



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CIVIL APPEAL NO.2 OF 2017

MALDE KANJILAL.....1ST APPELLANT

AFRO FANCY STORES LTD.....2ND APPELLANT

VERSUS

DORCAS OMITO WEKESA &

WILBERFORCE WABUCHAMU WEKESA

(Suing on their behalf and as administrators of the estate of late

Tom Wekesa Makanyaka).....RESPONDENTS

RULING

The Respondents Dorcas Omito Wekesa and Wilberforce Wabuchamu Wekesa filed a Notice of Motion application dated 15th October 2018 pursuant to the provisions of Order 42 Rule 35 (1) and Order 17 Rule 2(1), Order 42 Rule 35(1) and order 51 of the of the Civil Procedure Rules 2010 and Section 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of the law. It sought the following orders:-

- 1. THAT the Appeal be dismissed for want of prosecution.**
- 2. THAT the costs of this Application and the entire appeal be awarded to the respondents/applicants.**

The Respondents' present application was premised on the grounds that the memorandum of appeal filed on 25th January 2017 and since then the appeal has not been prosecuted and appellants have failed to take any steps.

The application was supported by Affidavit sworn on 15th October 2018 by Eliud Munga an advocate of the High Court of Kenya. He stated that judgment was entered in favour of the respondents/applicants against the appellant in **CMCC No 94 of 2010**. That the appellants being aggrieved by the decision filed Memorandum of Appeal on 25.01.2017 and have never prepared record of appeal and they have refused to prosecute the appeal. He stated that the respondents are greatly prejudiced by the delay to prosecute the appeal.

The Appellant opposed the present application and filed a Replying Affidavit by Jeremiah Ongeru Samba Advocate sworn on 6th March 2019. He deposed that the application is misconceived and bad in law. He deposed that the Deputy Registrar has not complied with order 42 rule 12 of the Civil Procedure Rules, 2010 and the appeal is yet to be listed before judge for directions or set it down for hearing.

He stated the appellant hands are tied to the extent that the application for direction can only be filed once the appeal has been admitted.

By court direction this appeal was disposed of by way of written submissions.

The applicant submitted through Ngare Advocate. He submitted that the neglect and failure to prosecute the appeal by the appellants is intentional and unreasonable and an abuse of court process. He submitted that there is unexplained delay on the part of the appellants and the appeal should be dismissed. In support of applicants' application he relied on case law in **Protein & Fruits Processors Limited & Another V Diamond Trust Bank Of Kenya Limited[2015] eKLR**.

Mr. Samba counsel for Respondent submitted that they oppose the application, an appeal can only be dismissed where there is failure to set it down for hearing. He submitted that the applicant can only seek to have the appeal dismissed for want of prosecution after directions herein had been given.

He submitted that the respondent applied for and paid for typing of the proceedings and they cannot be faulted for delay. He submitted that the application before this court is premature relying on case in *Alfred Mutua Ndutu V Peter Musau Wambua & Another [2018]eKLR*

Having analyzed the application and the parties respective submissions it is clear to my mind that the issue of determination is whether the appeal lodged by the appellant should be dismissed by this court for want of prosecution.

To determine issue at hand it is imperative to state that it is not in dispute that the Memorandum of appeal dated 19th January, 2017 was filed by the appellants herein. The issue of contention remain to be that whether the appellants have inordinately delayed and failed to prosecute the appeal.

It is the applicant contention that the appeal should be dismissed for want of prosecution on ground that the appellants have unreasonably delayed to prosecute the appeal since filing of memorandum of appeal. It is contention of applicants that respondents have failed to do follow to have their appeal heard and determined hence the same should be dismissed.

The Respondents/Applicants submitted that Order 42 Rule 11 and 13 of the Civil Procedure Rules requires that an appellant, within thirty (30) days of filing the appeal, cause the matter to be listed for directions under Section 79B of Civil Procedure Act. He added that it was the duty of an appellants to cause the appeal to be placed before the judge for directions.

