



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 26 OF 2019

DAVID MWANGI.....1ST APPELLANT/RESPONDENT

GEORGE NDUMBI KIMANI.....2ND APPELLANT/RESPONDENT

-VERSUS-

VERONICA GATHONI NDUNGU.....RESPONDENT/APPLICANT

(Sued as the personal representatives of

the estate of Stephen Ndungu Barungu- deceased)

RULING

1. This is a ruling on **Notice of Motion** dated **10th September, 2020** seeking the following orders: -

i. THAT the Honourable Court be pleased to dismiss this Appeal for want of prosecution.

ii. THAT costs of this Application and the Appeal be borne by the Appellants.

2. Grounds on the face of the application are that, more than twelve (12) months have already lapsed since this matter was last in court and that further the appellants had depicted by their indolence, a lack of willingness to prosecute the appeal.

3. Further, that the appellants had failed to comply with the conditions of stay issued by this court on 11th July, 2019 of depositing decretal sum in a joint fixed account in the names of the advocates for both parties as security for stay pending appeal hence are in contempt of court.

4. That on 21st August, 2020 in **Nakuru CMCC 107 of 2019; Veronicah Gathoni Ndung'u vs CIC Insurance Co. Ltd** made an order/declaration compelling the insurer of the appellants CIC Insurance Company Limited to satisfy the Judgement and Decretal sum in **Nakuru CMCC 1008 of 2016** and no prejudice whatsoever or at all shall be occasioned on the appellants upon dismissal of this appeal as they have lost interest in the appeal.

5. The application is supported by affidavit sworn by **Boniface Nyachae Momanyi** on 10th September, 2020. He restated grounds on the face of the application already captured above.

6. In response, the appellants/respondents filed a replying affidavit sworn by **Denning Murithi Ndeke** advocate on 4th December, 2020. He averred that the appeal was lodged on the 14th day of February 2019 by their erstwhile advocates **Tom Mutei & Co. Advocates** and it was only on 17th September, 2020 that the firm of **Sheth & Wathigo Advocates**, come on record on behalf of the appellants/respondents by a consent dated the same day.

7. He averred further that it was only after persistent follow up at the Nakuru Civil Registry that on 16th November, 2020 the certified copy of proceedings and ruling/order became available for them to prepare the requisite record of appeal, that the same was filed on 18th November, 2020 and served on the respondents/applicants advocate on 19th November, 2020 via courier. He submitted that the appeal was filed within three (3) months of them coming on record and that clearly showed the appellants/respondents interest in prosecuting the instant appeal.

8. He averred that the respondents/applicants herein moved and instituted a declaratory suit being **Nakuru CMCC Number 107 of 2019** which was heard and judgment delivered on 21st August, 2020 compelling the appellants'/respondents' insurer to settle the judgment from

which the instant appeal arises.

9. He averred further that the appellants have filed the record of appeal and raised the decretal sum for deposit in a joint interest earning account, thus it would be in the interest of justice if the appeal was heard and determined on merit.

10. The respondent aver that the respondent/applicant would not suffer any prejudice as the security to be deposited will accrue interest pending determination of the appeal.

11. The respondent/appellant further submitted that the issue of time is procedural and procedural technicalities should not subvert substantive justice.

12. In a rejoinder, the respondent/applicant filed a supplementary affidavit sworn by **Boniface Momanyi Nyachae** advocate on 9th December, 2020 where he averred that no plausible explanation had been offered for requesting proceedings and ruling after the instant application had been filed.

13. He averred further that filing and prosecution of the declaratory suit was prompted by appellants refusal to comply with the terms of stay of execution and no assets were available to execute against; that the appellant's/respondent's insurer failure to honour the terms of the consent and stay condition prompting the respondent/applicant to commence garnishee proceedings and upon being served with the garnishee order nisi the appellants/respondents insurer prepared cheques and filed application to set aside the said orders and sought for the extension of stay orders.

14. He averred that the copies of cheques referred to under paragraph 12 of the replying affidavit were for the stay of execution in **NAKURU CMCC No. 107 of 2019** pending the hearing of **NAKURU HCCA No. 132 of 2020**.

