



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL APPEAL NO 248 OF 2017**

**NJAI STEPHEN.....APPELLANT**

**VERSUS**

**CHRISTINE KHATIALA ANDIKA.....RESPONDENT**

**RULING**

**INTRODUCTION**

1. The Respondent's Chamber Summons application dated 25<sup>th</sup> April 2018 and filed on 26<sup>th</sup> April 2018 was brought pursuant to the provisions of Order 42 Rule 13 (1), 35 (1) & (2) and Order 17 Rule 2 of the Civil Procedure Rules 2010 and Section 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 by the Applicant.**

**2. THAT the balance of the decretal amount together with interest held in NIC Bank-City Centre Branch Account No [particulars withheld] be released to the Applicant/Respondent's advocates. (Barclays Bank Moi Avenue Branch Account No [particulars withheld]).**

**3. THAT the costs of this Application and the appeal be provided for.**

2. The Respondent's Written Submissions were dated 1<sup>st</sup> November 2018 and filed on 6<sup>th</sup> November 2018 while those of the Appellant were dated 28<sup>th</sup> September 2018 and filed on 4<sup>th</sup> October 2018.

3. When the matter came before the court on 6<sup>th</sup> November 2018, the Respondent requested it to render its decision based on its Written Submissions which he relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

**THE RESPONDENT'S CASE**

4. The Respondent's present application was supported by her Affidavit that she swore on 25<sup>th</sup> June 2018. The same was filed on 30<sup>th</sup> June 2018. .

5. She stated that judgment was entered in her favour against the Appellant in **CMCC No 3873 of 2011** whereupon he filed an application seeking a stay of execution pending appeal. The said application was compromised by a consent where he paid her half the decretal sum and deposited the other half in NIC Bank- City Centre Account No [particulars withheld].

6. It was her averment that since 14<sup>th</sup> April 2017, he had not taken any steps to have the Appeal listed before a judge for directions or to set it down for hearing. She said that he had also not co-operated in attempts to resolve this matter amicably.

7. She pointed out that she had suffered great inconvenience due to his disinterest in prosecuting his application to conclusion. She termed the Appeal an abuse of the court process that was intended to deny her her fruits of her judgment.

8. She therefore urged this court to allow her application as prayed.

**THE APPELLANT'S CASE**

9. The Appellant's present application was supported by the Replying Affidavit of his advocate, Elosy Muthonia Mbuthia, that was filed on 6<sup>th</sup> June 2018.

10. The deponent stated that her firm wrote to the Executive Officer seeking to be furnished with typed copies of the proceedings and judgment to enable them file an appeal but the same never elicited any response. She added that they had been unable to prepare a Record of Appeal in the absence of the said documents and the lower court file. She further contended that they had made efforts to obtain the said documents, through their clerks, to no avail.

11. It was her further averment that the Appeal had not yet been admitted in accordance with Section 79B of Civil Procedure Acts and hence, no further steps could be taken. She added that an appeal had to be admitted before it could be listed for hearing.

12. She asserted that the Respondent could only seek to dismiss the Appeal herein for want of prosecution under Order 42 Rule 35 (1) of the Civil Procedure Rules after the directions herein had been given.

13. The Appellant asked this court to give him an opportunity to prosecute his appeal. He invoked the provisions of Section 1A and 3A of the Civil Procedure Act that provides that not only does the court have unfettered discretion to ensure just and expeditious disposal of matters but that also it has inherent power to make such orders as may be necessary for the ends of justice by giving parties a right to be heard.

14. It was his case that he had an arguable appeal that ought to be heard on the question of the quantum that was awarded by the lower court. It pointed out that if the application was allowed, then he would have been denied an opportunity to have his Appeal determined on merits.

15. He therefore urged this court to dismiss the present application.

### **LEGAL ANALYSIS**

16. The Respondent 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. She added that it was the duty of an appellant to cause the appeal to be placed before the judge for directions.

17. In this regard, it placed reliance on the case of **Haron E Ongechi Nyaberi vs British American Insurance Co Ltd HCCA No 110 of 2001 eKLR** (sic) where it was held that:-

**“It will be the Appellant who shall really cause the appeal to be listed for directions before a judge by serving the Memorandum of Appeal and serving the Record of Appeal.”**

18. She also averred that the Appellant was granted leave to file an Appeal out of time over a year ago and had since that time not taken any steps to prosecute the Appeal herein.

19. On his part, the Appellant argued that the Respondent had not demonstrated the prejudice she would suffer if he was given more time to prosecute his Appeal. He asked this court to take judicial notice of the backlog of the typing of proceedings in the lower court. It was his argument that the application herein was premature and grossly misconceived.

20. He relied on the cases of **Jurgen Paul Flach vs Jane Akoth Flach [2014] eKLR** wherein Kasango J held that before an appeal can be set down for dismissal for want of prosecution directions ought to have been given.

21. He also placed reliance on the case of **Allan Otieno Ofula vs Gurdev Engineering & Construction Ltd [2015] eKLR** where Aburili J observed that **“the right of appeal is (sic) constitutional right and in as much as there has been delay which has not been satisfactorily explained by the appellant”**, the court has to weigh the cost and prejudice a respondent is to suffer if the appeal was struck out before it was heard on merits.

22. Order 42 Rule 35 of the Civil Procedure Rules, 2010 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.

23. 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”.**

24. 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).**

25. It is evident from the provisions of Section 79B of Civil Procedure Act that a judge has to peruse the appeal before he can 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”.**

26. 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.

27. 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.

28. 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. In the Civil Division Milimani Law Courts, the Registrar issues the notice for admission and directions of appeal after the High Court receives the file and lower court proceedings. 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.

29. 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.

30. 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”.**

31. 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”**

32. 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.

33. This court took the 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 could not 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.

34. 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.”**

35. 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.

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

#### **DISPOSITION**

37. For the foregoing reasons, the upshot of this court’s decision was that the Respondent’s Chamber Summons application dated 25<sup>th</sup> April 2018 and filed on 26<sup>th</sup> April 2018 was not merited and the same is hereby dismissed. Costs shall be in the cause.

38. 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

39. Since the Appellant does not have control of the court diary, the Registrar of High Court Civil Division Milimani Law Courts is hereby directed to facilitate the typing of proceedings and placing of the lower court file within thirty (30) days from date of this Ruling.

40. In the event that the Appellant shall not prosecute his Appeal expeditiously, the Respondent will be at liberty to take such appropriate steps to safeguard her interests.

41. Orders accordingly.

**DATED and DELIVERED at NAIROBI this 14<sup>th</sup> day of February 2019**

**J. KAMAU**

**JUDGE**