



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 359 OF 2018

GACHANJA NDARIO.....1ST APPELLANT/RESPONDENT

PATRICK MURIUKI MAINA.....2ND APPELLANT/RESPONDENT

VERSUS

SILVESTER MUSILI MULI.....RESPONDENT/APPLICANT

RULING

1. Silvester Musili Muli, the respondent/applicant herein, took out the Notice of Motion dated 16th September, 2019 and sought for an order to the effect that the appellants'/respondents' appeal be dismissed for want of prosecution with costs.
2. The Motion is supported by the grounds presented on its face and the facts stated in the affidavit of the applicant's advocate, **Ichaura Wachira**.
3. To resist the Motion, advocate **Allan Odongo** swore a replying affidavit on 9th October, 2019 on behalf of the respondents.
4. When the Motion came up for interparties hearing before the court on 28th October, 2019 the parties were directed to file and exchange written submissions.
5. I have considered the grounds laid out on the face of the Motion, the facts deponed in the affidavits supporting and resisting the Motion, and the contending written submissions and the authorities relied upon.
6. The sole issue for determination before me is whether the appeal filed by the respondents is ripe for dismissal.
7. In his supporting affidavit, advocate Ichaura Wachira stated that since lodging the appeal on 3rd August, 2018 the respondents have not taken any steps in prosecuting the appeal for over one (1) year and hence the same ought to be dismissed in the interest of justice.
8. The above averments were echoed in the submissions of the applicant, save to add that even though the appeal is yet to be admitted and directions are yet to be given, this court has inherent powers to still dismiss it in the interest of justice. To support his argument, the applicant cited the case of **Eunice Gathigo v Edger John Muchemi [2019] eKLR** where the court held that even where directions are yet to be given on an appeal, courts have inherent jurisdiction under Sections 3A, 1A and 1B of the Civil Procedure Act to make orders that are necessary in meeting the ends of justice or in preventing an abuse of the court process.
9. In response, Allan Odongo stated *inter alia*, that upon filing the memorandum of appeal, the respondents through their advocate wrote to the Executive Officer to request to be supplied with certified copies of the typed proceedings, judgment and decree to enable them compile, file and serve the record of appeal, to no avail. The deponent is therefore of the view that neither the respondents nor their advocate are to blame for the delay in prosecuting the appeal.
10. The deponent further stated that the appeal is not ripe for dismissal since it is yet to be admitted pursuant to the provisions of **Section 79B** of the **Civil Procedure Act** which provides that an appeal ought to be admitted for it to be set down for hearing upon directions on the same.
11. It is the assertion of the deponent that moreover, the lower court file has not been availed to the High Court to enable it determine whether the appeal should be admitted or not, and that the respondents have an arguable appeal which ought to be determined on merit.
12. In their submissions, the respondents argue that the applicant has not shown the prejudice he stands to suffer in the event that they are

given more time to prosecute their appeal, while the respondents stand to suffer the risk of being denied their constitutional right to appeal, should the appeal be dismissed at this point. The respondents cited the case of **Allan Otieno Osula v Gurdev Engineering & Construction Ltd [2015] eKLR** in which the court; in declining to strike out an appeal for want of prosecution; took into account the constitutional right of a party to appeal against a decision that he or she is aggrieved by.

13. The respondents also cited the case of **Jurgen Paul Flach V Jane Akoth Flach [2014] eKLR** where the court declined to dismiss an appeal on the ground that the appeal had yet to be admitted.

14. **Order 42, Rule 35** of the **Civil Procedure Rules, 2010** provides for the circumstances and manner of dismissal of an appeal as follows:

“(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.”

15. From the record, it is apparent that the respondents filed their memorandum of appeal on 3rd August, 2018.

16. The record shows that subsequently, the Deputy Registrar-Civil Division sent correspondences to the Chief Magistrate’s Court requesting for the lower court file and certified copies of the typed proceedings and judgment/decree. It is apparent that those correspondences did not elicit any response.

17. The respondents also annexed to the replying affidavit of Allan Odongo, a letter dated 11th January, 2019 addressed to the Executive Officer of the Chief Magistrate’s Court requesting for certified copies of the typed proceedings and judgment/decree. That letter was received on 17th January, 2019 and it is apparent that no response was given on the same. This position supports the explanation given by the respondents for not compiling and filing the record of appeal and which explanation I find to be reasonable in the circumstances.

18. Following from the foregoing, it is apparent that directions are yet to be given in respect to the appeal and consequently, the appeal is yet to be set down for hearing. It therefore follows that the appeal cannot be deemed to be ripe for dismissal under the provisions of **Order 42, Rule 35(1)** of the Civil Procedure Rules.

19. There is also nothing to indicate that the Deputy Registrar has since listed the appeal before a judge for dismissal pursuant to the provisions of **Order 42, Rule 35(2)** of the Civil Procedure Rules.

20. I have also noted from the record that the lower court file has not been made available to this court which therefore means that it would not have been possible in any event for the appeal to be admitted and/or set down for directions in the absence of the trial court’s file.

21. In the premises, I find the Motion to be premature and the same is struck out with costs abiding the outcome of the appeal.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 4th day of December, 2020.

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J. K. SERGON

JUDGE

In the presence of:

.....for the 1st and 2nd Appellants/Respondents

..... for the Respondent/Applicant