15. The application was canvassed by way of written submissions filed by both parties.

RESPONDENT/APPLICANT SUBMISSIONS

16. The applicants submitted that no plausible explanation has been given for failure to comply with stay conditions granted by court on 11th July, 2019 and failure by the appellant to comply with the conditions of stay prompted the respondent to prosecute the declaratory suit in **Nakuru CMCC No. 107 of 2019** and obtained judgement.

17. The applicants cited the case **Pancras T. Swai v Kenya Breweries Limited [2014] eKLR** where the court of appeal upheld the decision of High Court of dismissing appeal for failure to provide security for costs which was lawfully ordered.

18. The applicants submitted that litigation must come to an end but the appellant's conduct show that their intention is to delay the prosecution of the appeal contrary overriding objective of this court which require that cases be determined expeditiously. The applicants urged court to dismiss the appeal with costs.

APPELLANTS/RESPONDENTS SUBMISSIONS

19. The appellants/respondents submitted that under **Article 50 of the Constitution of Kenya**, every person is entitled to have a fair trial and 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.

20. The respondent further submitted that by the time of taking over the instant appeal, the declaratory suit had since been summarily determined and parties therein had consented to stay execution of the judgment and in the primary suit on condition that the entire decretal amount be deposited in joint interest earning account pending the hearing and determination of both appeals; and parties had the intention of proceedings with both appeals upon compliance of the condition set by parties.

21. They submitted that the previous advocates on record had failed to advice that the existence orders of stay of execution pending hearing and determination of the instant appeal on condition that the entire decretal sum be deposited in a joint interest earning account; and submitted that the mistake of the advocate should not be visited upon them.

22. The appellants/respondents urged this court to exercise its overriding objective by not letting procedural technicalities be a bar to dispensation of substantive justice and ensure that substantive justice is achieved by extending time to comply with the said orders are granted.

ANALYSIS AND DETERMINATION

23. I have considered averments herein and the submissions by parties. I wish to consider whether the applicant has demonstrated that this appeal should be dismissed for want of prosecution. **Order 42 Rule 35 of the Civil Procedure Rules** provide as follows: -

“35 (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 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”.

24. In view of the above, it is clear that an appeal can be dismissed for want of prosecution on two instances. Firstly, due to failure to list the appeal for hearing three months after directions have been made under **Order 42 Rule 13** or; secondly, if it has not been set down for hearing one year after service of memorandum of appeal. Where directions have not been given, the respondent has an option of either fixing the appeal for hearing and applying for its dismissal. And where appeal has not been admitted it can be dismissed upon Deputy Registrar issuing notice for dismissal by a judge.

25. In the instant case, the record shows that the memorandum of appeal herein was filed on 14th February, 2019. At the time this application was filed on 16th September 2020, record of appeal had not been filed. The Deputy Registrar could not admit it to hearing the option available for the Deputy Registrar to list the appeal for dismissal by a Judge.

26. My view is that the fact that the appeal has not been admitted should not bar the court from dismissing the appeal at the instance of the respondent where no explanation for prolonged delay has been given. It is the responsibility of parties who initiate proceedings to ensure that the matter they have filed in court progresses to logical conclusion. It is the responsibility of an appellant to ensure that record of appeal is prepared and filed to enable the Deputy Registrar to admit an appeal. Without record of appeal filed, the Deputy Registrar cannot admit an appeal to hearing.

27. I note from the record that on 18th November 2020 which about 2 months after filing this application, the appellants filed record of appeal.

28. I also note that, the appellants is willing to deposit the said decretal amount in a joint interest earning account.

29. I note that the appeal has been pending in court for about 2 years but in view of the fact that the respondent is committing to comply with the order for deposit of decretal amount, I believe no prejudice will be occasioned to the respondent if the appellants are allowed to prosecute the appeal.

30. **FINAL ORDER**

1) Application dated 10th September, 2020 is hereby dismissed

2) The appellant to comply with order 2 ruling delivered on 11th July 2019 (deposit the decretal amount in a joint interest account in the names of both Advocates) within 30 days from today's date.

3) Failure to comply with order 2 above, execution to issue.

4) This appeal to be set down for hearing on priority basis.

5) No orders as to costs of the application.

RULING DATED, SIGNED AND DELIVERED VIA ZOOM AT NAKURU THIS 22ND DAY OF JULY, 2021

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RACHEL NGETICH

JUDGE

In the presence of:

Schola/Jeniffer - Court Assistant

Mr. Murithi counsel for Appellants

Mr. Momany counsel for Respondent