



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 198 OF 2017

SALIM PETER MURITHI.....APPELLANT

VERSUS

KASIWA GONA KIRAO.....RESPONDENT

RULING

1. Before court is a **Notice of Motion** application dated **31st October, 2018** filed by the Respondent/Applicant and brought under the provisions of **Sections 3A** and **79G**, both of the **Civil Procedure Act, Order 21 and Order 42 Rule 35**, both of the **Civil Procedure Rules** and any other relevant provisions of the law. By the application, the Respondent/Applicant seeks for the following orders: -

a) Spent.

b) Spent.

c) THAT the Honourable Court be pleased to declare the orders granted on 9th October, 2017 to have automatically lapsed.

d) THAT the Honourable Court be pleased to declare that orders of the 9th of October, 2017 have been discharged for non-compliance with the terms granting the orders, and efflux of issued time.

e) THAT the Appeal be dismissed for want of prosecution for non-compliance with the Conditional Orders and Express Terms of the Consent Order dated 9th October, 2017.

f) THAT, the Costs of this application be in the cause.

2. The grounds upon which the application is premised are on the face of the application and further expounded in the **Supporting Affidavit** of **Christopher K. Kamau**, the Respondent/Applicant's Counsel sworn on the **31st October, 2018**. He deponed that the cause of action in the suit herein arose out of an accident that occurred on the **9th October, 2012**. The Respondent/Applicant filed a suit being **Mombasa CMCC No.1966 of 2015**. Upon both parties being heard on the **19th May 2017**, the trial court delivered a Judgment awarding the Respondent/Applicant general damages of Kshs.1,000,000/= and Special damages of Kshs.2,000/=.

3. It was further deponed that on the Appellant on being dissatisfied by the Judgment of **19th May, 2017**, sought to Appeal. On the **19th July, 2017**, the Appellant filed an application seeking leave to file its Appeal out of time. The Application dated **19th July, 2017** was never argued as parties entered into a **Consent** dated **4th October, 2017** as lodged at the High Court's registry on **9th October, 2017**. In the said Consent Order, it was agreed that the Appeal herein be heard and determined within one year, and that failure to comply with the said order, the Respondent/Applicant was at liberty to execute.

4. The Respondent/Applicant contends that parties herein had agreed that the **Consent Order** dated **4th October, 2017** has not been complied with in terms of the filing of the **Memorandum of Appeal** that was to be filed 7 days from the date of the consent, but was filed on **9th October, 2017** and the **Record of Appeal** filed on **18th October, 2018**.

5. The Respondent/Applicant states that the Appeal herein was conditional on the same being disposed of within one year. The **Consent Orders** were binding on all parties unless vacated but the same has not been done. It was further stated that there is no competent Appeal before this court as the Appellant was in a slumber only to be awakened by the Respondent/ Applicant via a letter dated **11th October, 2018** informing them of the efflux of time.

6. According to Counsel of the Respondent/Applicant, the Appellant is neither keen nor has he any intention to pursue the Appeal herein and are purposefully employing delaying tactics to deny the Respondent/ Applicant the fruits of his Judgment.

7. It was finally averred by the Respondent/Applicant that the Appellant herein never disputed the factual dispositions in the suit before the trial court being **Mombasa CMCC No.1966 of 2015**, the Appellant did not tender any evidence to controvert the Respondent/Applicant's evidence at trial.

8. The Appellant opposed the application dated **31st October, 2018** and filed **Grounds of Opposition** dated **16th November, 2018** and a **Replying Affidavit** sworn by Appellant's Counsel **RICHARD MBUYA** sworn on **6th December, 2018**. The Appellant's Counsel agrees that there is in existence a **Consent Order** dated **4th October, 2017** whose contents are not disputed.

9. The Appellant states that the **Memorandum of Appeal** was filed within 7 days as agreed but the **Record of Appeal** was filed later as they were unable to obtain a **Decree** until **9th May, 2018**. The Counsel blamed the delay on the Court Registry who he claims refused to sign the **Decree** and demanded **Kshs.70,000/=** which they were unable to pay as additional fees that was outstanding and ought to have been paid by the Respondent/Applicant at the time of the filing of the suit.

10. The Appellant avers that the **Record of Appeal** was filed before the lapse of 365 days but the delay was occasioned by the late filing of submissions. Also it was the Appellant's Counsel averment that the **Decree** as obtained on **9th May, 2018** was not brought to his attention on time to enable him fast track the preparation of the Appeal. He then stated that the mistake of Counsel should not be visited on an innocent litigant.

11. Further, the Appellant deponed that the Court Registry did not admit the Appeal herein, and when he wanted to seek a further extension of time, the same was made impossible by the Respondent's/ Applicant's application herein.

12. The Appellant's Counsel stated that the Respondent/Applicant will not suffer any prejudice that cannot be compensated by way of damages. In any event, the **Memorandum of Appeal** and **Record of Appeal** have already been filed, and it would only be fair that the same proceeds for hearing.

13. Parties were directed to dispose of the Application dated **31st October, 2018** by way of written submissions and the record reflects that both parties have complied. All parties indicated that they would be relying on the said written submissions as presented. The Respondent/Applicant filed written submission on **31st January, 2019** while the Appellant filed written submissions on the **21st February, 2019**.

14. I have had the benefit of reading through the written submissions. They replicate much on the grounds in support and opposition of the application as captured above that I need not to duplicate the same herein.

ANALYSIS AND DETERMINATION

15. I have considered the **Notice of Motion** application dated **31st October, 2018**, affidavits in support and objection thereof, the Grounds of Opposition by the Appellant/Respondent, the written submissions, the statute law and judicial authorities relied on therein. This Court finds that the only issue that arises for determination, **is whether the Appeal herein is rightfully before the Court**.

