



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 266 OF 2017

EUNICE GATHIGO.....APPELLANT

VERSUS

EDGER JOHN MUCHEMI..... RESPONDENT

RULING

1. The respondent *Edger John Muchemi* moved this court by way of a Notice of Motion dated 17th August 2018 seeking orders that the appellant's appeal be dismissed for want of prosecution and that he be awarded costs of the application and the appeal.

2. The application is premised on grounds stated on its face and the depositions made by the respondent's learned counsel *Mr. Amos Ogutu Wandago* in the supporting affidavit sworn on 17th August 2018. The applicant contends that the appeal ought to be dismissed as the appellant has clearly lost interest in prosecuting it given that he has not taken any step to prosecute the same since filing the memorandum of appeal on 29th May 2017; that the delay in prosecuting the appeal is causing prejudice to the appellant who is unable to enjoy the fruits of his judgment obtained on 2nd May 2017.

3. The application is opposed through a replying affidavit sworn on behalf of the appellant by her learned counsel *Mr. Allen Odongo* on 10th November 2018.

In his depositions, learned counsel denied the respondent's claim that the applicant has lost interest in prosecuting the appeal. He contended that after filing the memorandum of appeal, the appellant took the step of writing to the Executive Officer of Milimani Commercial Courts requesting for copies of typed proceedings and judgment of the lower court to enable her compile the record of appeal; that to date the appellant is yet to be supplied with the proceedings of that court; that since the appellant cannot prepare the record of appeal without certified copies of the proceedings and judgment of the lower court which is a precondition to having the appeal admitted and cause-listed for directions, the delay in prosecuting the appeal can only be blamed on the trial court and not the appellant; that the orders sought cannot be granted since under *Order 42 Rule 35 (1)* of the *Civil Procedure Rules*, an appeal can only be dismissed for want of prosecution after it had been admitted and directions on its hearing had been issued; that the appellant is keen on prosecuting the appeal which is arguable and should be given an opportunity to do so and should not be ousted from the seat of justice; that the application should be dismissed with costs.

4. The application was argued before me on 13th December 2018. Learned counsel *Mr. Shimanya* represented the respondent while learned counsel *Mr. Muthee* held brief for *Mr. Odongo* for the appellant. In their submissions, both counsel on record buttressed the positions taken by their respective clients in supporting and opposing the motion.

5. I have carefully considered the application, the affidavits on record and the submissions. I have also perused the court record.

The record confirms that since the filing of the memorandum of appeal on 29th May 2017, the appellant has indeed not taken any steps towards prosecution of the appeal since to date she has not filed a record of appeal.

The annexure to the replying affidavit shows that the appellant applied to be supplied with certified copies of the proceedings and judgment of the lower court through letter dated 10th November 2017 but since then, no effort appears to have been made to follow up on the request with the aim of having the lower court fast track the processing of the said proceedings.

Though it is true that it is the duty of the trial court to supply the proceedings in order to enable the appellant prepare the record of appeal, the fact that the appellant appears to have gone to sleep after applying for the proceedings over a year ago clearly shows that the appellant has not been diligent in pursuing her appeal. She cannot therefore escape blame for the delay in prosecuting the same.

6. I wish to comment on the respondent's submission that since the appeal has not been admitted and no directions under *Order 42 Rule 13* of the *Rules* have been issued, the appeal cannot be dismissed for want of prosecution. Though not expressly stated, this submission was based on the provisions of *Order 42 Rule 35 (1)* of the *Rules* which provides that if within three months after the giving of directions the

appellant had not fixed an appeal for hearing, the respondent has the option of either setting down the appeal for hearing or applying for its dismissal for want of prosecution.

7. Although it is true that *Order 42 Rule 35 (1)* contemplates the dismissal of appeals for want of prosecution where an appeal has been admitted for hearing and three months after the taking of directions under *Order 42 Rule 13* no date had been taken for its hearing, this does not mean that the court is powerless and lacks jurisdiction to dismiss appeals for want of prosecution simply because the appellants have absconded their responsibility of ensuring that their appeals are admitted and caused for directions. Under *Section 3 A, 1A and 1B* of the *Civil Procedure Act*, the court has inherent jurisdiction to make orders that are necessary for the ends of justice or to prevent abuse of its process and it can in appropriate cases dismiss an appeal for want of prosecution even before it is admitted or directions are given if it is satisfied that doing so will serve the ends of justice or where it is apparent that the appeal was filed in bad faith with the aim of obstructing the course of justice.

8. In this case, the appellant has claimed that the delay in prosecuting the appeal has been caused by the trial court's failure to supply her with certified copies of its proceedings and judgment. As noted earlier, the appellant is also partly to blame for the delay since she did not follow up on her request for the supply of the proceedings to ensure that they are supplied in good time. Since the appellant has expressed interest in pursuing her appeal, I am minded to give her an opportunity to prosecute the appeal but on terms which will ensure its expeditious disposal. I thus decline to dismiss the appeal on condition that the appellant shall file a record of appeal and cause the appeal to be placed before a judge for directions under *Section 79 B* of the *Civil Procedure Act* within the next 60 days of today's date in default of which the appeal shall stand dismissed for want of prosecution with costs to the respondent.

9. The applicant is awarded costs of the application.

It is so ordered.

DATED, DELIVERED and SIGNED at NAIROBI this 13th day of February, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Shimenga holding brief for Mr. Wandago for the appellant/respondent

Mr. Muthee holding brief for Mrs. Mwaragwa for the respondent/applicant

Mr. Fidel: Court Assistant