



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

COMMERCIAL CASE NO.16 OF 2019

BETWEEN

DIAMOND TRUST BANK KENYA LTD.....APPELLANT

VERSUS

GEORGE MWAHIA WARUKIARA.....RESPONDENT

RULING

PRELIMINARY

1. Although the title of this case is shown as Commercial Civil case, in reality, this is an appeal filed by **DIAMOND TRUST BANK KENYA LIMITED (DTB)** against the judgment dated 27th April, 2016 in **Chief Magistrate's court Kiambu Civil Case No. 209 of 2010**. It follows that there is an error in the categorization of this case. It ought to be titled as an appeal and not a commercial case. The Deputy Registrar of this Court is requested to ensure the correct title is given to this matter.

BACKGROUND

2. As stated above, the Kiambu Chief Magistrate's court, in civil Case No. 209 of 2010 delivered judgment on 27th April, 2016 in favour of **GEORGE MWAHIA WARUKIRA (George)**. DTB being aggrieved by that judgment filed an appeal against that judgment.

3. That appeal was filed on 20th May, 2016 at the Nairobi High Court Civil Division. On 23rd May, 2016, the Presiding Judge of the Civil Division of Nairobi High Court transferred the appeal to the Nairobi High Court Commercial Division.

4. A stay of execution pending appeal was granted in the Commercial Division of the Nairobi High Court on condition that DTB provided the decretal sum to be deposited in interest earning account. Although there is no record of such an account being opened, as ordered, it does seem to be a common position of the parties that the amount of Kshs.1,607,000/= was deposited into a joint interest earning account at Equity Bank.

5. It is in that background that George filed a Notice of Motion application dated 30th November, 2020. It seeks the following prayers:-

a. That the honourable court be pleased to dismiss the appeal herein for want of prosecution.

b. That the order of stay of execution granted on 19th December, 2016 be vacated and the sum of Kshs.1,607,000/= deposited by the appellant in a joint interest earning account ... be forthwith released to the applicant/respondent (George).

6. The application is based on the grounds that DTB filed this appeal on 20th May, 2016 challenging the judgment of 27th April, 2016 of the Kiambu Chief Magistrate's Court. That DTB has deliberately failed to take necessary step to set down the appeal for hearing and DTB is not keen to have the appeal heard. That the delay in prosecution of the appeal had prejudiced George by preventing him from enjoying the fruits of his judgment.

7. DTB relied on a replying affidavit sworn by its Assistant Legal Manager, *Francis Kariuki*. The deponent stated that DTB has been keen to proceed with its appeal. The deponent set out the movement of the file in this appeal before different courts and further stated the trial court file was not availed to enable the appeal to proceed and that thereafter the progress of the appeal was affected by the closure or slowdown of court's process due to COVID-19 pandemic. The deponent also stated that the application was bad in law because directions on the hearing of the appeal had not been given as required under **Order 42 Rule 35(1)** of the Civil Procedure Rules (hereafter the Rules).

ANALYSIS

8. The protocol or procedure of an appeal from the Magistrate's court to the High Court is well presented in the Civil Procedure Act and its Rules.

9. **Section 79B** is probably the best place to start in consideration of that procedure this Section provides:-

“Before an appeal from a subordinate 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”.

10. That Section 79B gives the court an opportunity to consider an appeal filed and confirm whether or not the appeal presents sufficient grounds for interfering with Magistrate's Court's decree. The court is empowered by this Section to summarily reject an appeal.

11. That consideration under **Section 79B** has not occurred in respect to this appeal. Although **Order 42 Rule 11** of the Rules provides that it is the appellant who, within thirty days of filing the appeal should move the court to give directions under **Section 79B**, that is not what happens on the ground.

12. It needs to be stated that as a matter of practice how **Section 79B** operates is that the courts indicates in file on its own motion whether an appeal has been admitted.

