



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 549 OF 2016

SILAS MWONGERA MWITHIMBI.....APPELLANT

VERSUS

MBICHI NDERITU (Suing as the administrator of the

Late PETER CHEGE MBICHI.....RESPONDENT

(Being an appeal from the Judgment of the Hon R. Ngetich (Mrs), Chief Magistrate (CM) at the Chief Magistrate's Court at Milimani in Civil Case No 3851 of 2013 delivered on 22nd July 2016)

RULING

INTRODUCTION

1. The Respondent's Notice of Motion application dated 11th December 2017 and filed on 15th December 2017 was brought pursuant to the provisions of Order 17 Rule 2(3), Order 42 Rule 11 and Order 51 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other enabling provisions of the law. It sought the following orders:-

- 1. THAT the Appellant's Appeal herein be dismissed with costs to the Respondent for want of prosecution.**
- 2. THAT cost of this application be borne by the Appellant.**

2. The Respondent's Written Submissions were dated 11th October 2018 and filed on 15th October 2018 while those of the Appellant were dated 26th October 2018 and filed on 12th November 2018.

3. When the matter came before the court on 20th 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 the Affidavit of his Advocate, Brian Adira that was sworn on 11th December 2017.

5. The deponent stated that Judgment was entered in favour of the Respondent for the sum of Kshs 1,185,021/= and that since the Appellant filed his Memorandum of Appeal on 19th August 2016, he had not served him with a Record of Appeal or fixed the Appeal for directions as is required under the Rules.

6. It was his contention that it was over one (1) year since the Appellant took to prosecute his matter, which failure amounted to an abuse of the process of the court.

7. He therefore urged this application to allow his application as prayed.

THE APPELLANT'S CASE

8. In response to the said application, the Appellant's advocate, Daniel Muthee swore a Replying Affidavit on 20th January 2018. The same

was filed on 12th February 2018.

9. He contended that they obtained a stay of execution of the judgment that was delivered in favour of the Respondent against the Appellant on condition that they deposited half the decretal sum amounting to Kshs 639,228/= into court and release a similar amount to the Respondent pending the hearing and determination of the Appeal herein.

10. He stated that despite having applied for certified copies of the proceedings and judgment from the lower court on 16th September 2016, they had never obtained the same making it difficult for them to file a Record of Appeal.

11. He further pointed out that the Appeal herein had not been admitted for hearing and directions given as provided in Section 79B of the Civil Procedure Act.

12. He urged this court not to dismiss the Appeal herein as the Appellant had an arguable appeal and ought to be given an opportunity to prosecute the case and that the same be determined on merits.

13. He therefore asked this court to dismiss the present application.

LEGAL ANALYSIS

14. 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.

15. 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”.

16. 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).

17. 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”.

18. 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.

19. 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.

20. 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.

21. 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.

22. 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”.

23. 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”

24. 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.

25. 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.

26. 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.”

27. 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.

28. 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

29. For the foregoing reasons, the upshot of this court’s decision was that the Respondent’s Notice of Motion application dated 11th December 2017 and filed on 15th December 2017 was not merited and the same is hereby dismissed. Costs shall be in the cause.

30. To progress this matter further, the Appellant is hereby directed to file and serve his 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

31. 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.

32. 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 his interests.

33. Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this **14th** day of **March** 2019

J. KAMAU

JUDGE