



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL APPEAL NO. 62 OF 2016

JOHN NJAGI KARUA.....APPELLANT

VERSUS

NJIRU GATUMU....RESPONDENT/APPLICANT

RULING

1. By way of a chamber summons dated 2.02.2021, the respondent/applicant moved this court seeking for orders that the appeal herein be dismissed with costs for want of prosecution and further that the costs of the application be provided for.
2. The application is premised on the grounds on its face and further supported by the affidavit of Mr. Joe Kathungu – advocate of the High court of Kenya. In a nutshell, the applicant’s case is that the appeal herein was filed in November 2016. That despite the applicant having filed an application dated 12.03.2019 seeking dismissal of the same, it was compromised and withdrawn by consent. The court ordered the appellant do file and serve the Record of Appeal within five (5) days and which orders have never been complied with to date and the appellant has never taken any steps to prosecute the appeal since July 2019 and as such, it appears that he is not interested in prosecuting the said appeal. As such the same should be dismissed with costs.
3. The application is opposed by way of grounds of opposition dated 29.03.2021. the appellant’s case is that the delay in prosecuting the appeal was as a result of the closure of the courts and registries due to the Covid-19 pandemic and which registries remained closed for a full year and spilled to the following year.
4. The application was canvassed by way of written submissions. The applicant reiterated the contents of his affidavit to the effect that the respondent herein has not been vigilant in prosecuting his appeal. Further that judgment by the lower court was entered on 24.10.2016 and that the applicant has been pursuing justice for the last sixteen years. As such, a suit should not be left to hang over the head of a litigant for unnecessary long period and the appeal ought to be dismissed.
5. Further that, despite the orders of 22.07.2019 that he does file the record of appeal within five (5) days, the same has not been complied with. As such, the appeal is frivolous and an abuse of the court process as the appellant appears to have lost interest in the appeal. Further that, he did not file a replying affidavit to the application explaining why he did not file the record of appeal but only filed grounds of opposition which are too general. The applicant relied on the case of **Protein & Fruits Processors Limited & Another –vs- Trust Bank Kenya Ltd [2015] eKLR** to the effect that under Order 2 Rule 35 of the Civil Procedure Rules 2010, an appeal can be dismissed even if directions have not been given.
6. The appellant/respondent filed his submissions in opposition to the application and it was submitted that he was unable to comply with the Civil Procedure rules due to the Covid-19 pandemic and as such the court should exercise its discretion and reject the application. Further that, the application is premature, invasive and an abuse of the court process as no directions have been taken under Order 42 Rule 35(1) of the Civil Procedure Rules 2010. Further that, under Order 42 Rule 35(2), no party is supposed to move the court for dismissal of the appeal but it’s the Deputy Registrar who is supposed to list the appeal before the judge for dismissal and with notice to the parties.
7. I have considered the application herein together with the supporting affidavit. I have further considered the grounds of opposition filed by the respondent herein and the rival written submissions.
8. Dismissal of appeal is provided for under Order 42 Rule 35 of the Civil Procedure Rules and which is the provision under which the instant application is brought.
9. Order 42 Rule 35(1) of the Civil Procedure Rules stipulates as follows: -

“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.”.

10. Order 42 Rule 35(2) of the Civil Procedure Rules stipulates as follows: -

“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”.

11. The respondent in his submissions submitted that the application is premature as directions had not been given in this appeal as required by the law. As a general rule, appeals cannot be dismissed under Order 42 Rule 35 (1) unless directions have been given under Order 42 Rule 11 of the Civil Procedure Rules. The legal position in this respect was well articulated by Hon. Justice J. Kamau in **Pinpoint Solutions Limited and Another -vs- Lucy Waithegeni Wanderi (as the Legal Administrator of the Estate of James Nyanga Muchangi) [2020] eKLR** and which decision I am fully in agreement with. The Learned Judge held that: -

“.....20. 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 fails to proceed as per Order 42 Rule 11 and Order 42 Rule 13 of the Civil Procedure Rules, 2010.

21. This court took the view that an appeal cannot be dismissed before directions had 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(1) 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 the 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...”

12. In the instant case, the appeal was instituted by way of a memorandum of appeal dated 7.11.2016 and filed in court on 8.11.2016. The records further show that the file was taken before Hon. F Muchemi J on the 11.03.2019 for admission and the court made orders to the effect that “record to be filed and served followed by taking of directions”. What followed is an application dated 12.03.2019 seeking dismissal of the appeal for want of prosecution. The records further reveals that the court issued a mention to the firm of Eddie Njiru & Co. Advocates dated 4.06.2019 for mention on 17.06.2019.

13. On the said date, the matter went before the Deputy Registrar and wherein the court noted that there was no return of service and ordered the file was referred back to the registry for proper service to be effected as per the law. The matter was fixed for another mention on 22.07.2019 wherein Ms. Kiai holding brief for Mr. Kathungu for the respondent informed the court that there was consent for adoption by the court. The said consent was in relation to the application dated 12.03.2019 (seeking dismissal of the appeal for want of prosecution). The court however noted that the said consent was not proper as it referred to an application which was not on record. The court further noted that the appellant had not yet filed his record of appeal and granted him five (5) days.