It is the case of the appellants on the other hand that the delay was occasioned by Deputy Registrar who failed to issue directions on the appeal. The appellants also stated that they have paid the necessary court fees, for proceedings so as to be furnished with the proceedings but they have not been provided with the same.

To determine issue at hand it is on record that the appellant wrote to deputy registrar seeking directions and they have also provided the evidence for payment of court fees so as to be furnished with proceedings.

I wish to draw attention of parties to Order 42 Rule 35 of the Civil Procedure Rules, 2010 that envisages two (2) scenarios for the dismissal of an appeal for want of prosecution. The first scenario is when an appellant fails to cause the matter to be listed for directions under Section 79B of the Civil Procedure Act as is envisaged in Order 42 Rule 11 of the Civil Procedure Rules. The second scenario is that if after service of Memorandum of Appeal the appeal would not have been set down for hearing, the registrar shall on notice to the parties list the appeal before the judge for dismissal.

Section 79B of the Civil Procedure Act provides as follows:-

“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”.

Order 42 Rule 13 of Civil Procedure Rules provides as follows:-

- 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.**
- 2. Any objection to the jurisdiction of the appellate court shall be raised before the judge before he gives directions under this rule.**
- 3. The judge in chambers may give directions concerning the appeal generally and in particular directions as to the manner in which the evidence and exhibits presented to the court below shall be put before the appellate court and as to the typing of any record or part thereof and any exhibits or other necessary documents and the payment of the costs of such typing whether in advance or otherwise.**
- 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).

It is evident from the provisions of Section 79B of Civil Procedure Act that a judge has to peruse the appeal before he can admit it or summarily reject the same. These are the directions contemplated in Order 42 Rule 11 of the Civil Procedure Rules that states as follows:

“Upon filing of the appeal the appellant shall within thirty days, cause the matter to be listed before a judge for directions under section 79B of the Act”.

If the appeal is not summarily dismissed, then the registrar shall notify the appellant who shall then serve the Memorandum of Appeal upon all the respondents within seven (7) days of receipt of the notice from the Registrar in accordance with Order 42 Rule 12 of the Civil Procedure Rules.

After service of the Memorandum of Appeal, on notice to the parties delivered not less than twenty one (21) days, the appellant shall again cause the appeal to be listed before the judge for directions as seen in Order 42 Rule 13 of the Civil Procedure Rules.

Notably, the procedure for rejection and/or admission of appeal and giving of directions is very well set out in the Civil Procedure Rules. However, this procedure does not seem to be strictly followed and differs from one court to another. The appellant does not seem to have any role in fixing the appeal for directions as contemplated under Order 42 Rule 11 of Civil Procedure Rules and Order 42 Rule 13 (1) of the Civil Procedure Rules. 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.

Once directions are given under Order 42 Rule 13 of Civil Procedure Rules and the appellant fails to fix the appeal for hearing, the respondent may fix the same for hearing and/or seek dismissal of the same for want of prosecution under Order 42 Rule 35 (1) of the Civil Procedure Rules or the registrar lists the appeal before a judge for dismissal under Order 42 Rule 35 (2) of Civil Procedure Rules.

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”.

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”

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.

This court is of 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 cannot 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 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.

Notably, every person is entitled as envisaged under Article 50 of the Constitution of Kenya to have a fair trial. The said Article 50 of Constitution of Kenya 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.”

It therefore follows that every person ought not to be shut out from accessing court or having his day in court. Indeed, 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.

It was, therefore, the considered opinion of this court that allowing the present application would be shutting out the Appellants from accessing the court and would be contrary to Article 50 of the Constitution of Kenya.

For the foregoing reasons, the upshot of this court’s decision is that the Respondents/applicants Notice of Motion dated 15th October 2018 is

not merited and the same is hereby dismissed. Costs shall be in the cause.

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 Ruling. In the event the proceedings of the lower court and the lower court file will have been placed in the file herein and the Appellant shall have failed to file his Record of Appeal as aforesaid, the Appeal herein will stand as automatically dismissed.

Dated, signed and delivered at Bungoma this 5th day of June, 2020.

.....

S N RIECHI

JUDGE