



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 125 OF 2015

REVITAL HEALTHCARE (EPZ) LTD.....APPELLANT

VERSUS

MARK ANYAMA.....RESPONDENT

RULING

1. What is before the court for determination is the application by the defendant praying that the appeal be dismissed for want of prosecution. That application invokes the provisions of order 42 Rule 35(1) Civil Procedure Act.
2. The reasons advanced to found the application are that since filling the appeal, the appellant has taken no step at all to prosecute it including taking steps to have the matter listed for giving of directions and that such inertia has occasioned to the respondent loss, damage and prejudice because parties has agreed on a stay pending appeal hence the respondent cannot access the judgment sum. In addition the respondent deems the inaction as a demonstration of total loss of interest in the suit. Those same facts were reiterated in the Affidavit by the respondent which stresses the point that due to stay granted he has been kept away from the judgment sum which would have afforded him specialized treatment.
3. The application was opposed by the appellant through the replying Affidavit sworn by Shishir Suryakant Gor advocate which affidavit make no attempt at all to explain the delay or give any excuse for failure to take the requisite steps and only asserting that the respondent has not lost interest in the appeal and is in fact prepared to urge the appeal on the merits by way of written submissions. He thus pleaded for the court's indulgence to allow the matter be heard on the merits noting that the entire decretal sum was deposited in an escrow account which keeps getting renewed quarterly.
4. Parties did file submission as directed by the court. The applicant's submissions are dated 19.05.2018 and filed on 24.05.2018 while those by the Appellant/respondent are dated 8.5.2018 and filed in court the next day. The day the matter came up for parties to highlight the submissions there was no time to hear the parties hence the court undertook to read the submissions and determine the application on their basis.
5. I have had a chance and opportunity to read the application and the opposition thereto together with the submissions by both parties and I have taken the view that the only question for determination is whether or not there has accrued a right on the respondent to urge that the appeal be dismissed for want of prosecution under order 42 rule 35(1).
6. Order 42 Rule 35 as a whole is worded in these clear words:-

Dismissal for want of prosecution [Order 42, rule 35.]

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.

7. It is overly clear that in terms of the application before me to pass the legal threshold, there must have been undertaken the giving of directions followed by service of the memorandum of appeal. In this file the appeal has never been admitted nor have directions been issued with the consequence that the memorandum of appeal is yet to be served. Before those steps are taken, there is no right to seek dismissal under Rule 35(1)^[1]It is however apparent that the appellant did compile filed and served a record of appeal way back on the 8.12.2015.

8. For all intents and purposes the appeal is ready to be heard if not for the need for admission and giving of direction. Those are steps to be undertaken by the court even though the law obligates the appellant to move the court. The question that must be considered by this court is whether justice would be served by dismissal before hearing on the merits or if the appellant needs to get his day in court the blunder of failing to comply with order 42 Rules 11 & 13 notwithstanding.

9. In the course of preparing this ruling, I have had a chance to read the file and the proceedings at trial and I am unable to find that this is the kind of an appeal to be rejected summarily. It presents arguable points which justice demand to be canvassed for the court to make a determination on the merits. I am minded to excuse the blunder by appellant in failing to comply with the rules regarding moving the court for admission of the appeal and giving of directions for the sake of the appeal being heard on the merits. I decline to dismiss the appeal but instead treat the application as alarm to court and the appellant that this appeal needs to be moved forward and determined. I therefore make the following orders:-

- a) The application is dismissed but with costs in the cause.
- b) appeal is admitted for hearing
- c) It shall be heard in Mombasa before one judge by way of written submissions.
- d) The parties have 40 days from today to file and serve submissions.
- e) Matter be listed for hearing on 18.03.2019

Dated signed and delivered at Mombasa this 18th January 2019.

P J O Otieno

Judge

[\[1\]](#) Jurgan Paul Flach Vs Jane Akoth Flach (2014)eKLR