



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 60 OF 2016

MBUNI DRYCLEANERS LIMITED.....APPELLANT/RESPONDENT

VERSUS

KENYA POWER & LIGHTING CO. LTD.....RESPONDENT/ APPLICANT

R U L I N G

A. Introduction

1. Coming up for ruling is the application dated 25th September 2018 by the Respondents that seeks that this appeal be dismissed for want of prosecution.

B. Respondent/Applicant's Case

2. The respondent/applicant in their supporting affidavit deponed that the appellant filed its Memorandum of Appeal on 2nd November 2016 and had failed to take any steps to have the same set down for hearing and further that the appellant had done nothing to ensure the appeal was set down for hearing despite having ample time to do so.

3. The applicant further deponed that the appellant had not filed their record of appeal for over one and a half years to enable this court accept or reject it and had thus lost interest in the case, whereas the applicant had moved the court unsuccessfully thrice to try and have the matter determined.

4. The applicant further deponed that the delay in prosecution of the suit was causing the applicant undue prejudice and continued loss and damage

C. Appellant/Respondent's Case

5. The appellant/respondent in response filed a replying affidavit dated 6th December 2018 in which it is deponed that the respondent's deponent, Jude Ochieng did not annex any evidence to demonstrate the purported authority to swear the affidavit.

6. The appellant further deponed that the delay in filing the record of appeal was because the lower court was yet to furnish typed proceedings and that he was not aware of efforts by the respondent to have the appeal determined.

7. The appellant further deponed that the respondent had not suffered any undue prejudice or loss as the contested bill was not due as they installed a functioning metre.

8. The appellant deponed that the court had a duty to do substantive justice as provided under **Article 159 of the Constitution** as well as **Section 1A and 1B of the Civil Procedure Act**.

D. Applicant's Submissions

9. The respondent submitted that in view of the appellant's liability to file the record of appeal, the court was mandated to dismiss the same as provided in Order 42 Rule 35 (2) of the Civil Procedure Rules as read with Sections 1A, 1B and 3A of the Civil Procedure Act as well as Article 159 (2) (b) of the Constitution. He relied on the cases of **Malonza Maiko V James Kisilu Mang'eli [2017] eKLR** and **Protein & Fruits Processors Limited & Another v Diamond Trust Bank Kenya Limited [2015] eKLR**.

E. The Determination

10. I do note that the Respondent's application is brought under **Sections 1A and 3A of the Civil Procedure Act** and **Order 42 rule 35 (2)** and **all other enabling provisions of law**.

11. The issue which arises for determination is whether this appeal should be dismissed for want of prosecution. From the record, the memorandum of appeal was filed on 2nd November 2016. The appeal has not been admitted as provided under **Section 79B of the Civil Procedure Act**.

12. It provides:

“Before an appeal from a sub-ordinate 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.”

13. The applicant brought this application under **Order 42 rule 35 (2)**. **Order 42 rule 35 (1)** and **(2)** provides:

“(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 to either set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.

(2) If within one year after 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.”

14. The rule is clear that there are two situations where an application for dismissal can be made. The respondent can only apply if after directions have been given the appellant has not taken action to set down the appeal for hearing. The second is where the registrar with notice to the parties shall place the appeal before the Judge for dismissal if one year after service of memorandum of appeal the appeal has not been set down for hearing. The applicant is not in order to have brought the application under **Order 42 rule 35 (2)**. Under this provision the respondent should have requested the Registrar to list the matter for dismissal.

15. The applicant cited **Section 3A and Order 42 rule 35 (2)** which is specifically dealing with the issue of dismissal. Where there is a specific provision, the Court will not rely on **Section 3A. Order 42 rule 35 (1) and (2)** is open to the applicant to apply for dismissal by herself where directions were given or by writing to the registrar to request that the appeal be placed before the Judge for dismissal. These provisions ensure that where delay may be occasioned by the appellant, the registrar can place the appeal before the Judge for dismissal.

16. In the case of **Elem Investment Ltd. -Vs- John Mokora Olowoma [2015] eKLR Aburili J** stated:

“a reading of the above provision shows that it is clear that an appeal can be dismissed for want of prosecution in two instances. Firstly where there has been a failure to admit the appeal for hearing three months after directions have been given under Order 42 rule 13 Civil Procedure rules or secondly if after one year of service of memorandum of appeal the appeal has not been listed for hearing.

In these two scenarios, the procedure is different. In the first scenario, the respondent is given the option to either list the appeal for hearing or apply for its dismissal. Under that scenario however, the appeal can only be dismissed if it has been admitted and directions have been given”.....

17. I am persuaded to adopt the finding by **Aburili J in Rosarie (EPZ) Limited -V- Stanlex Mbithi James (2015) EKLR** where he stated:

“Since under Order 42 rule 35 (1) the appeal cannot be dismissed before directions have been given the applicant should have taken advantage of Order 42 rule 35 (2) and cause the registrar to list the appeal for dismissal. If there had been such correspondence which the registrar ignored, I would have been inclined to the application. Since however, there is no evidence that the applicant had requested the registrar to list the matter in terms of Order 42 rule 35 (2) and the latter failed, I find it difficult to accede to the application.”

18. The applicant is not without an option where circumstances do not allow him to file an application under **Order 42 rule 35 (1)**. To overcome delay and prejudice the applicant can request the registrar to place the appeal before the Judge for dismissal other than move the Court under the wrong provision.

19. In the case of **Kirinyaga Machinery -V- Hezekiel Mureithi Ireri H.CCC No. 98/2008** where it was held:

“It is clearly seen from that rule that before the respondent can move the Court either to set the appeal down for hearing or to apply for dismissal for want of prosecution, directions ought to have been given as provided under rule 8B. The directions having not been given, the orders sought by the respondent cannot be entertained.”

20. I find that this application is incompetent and it is hereby dismissed with no order as to costs.

21. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 17TH DAY OF JANUARY, 2019

F. MUCHEMI

JUDGE

In the presence of: -

Mr. Muthomi for Rono for the Applicant

Ms. Mbogo for Gachuba for Respondent/Appellant