13. Once the appeal is admitted under **Section 79B** the appellant is required under **Order 42 Rule 13** of the Rules to have the appeal listed for direction by a Judge. Before fixing the appeal for hearing, the requirements of **Order 42 Rule 13(4)** of the Rules have to be met. **Order 42 Rule 13(4)** of the Rules provides:-

“4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—

- a) the memorandum of appeal;
- b) the pleadings;
- c) the notes of the trial magistrate made at the hearing;
- d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
- e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
- f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:

Provided that:-

- i. a translation into English shall be provided of any document not in that language;
- ii. the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).

14. Directions have not been given as provided in **Order 42 Rule 13(4)**. In light of that, can the court grant the order sought by George, for the dismissal of the appeal for want of prosecution? George has moved his application under **Order 42 Rule 35(1)** of the Rules which provides:-

“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”.

15. That Rule provides an avenue for the respondent to either set down the appeal for hearing or seek its dismissal for want of prosecution. The respondent can only move under **Order 42 Rule 35(1)** after directions have been given as provided under Rule 13. In this case such direction have not been given. I have considered the cases cited by the respondent which suggest that power to dismiss under **Order 42 Rule 35(1)** of the Rules can also cover an instance where there has been inordinate delay in proceeding with the appeal. In that regard the respondent cited the case *NAKURU MODERN FEED LIMITED VS. BENSON KARIUKI (2013) eKLR* and *NAIROBI CITY COUNTY VS. HERMATON LITSWA (2019) eKLR*. I decline to read into **Rule 35(1)** what is not provided. In my view respondent can only move as provided under that Rule and no more.

16. The only other possible way of dismissing appeal for want of prosecution is at the instance of the court as provided under **Order 42 Rule 35(2)** of the Rule. The Rule provides:-

“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”

17. That Rule as it will be noted requires the Registrar to give notice to the parties of dismissal of the appeal. That is not what is before me. I have considered the move to dismiss is by George, the respondent, and my finding is that in absence of directions being given there cannot be a dismissal as sought.

18. It is worth while noting that DTB is not entirely to blame for the non-prosecution of this appeal. I began this Ruling by setting out how this appeal was first filed at the Nairobi High Court Civil Division then was transferred to the Commercial Division of Milimani court whereafter, it was transferred to Kiambu High Court. All the while the trial court’s file and the trial proceedings have not been availed by the Kiambu Chief Magistrate’s court. Indeed, as stated by DTB on 22nd October, 2019, the learned Judge, *C. Meoli* noted that the trial court file and proceedings had not been brought to this Court and the learned Judge directed the Deputy Registrar to pursue the same. To date, however, the same have not been produced to this Court. That trial court file and proceedings must be produced to this Court before this appeal can be admitted for hearing and thereafter directions be given. In the absence of the trial court file directions on the hearing of the appeal cannot be given and no blame can be laid against DTB for not proceeding with this appeal. It is therefore of utmost importance that the trial court’s file and proceedings be provided to this Court for indeed it is a travesty of justice that an appeal filed on 20th May, 2016 against the trial court’s judgment of 27th April, 2016 remains unheard in the year 2021. I will therefore give directions to ensure this appeal is heard without further delay.

DISPOSITION

19. In respect to the Notice of Motion dated 30th November, 2020, I grant the following orders:-

- a. The said Notice of Motion dated 30th November, 2020 is dismissed and the costs thereof shall abide with the outcome of this appeal.
- b. The Deputy Registrar of this Court shall, *on Notice to the parties* open an *appeal* file for this matter. Accordingly, this Civil Case NO. 16 of 2020 is *hereby marked as closed* and the documents in this matter shall be placed in the appeal file which shall be opened by the Deputy Registrar as directed hereof.
- c. The Deputy Registrar shall place before me the appeal file with a view to considering its admission or otherwise as provided under **Section 79B** of the Civil Procedure Act.
- d. At the reading of this Ruling, a date for direction shall be given.

RULING DATED AND DELIVERED AT KIAMBU THIS 5TH DAY OF OCTOBER, 2021

MARY KASANGO

JUDGE

Coram:

Court Assistant : Ndege

For the Appellant (DTB) :

For the Respondent (George Warukira) :

COURT

Ruling delivered virtually.

MARY KASANGO

JUDGE