



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO 268 OF 2017

THE REGISTERED TRUSTEES OF NATIONAL UNION OF KENYA

MUSLIM COAST PROVINCE TRUST FUND.....APPELLANT

-VERSUS-

FRANCIS ALBERT GACHOKA T/A

RIFKINS BUSINESS COLLEGE.....RESPONDENT

RULING

1. The Applicant's/Respondent's Notice of Motion application is dated 21/9/2020 and filed on 22/9/2020. It seeks the following orders:

a) Spent.

b) That this Honourable court be pleased to dismiss the appeal for want of prosecution.

c) That the Honourable court be pleased to set aside an order for stay of execution issued to the appellant on 22nd January, 2018 and all other consequential orders emanating therefrom.

d) That the costs of this application and the appeal be provided for.

2. The application is premised on the grounds thereon and also contained

in the Supporting Affidavit sworn by the applicant. He avers that a Judgment was delivered in his favour on 29/7/2017, but the Respondent being dissatisfied with the said Judgment and decree of the trial Court, the Appellant filed a Memorandum of Appeal dated 13/12/2017. He also moved the trial court via an Application dated 18/1/2018 seeking for stay of execution orders and the subsisting orders of stay issued on 22/1/2018.

3. The Applicant avers that it is the duty of the Appellant to cause the Appeal to be placed before the Court for direction as envisaged under **Order 42 rule 11 and 13** of the **Civil Procedure Rules**, which require that the Appellant within 30 days of filing the Appeal to cause the Appeal to be listed for directions under **Section 79B** of the **Civil Procedure Act**.

4. It is averred that the Respondent has not set the Appeal for directions and/or hearing, which is sufficient proof that they are no longer keen on prosecuting the same. Further, the delay on the part of the Appellant is inexcusable and has surpassed twelve months from the date of filing the Memorandum of Appeal.

5. Further, the Applicant avers that the delay in prosecuting the Appeal has denied him the enjoyment of the fruits of his Judgment so that if his Application is not allowed, and the orders sought granted, his case will be rendered nugatory and he will suffer irreparable damage and substantial loss.

THE RESPONSE

6. The motion is opposed by the Respondent's vide a Replying Affidavit sworn by **Charlotte Naliaka** who is the Appellant's Counsel. She avers that the applicant's affidavit is replete with deliberate misrepresentation of facts and non-disclosure of material facts as to the events that transpired after the Appellant filed the Memorandum of Appeal and why the Appeal has not been prosecuted.

7. The deponent states that in an attempt to expedite the Appeal, they caused the court proceedings to be typed and submitted a copy thereof to the Executive officer for proof reading vide their letter dated 18/1/2019. However, after several attempts to trace the Court file for further action, the Executive officer on 18/6/2019 issued parties with a certificate confirming loss of file as ordered by the Court. Thereafter, the Applicant filed an Application in the trial Court seeking the opening of a skeleton file and the trial Court gave direction on the reconstruction of the same on 19/7/2019.

8. However, the Applicant failed to reconstruct the skeleton file until the 8/10/2019 and upon construction of a Skeleton file, the Appellant's Application for stay was allowed on 30/1/2020. Therefore, if the file is deemed to have been constructed on 8/10/2019, the Response submits that the Application herein is premature.

9. The deponent further states that an Appeal is properly constituted upon the filing of a Record of Appeal. It is clear from the above explanation that the Appellant had been keen on prosecuting the Appeal but due to the circumstances beyond it, it was unable to prepare a Record of Appeal and set the Appeal for directions within time.

REJOINDER

10. In rejoinder, the Applicant filed a further Affidavit sworn on 27/10/2020 in which it averred that the Appellant has never made any effort or taken any steps to fix the Appeal for direction and it is the Applicant that sought for the construction of the lower Court file vide an Application dated 27/6/2019.

11. The Applicant also submits that failure to constitute and file a Record of Appeal, is not a proper ground for failure to take directions before the Judge in chambers since 18/1/2019, yet the Appellant continues to enjoy stay orders without furnishing any form of security before the appellate Court.

SUBMISSIONS

12. On 29/10/2020, parties were directed to canvass the application by way of written submissions. The Applicant/Respondent filed their submissions on the 30/11/2020, while the Respondent/Appellant filed theirs on 15/12/2020. The Counsel for the parties highlighted their respective submissions on 27/1/2021.

ANALYSIS AND DETERMINATION

13. In my view, from the pleadings and submissions filed by the parties before this Court, I find that the issues for the determination are as follows:

a) Whether the Appeal ought to be dismissed for want of prosecution.

b) Whether the Stay of execution orders in place ought to be discharged

a) Whether the Appeal ought to be dismissed for want of prosecution.

14. From the record, the Memorandum of Appeal was filed on 13/12/2017,

the appeal has not been admitted as provided under **Section 79B of**

the Civil Procedure Act. It is also noted that the only step the Appellant has taken towards the prosecution of the Appeal herein is requesting for certified copies of typed proceedings and Judgment vide a letter dated 18/1/2019. **Section 79B** of the **Civil Procedure Act** provides thus:

“Before an appeal from a sub-ordinate 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.”

15. The Applicant brought this application, inter alia, under **Order 42 rule 13(1) and rule 35(1) & (2)**. **Order 42 rule 13(1)** provides:

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.

Order 42 Rules 35(1) & (2) provides that;-

(1) “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 to either set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.

(2) If within one year after 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.

16. **Rule 35 of Order 42 of the Civil Procedure Rules** is clear that there are two situations where an application for dismissal can be made. Firstly, an Applicant can only apply for dismissal of an appeal if after directions have been given, the Appellant has failed to take action to set down the appeal for hearing. Secondly, is a situation where the Registrar with notice to the parties shall place the appeal before the Judge for dismissal if one year after service of Memorandum of Appeal, the appeal has not been set down for hearing.

17. In the case of **Morris Njagi & another v Mary Wanjiku Kiura [2017] eKLR**, the Court held;

“A party can only apply for dismissal where directions have been given. This is under Order 42 rule 35 (1) of the 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.

18. It is worth-noting that the Respondent was at liberty to have the Registrar of the High Court list the matter in terms of **Order 42 rule 35(2) of the Civil Procedure Rules**. However, he failed to do so and yet this was the option available to him at this point.

19. In the case of **Morris Njagi & Another v Mary Wanjiku Kiura** (supra) the court held;

“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.

20. Whereas it is true that a suit should not be left to hang over the head of a litigant for unnecessarily long period, there are occasions when such situations are dictated by circumstances entirely beyond the parties. Under **Order 42** of the **Civil Procedure Rules**, there are steps prescribed which should be initiated by either the Appellant or the Registrar of the court or both to advance the prosecution of an appeal. Those steps have not been taken in this case. Therefore, I find and hold

that this instant application dated 21/9/2020 is premature.

21. It is also note-worthy that striking out of any pleading which includes an appeal, is a drastic measure which should be applied sparingly. Such an action, if allowed has the result of locking out a party from the corridors of justice before the avenues of litigation are exhausted. That is not to say that parties should not be vigilant in the exercise of their duties in advancing the course of justice.

b) Whether the Stay of execution orders in place ought to be

discharged

22. As at the time the application was filed, there had been was a delay of about 11 months from the time the trial Court file was officially reconstructed. Currently, the Appellant is yet to file a Record of Appeal, in order for the Appeal to be fixed for admission, and directions given as to the hearing thereof. 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.

23. 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. Article 50 of Constitution 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.”

24. As for whether the order of stay of execution in this case should be set aside, the power to set aside an order or Judgment is also an exercise of discretion. The Court of Appeal in the case of **Simon Thuo Mwangi Vs Unga Feeds Limited, Civil Appeal No.181 of 2003 [2015] eKLR** observed that:

“The court is not bound to set the Judgment aside. On reasons presented, it takes course to set aside or refuse to set aside. The court thus exercises a judicial discretion all the time having in mind what is just and fair in the case. The reason to set aside must therefore be based on good grounds or reasons advanced not on a whim or caprice”

25. The grounds advanced by the Applicant/Respondent for setting aside the order is that the conduct of the Appellant does not warrant it to enjoy the stay order since it has refused to prosecute the Appeal. The Applicant/Respondent case is that the Appellant was granted leave to file an Appeal out of time on 7/12/2017 vide **Misc Civil Application 260 of 2017** and a Memorandum of Appeal was filed on 13/12/2017. The next step the Appellant took towards setting down the Appeal for hearing and/or direction was vide letter dated 18/1/2019, which requested for the supply of draft typed proceedings and a request for certified typed proceedings. The said request was made one year after the Memorandum of Appeal had been filed.

26. However, in my view, the reason for the delay is explained and the same was as a result of the loss of the trial Court file that was reported on 4/4/2018. Nevertheless, an Application for reconstruction of the Court file was made by the Applicant/Respondent on 28/6/2019, and the Court file was reconstructed on the 8/10/2019 and the instant Application was made 11 months after reconstruction of the Court file.

27. Further, I note that the evidence before the court shows that the Appellant has not been keen on prosecuting the Appeal. All the initiative to follow up on the reconstruction of the Court file was made by the Applicant /Respondent. Other than requesting for typed proceedings

vide a letter date 18/1/2019, the Appellant has not shown any signs of interest in this matter.

28. I am therefore convinced that the Appellant does not deserve the orders of stay pending the Appeal granted. The orders of stay were granted to allow the Appellant proceed to prepare and prosecute the appeal but that right of appeal must be balanced against an equally weighty right of the Applicant/Respondent to enjoy the fruits of the Judgment delivered in his favour. The Appellant went on to state that lack of interest in prosecuting the Appeal leads to a conclusion that the Applicant/Respondent herein has been prejudiced. Consequently, I find that the orders of stay granted ought to be vacated.

DISPOSITION

29. For the foregoing reasons, the Notice of Motion application dated 21/9/2020 and filed on 22/9/2020 is not merited and the same is hereby dismissed. Costs shall be in the cause.

30. The orders of stay of execution issued by the trial Court on 22/1/2018 and all other consequential orders emanating therefrom are hereby discharged.

31. To progress 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. In the event the proceedings of the lower court file will have been placed in the file herein and the Appellant fails to file his Record of Appeal as aforesaid, the Appeal herein will stand as automatically dismissed.

32. Since the Appellant does not have control over the typing of proceedings and placing of the lower court file before the Deputy Registrar, the Registrar of High Court Mombasa Law Courts Civil Division is hereby directed to facilitate the typing of the original record of proceedings, avail and place the same on this record within sixty (60) days from date of this Ruling.

33. Either party is at liberty to apply.

Orders accordingly.

DATED, SIGNED and DELIVERED VIRTUALLY at Mombasa on this 16th day of JUNE, 2021.

D. O CHEPKWONY

JUDGE

In the presence of:

Mr. Taghbai Counsel holding brief for M/S Nafula Counsel for Appellant.

No appearance for and by Respondent

Court Assistant - Winnie