the delay in typing and certifying of proceedings in the lower court was caused by the numerous applications made therein by the defendants therein and now respondents herein.

[14] On 8th march 2018 the appellant's advocate wrote to this court to list this appeal for directions and/ or admission before the honourable judge. They were informed at the registry that the lower court file had not been remitted to the high court for the appeal to be placed before the honourable judge for directions and a request was made to the lower court to forward the lower court file and they would be notified once that was done. That to date no such notification was ever issued or served on the appellant. When they followed up they were informed that the lower court file was being used by the honourable judge in **Narok HCCA No. 8 of 2016** for yet again a series of applications made by the Respondents herein and appellants therein.

[15] The Appellant had visited the court registry severally and had been informed that the files for the Narok high court were to be handled by the high court in a Naivasha and the court file herein had been forwarded to the said court. The court registry was waiting for directions from the resident judge in Naivasha on how to proceed with Narok civil appeals.

[16] When a judge was posted to high court at Narok the court file could not be traced for some time either in Naivasha or this honourable court.

[17] That the notice to show cause came to them as a surprise since it is the court which for one reason or another had not taken the requisite steps to enable the appellant fix the appeal for directions and serve the memorandum of appeal as per the rules.

[18] That under Order 42 Rule 12 of the Civil Procedure Rules 2010, memorandum of appeal can only be served after the appeal has been admitted and notice to that effect given to the Appellant.

[19] That no such notice has ever been issued to the appellant and it is apparent that the appellant has all along been proactive and had taken number of steps as herein above enumerated to have the appeal disposed of but the delay was solely caused by the court.

[20] After being served with the notice to show cause, the Appellant prepared, filed and served the record of appeal despite the fact that the registrar had not served her with the requisite notification.

[21] The appellant has been and is desirous of having her appeal heard and disposed of on merit. She therefore prays for directions on the appeal.

[22] On 22nd April 2021 the appellant filed grounds of opposition dated 21st April 2021. She reiterated her arguments in her replying affidavit to the notice to show cause. She argued that this honourable court had delivered its ruling on 4th February 2021 therefore the application is incompetent, misconceived and otherwise an abuse of the court process. That the application is meant to defeat the overriding objective of the court under Section 1A,1B, of the Civil Procedure Act and Article 159 (2) of the Constitution.

[23] The Respondents filed a further affidavit sworn on 23rd April 2021. They denied the averments made by the appellant in the replying affidavit and grounds of opposition.

[24] At the hearing of the application directions were issued to have it disposed of by way of written submissions.

ANALYSIS AND DETERMINATION:

Issue

[25] Should this court strike out the memorandum of appeal and the record of appeal and consequently dismiss the appeal?

Of law's delay

[26] William Shakespeare, in Hamlet Act III, lamented:

“The Law’s delay’ is one of whips and scorns of time.”

[27] Likewise in the Bar Review Journal Ireland Vol. 13 Issue No.4 of 4.7.2008, a contributor, Thomson, in an article on delay, informed consents/employment injunctions observed thus:

“The prolonged nature of modern litigation continues to be a source of torment; indeed, lengthy delays may make it impossible for a defendant to receive a fair trial”.

[28] Our own Constitution of Kenya, 2010 in Article 159(2)(b) provides as a principle of justice that:

‘Justice shall not be delayed.’

[29] Today, expeditious disposal of cases is embraced as a principle of justice. Parties now bear statutory obligation under the principle of Overriding Objective under the Civil Procedure Act and Civil Procedure Rules to assist the court to dispose of cases expeditiously. Thus, dismissal of cases for want of prosecution should be seen within this philosophy of expeditious disposal of cases as a tenet of justice.

Dismissal of appeal for want of prosecution

[30] Dismissal of an appeal for want of prosecution is provided under Order 42 Rule 35(1) as follows:

“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.”

[31] Notably, the procedure for rejection and/or admission of appeal and of giving of directions in the Civil Procedure Rules is driven by the court. The Registrar’s notice is required in some of the steps. Of significance is that admission or rejection of or directions on the appeal is possible only after the High Court has received the trial court’s file and proceedings. See also Order 42 Rule 13 (4) of the Civil Procedure Rules, that the appeal shall not be heard unless the record of Appeal is duly filed.

[32] Subject to the foregoing, the appellant bears the responsibility of ensuring the appeal is heard expeditiously. I do note also that under Order 42 Rule 13 of Civil Procedure Rules, where 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.

[33] In this case; (a) the court has not given directions on the appeal; (b) there is no indication that Registrar has issued a notice under Order 42 Rule 12 of Civil Procedure Rules; and (c) the original trial court’s file and typed proceedings have not been forwarded to this Court. In such scenario, care should be taken not to be quick in dismissing such appeal for want of prosecution- it is only just to first establish the status of the appeal in so far as the requirements in law are concerned before condemning the appeal to the abyss.

[34] In saying so, I appreciate the respondent’s application is a *bona fide* quest to bring litigation to closure. I also do not take for granted arguments by learned counsel for the respondents that, as a matter of good practice and courtesy the appellant should have notified them of the existence of this appeal. I do note, however, that the appellant attributed the delay herein to the court processes and has given an elaborate account of efforts made by her to obtain proceedings and judgment. It is not lost to the court that special problems attended transfer and movement of physical files from Naivasha to Narok when a High Court was established in Narok. It seems the primary file herein may have suffered the delay arising from the movement of the physical files to Narok.

[35] In light of the above observations by the court, the applicable test is as was aptly put in the case of *Ivuta v Kyumbu [1984] KLR 441* as follows: -

“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 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.”

[36] Courts should always strive to serve substantive justice by hearing cases on merit rather than dismissing them summarily. The latter deprives a party the right to be heard on the merits of his case. Accordingly, the discretion to dismiss suit should be exercised sparingly and in clear cases where the delay is in itself prejudicial to fair trial. This principle recognizes the fundamental rights to, and obligation of court of law to do substantive justice between the parties in order to give a better effect of the right to be heard.

[37] Although the memorandum of appeal was filed on 4/12/2015- over five years- no directions have been taken before a judge in chambers

under section 79B of the Civil Procedure Act, and no proceedings had been supplied despite the appellant having applied and paid for them. See several letters by the appellant to court . Ordinarily, an appeal will not be dismissed if the court is satisfied that the failure to set the appeal down for hearing within the prescribed time has been caused by the inability of the appellant or his advocate to obtain a copy of the judgment or order appealed against, and a copy of the record, or proceedings within a reasonable time of applying to the court therefor. In the circumstances, I will spare the appeal the hangman's noose. I dismiss the application dated 2/2/2021. Costs shall be in the cause. However, I give the following directions: -

a) The appellant to file and serve the Record of Appeal within thirty (30) days from the date of receipt of certified copies of proceedings and judgment of the trial court.

b) In the event of default by the appellant, the Appeal herein will stand automatically dismissed.

c) As it appears several matters relating to the primary suit are pending, I direct parties to suggest ways of ensuring all of these matters are dealt with expeditiously and in a manner that avoids embarrassment.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION, THIS 13TH DAY OF MAY 2021

F.M. GIKONYO

JUDGE