16. Parties have not disputed the existence of a **Consent Order** dated **4th October, 2017** and the same has not been varied nor set aside. The terms of the **Consent Order** were: -

- 1. That Leave be and is hereby granted to the Defendant/ Applicant to file his Memorandum of Appeal within 7 days from the date of filing this Consent.**
- 2. That the substantive Appeal be heard and determined within one (1) calendar year, for avoidance of doubt, 365 days.**
- 3. That failure to comply with either of the Clauses 1 or 2 above, the Plaintiff be at liberty to execute.**
- 4. That there be Stay of Execution pending determination of the Appeal.**

17. From the pleadings before the court, the Appellant complied with **Order 1** of the **Consent Order** and filed its **Memorandum of Appeal** on **9th October, 2017**. The Appellant admits that **Consent Order No.2** that required the Appeal be disposed of within one year was not complied with. The reason being that he was unable to obtain a **Decree Order** from the Court's Registry to enable him put together a **Record of Appeal**. The court was further told that the delay was occasioned by the Appellant's Counsel, as his Assistant did not bring to his attention that a **Decree** had been secured as at **9th May, 2018**.

18. **Section 79G** of the **Civil Procedure Act** provides that:-

“Every Appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the Decree or Order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the Appellant of a copy of the Decree or Order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

19. In the filing of the **Record of Appeal**, the Appellant ought to have had the provision of the **Section 79G** of the **Civil Procedure Act** in mind which requires a party to file its **Record of Appeal** within **30 days**. The Appellant herein gives reasons that he was unable to secure the Decree from court but does not attach any proof that indeed there was hardship in securing the Decree. This Court is therefore not sure that indeed there was hardship or that the Appellant chose to extract the Decree at a later date being the **9th May, 2018**.

20. For the Appellant to be compliant with **Consent Order No.2** that states the Appeal was to be heard and determined within one year and for avoidance of doubt (365) days, time started running on the **9th October, 2017** when the **Consent Order** was filed and would have automatically ended on **9th October, 2018**. The Appellant filed the instant **Record of Appeal** on the **8th October, 2018** which is **four days later** than the agreed period that the Appeal was to be heard and determined.

21. In the case of ***Kenya Commercial Bank Ltd –vs- Specialised Engineering Co. Ltd [1982]KLR 485***, Harris, J correctly held, *inter alia*, that: -

“...1. A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement...”

22. The court has perused the pleadings and records before it, and finds that in the strictest sense, the Appellant partially complied with the **Consent Order No.1** of **4th October, 2017** by filing the **Memorandum of Appeal** on the **9th October, 2017** but failed to comply with **Consent Order No.2** that required efficient filing of the Record to ensure the Appeal is heard and determined within one (1) year.

23. This Court also finds that as per the **Consent Order No.3**, the Respondent/Applicant was at liberty to execute in view of the non-compliance by the Appellant with **Orders 1 and 2** of the **Consent Order** dated **4th October, 2017**.

24. Counsel and litigants are reminded time and again that once a **Consent Order** is adopted as an Order of the Court as was done on **4th October, 2017**, in this case, the same becomes an Order of the court that is binding on the parties.

25. This Court agrees with the Respondent/Applicant that the Appellant seem to have been or gone into a slumber and has not been keen in prosecuting the Appeal. The Appellant wants a free pass that he be allowed to prosecute his Appeal **‘just because the same is on record’** without him being required to comply with the due process of the law such as obeying court orders and directions.

26. The Court of Appeal in the case of ***Fred Matiang’i, The Cabinet Secretary, Ministry of Interior and Co-ordination of National Government –vs- Miguna Miguna & 4 Others [2018]eKLR***, stated the following with regard to Orders of the court: -

“...When courts issue orders, they do so not as suggestions or pleas to the persons at whom they are directed. Court orders issue ex cathedra, are compulsive, peremptory and expressly binding. It is not for any party; be he high or low, weak or mighty and quite regardless of his status or standing in society, to decide whether or not to obey; to choose which to obey and which to ignore or to negotiate the manner of his compliance. This Court, as must all courts, will deal firmly and decisively with any party who deigns to disobey court orders and will do so not only to preserve its own authority and dignity but the more to ensure and demonstrate that the constitutional edicts of equality under the law, and the upholding of the rule of law are not mere platitudes but present realities...”

27. Once the Appellant failed to comply with **Order 2** of the **Consent Order**, there was no viable Appeal before the court since the terms of the **Consent Order** under **Order 3** were that the Respondent/Applicant be at liberty to execute. Therefore, there is no Appeal before this Court to be prosecuted by virtue of the said **Consent Order** of **4th July, 2017**

28. Seemingly, the Appellant wants to delay the Respondent’s/Applicant’s from enjoying the fruits of the Judgment as was awarded on **19th May, 2017** by dragging its feet and, appears not to be in a hurry to prosecute the Appeal they have filed.

29. Of importance in the instant case is that the Appellant has shown to the court that they have no regard to obeying orders as issued by it and the due process of the law. But, the Court cannot proceed with an Appeal that does not exist before it. It then follows that the orders of **9th October, 2017** are discharged for non-compliance with the terms granted by the court and efflux of time.

30. For the reasons explained above, the application dated **31st October, 2018** has merit and is hereby allowed with the Appeal being dismissed for want of prosecution with costs.

31. Costs to be borne by the Appellant.

It is hereby so ordered.

DELIVERED, DATED and SIGNED VIRTUALLY at MOMBASA this 4th day of MAY, 2021.

D. O. CHEPKWONY

JUDGE

4/5/2021