14. The matter was fixed for mention on 29.07.2019. On the said date, the matter came before Hon. T. Kwambai and the consent dated 29.07.2019 was adopted as the order of the court. The said consent was in relation to the application dated 12.03.2019 (seeking dismissal of the appeal for want of prosecution) and the consent had the effect of having the same withdrawn with no orders as to costs. The matter came up again in court on 28.07.2020 but none of the parties’ advocates attended court and the same was fixed for mention on 3.08.2019 and on which date the Deputy Registrar of this court noted that the appellant has had over a year to prepare the record of appeal but has since become laxed. The court ordered that the appeal do proceed for dismissal. What followed thereafter was the instant application.

15. What is clear from the above therefore is that the directions as required under Order 42 Rule 11 and also under Order 42 Rule 13 of the Civil Procedure Rules 2010 were never made in this file. Under Order 42 Rule 35(1), the respondent in an appeal cannot apply for dismissal of the appeal for want of prosecution *unless within three months after the giving of directions under rule 13 the appeal has not been set down for hearing by the appellant.*

16. It is my considered opinion therefore that the application herein is premature as it was filed before directions were given as is required by the Rules.

17. However, this does not mean that this court cannot dismiss an appeal before directions are given. Where there are sufficient reasons, the court can invoke its inherent powers as bestowed on it by the Civil Procedure Act and the Rules and dismiss an appeal for want of prosecution even where directions have not been given. Odunga J in **China Road & Bridge Corporation -vs- John Kimenye Muteti [2019] eKLR** held that; -

“19. It is therefore clear that it is upon the appellant to trigger the process of the giving of directions and an appellant who sits on his/her laurels and when confronted with an application to dismiss the suit contends that no directions have been given when he has not moved the court to give the said directions cannot but face censure from the court. To contend that an application for dismissal of an appeal is premature for failure to give directions when the appellant himself has not moved the court to give directions to my mind cannot be taken seriously where the delay is contumelious. Nothing bars the court from dismissing an appeal even where no directions have been given.....” (See also Abraham Mukhola Asitsa -vs- Silver Style Investment Company Ltd [2020] eKLR).

18. As such, where the appellant files an appeal and goes into slumber, this court can invoke its inherent powers under Section 3A, to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process and further the provisions of Article 159(2)

(b) of the Constitution to do justice without undue delay. This is notwithstanding that directions have not been given.

19. The question therefore is whether this is a proper case for the court to invoke its inherent powers and dismiss the appeal herein (notwithstanding that directions have not been given)?

20. I take note that the appellant/respondent herein instituted the instant appeal vide the memorandum of appeal which was filed in this court on 8.11.2016. The appellant/respondent despite having been ordered to file his record of appeal within five days (vide the orders of 29.07.2019), he did not comply with the said orders. In defense to this laxity, it was averred that that he was prevented from doing so by the Covid-19 pandemic and which led to the closure of the court’s registry. However, this court takes judicial notice that the first case of Covid-19 was reported in Kenya in March 2020 and which was almost eight (8) months after the said orders.

21. Further after the mention wherein the consent to withdraw an earlier application was adopted as an order of the court (on 29.07.2019), the appellant did not bother to file the Record of Appeal and when the matter came up before the court on 3.08.2020 (for the second time the first time having been 28.07.2020), the advocate for the appellant/ respondent did not explain to court the reason why the Record of Appeal had not been filed. This was despite Ms. Kiai having informed the court that they were yet to be served with the record of appeal. This was one year post the orders that the appellant do file the record of appeal and almost four (4) years after the instituting of the appeal herein.

22. The principles to be considered while considering an application for dismissal of appeal were restated by the Court of Appeal in **Peter Kipkurui Chemoiwo –vs- Richard Chepsergon [2021] eKLR** and include whether the delay is prolonged and inexcusable, and if it is, whether the delay could be excused and justice can be done despite the delay. (See also **Ivita –v- Kyumba [1984] KLR 441**). It is clear from the instant case that the delay herein is indeed prolonged. The respondent blamed Covid-19 for the same but as I have already said, the pandemic hit Kenya many months after the orders on filing of the Record of Appeal were given. Further, it is a matter of public notoriety that despite the pandemic, directions were issued by the Hon. Chief Justice on the e-filing of matters. The appellant being represented by an advocate cannot as such blame the closure of the registries for his failure to file the Record of Appeal.

23. However, the court is of the considered view that justice can still be done despite the delay as dismissal of a matter before party is substantively heard is a draconian action.

24. In the premises, I do allow the application and for purposes of expediting the hearing of the appeal, make the following orders;

- a. The appellant to file the Record of Appeal within 21 days from the date of this ruling.**
- b. Thereafter, the appeal to be listed for directions within 15 days after filing of the Record of Appeal.**
- c. The appeal to be prosecuted within sixty (60) days from the date the directions shall be given.**
- d. The respondent/applicant is awarded throw away costs assessed at Kshs. 10,000/= to be paid within 14 days from the date of this ruling.**

25. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 22ND DAY OF SEPTEMBER, 2021

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent