



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL APPEAL NO 243 OF 2017**

**JESSE GICHURU MWANGI.....1<sup>ST</sup> APPELLANT**

**NDUNG'U STEPHEN.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**VIDELIS AUMA WANYAMA & CHRISTABEL ONDECHE SIRO (Suing as the legal**

**representatives of the Late WITMAN SIRO MALOBA).....RESPONDENTS**

**RULING**

**INTRODUCTION**

1. The Respondent's Notice of Motion application dated 7<sup>th</sup> August 2018 and filed on 10<sup>th</sup> September 2018 was brought pursuant to the provisions of Section 1A, 1B & 3A of the Civil Procedure Act Cap 21 Laws of Kenya, Order 42 Rules 35 (2), Order 51 Rule 1 of the Civil Procedure Rules 2010 and Articles 159 of the Constitution of Kenya 2010. It sought the following orders:-

**1. THAT the Appellants' appeal herein be dismissed for want of prosecution.**

**2. THAT the funds in the account in the joint names of Kiruki and Kayika and Kairu McCourt Advocates account number 1004951488 domiciled at NIC Bank Limited, Kenyatta Avenue Branch be released to the Respondents' Advocates herein Messrs Kiruki & Kayika Advocates.**

**3. THAT any other orders that this Honourable Court may deem fit to issue in the circumstances.**

**4. THAT the costs of this application and those of the entire appeal to be borne by the Appellants.**

2. The Respondents' Written Submissions were dated 5<sup>th</sup> November 2018 and filed on 8<sup>th</sup> November 2018 while those of the Appellants' were dated 14<sup>th</sup> November 2018 and filed on 16<sup>th</sup> November 2018.

3. When the matter came before the court on 19<sup>th</sup> November 2018, the parties requested it to render its decision based on its Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

**THE RESPONDENT'S CASE**

4. The present application was supported by the Affidavits of one of the Co-Respondent, Christabel Ondeché Siro. The Supporting Affidavit was sworn on 7<sup>th</sup> August 2018 while her Supplementary Affidavit was sworn on 7<sup>th</sup> November 2018 and filed on 8<sup>th</sup> November 2018

5. She stated that on 19<sup>th</sup> April 2017, Hon D.A. Ocharo, entered judgment in her favour and that of her Co-Respondent against the Appellant in CMCC No 5104 of 2014 for a sum of Kshs 4,099,440/= general damages plus costs and interest at court rates.

6. It was her averment that after the Appellants filed their Memorandum of Appeal on 19<sup>th</sup> May 2017, they had never taken any steps to

prosecute their Appeal and had in fact not requested for the certified copies of the proceedings of the lower court. She added that the Appellants' delay in fixing the Appeal for directions was unduly prejudicing her and her Co-Respondent and their lethargy was wasting precious judicial time and denying them an opportunity of enjoying the fruits of their judgment.

7. She pointed out that the Appellants had not adduced any evidence to prove that they had paid for certified copies of the proceedings or to show what effort their advocates had made to obtain the same. It was her contention that if a letter was done to the Executive Officer, the same was not copied to them.

8. She was emphatic that the provisions of the law were clear that if the Appeal shall not have been set down for hearing, the registrar shall on notice to the parties, list the appeal before the judge for dismissal.

9. She therefore sought that their present application be allowed as it was in the interest of justice that litigation come to an end.

### **THE APPELLANTS' CASE**

10. In response to the said application, the Appellants' advocate, Allan Odongo, swore a Replying Affidavit on 12<sup>th</sup> October 2018. The same was filed on 15<sup>th</sup> October 2018.

11. He pointed out that they and the counsel for the Respondents recorded a consent on 11<sup>th</sup> July 2017 whereby a stay of execution pending appeal was granted on condition that they deposited a sum of Kshs 3,000,000/= in a joint account in the names of the advocates and the balance be held in abeyance, which condition was duly complied with.

12. He stated that his firm wrote to the Executive Officer on 11<sup>th</sup> November 2017 requesting for the certified copies of the proceedings but they had not received any response thereto. He said that their further reminder to the Executive Officer on 2<sup>nd</sup> February 2018 had not elicited any response from him.

13. It was his assertion that they could not compile and file a Record of Appeal in the absence of the proceedings and documents as provided for in the law. He added that the Appeal had yet to be admitted for Appeal and that since directions on whether the Appeal should proceed or be summarily dismissed, the Appeal could not be dismissed. He pointed out that the Appellants had an arguable Appeal and should be allowed to have their Appeal heard on merit.

14. The Appellants therefore urged this court to dismiss the application herein.

### **LEGAL ANALYSIS**

15. The Respondents referred this court to the provisions of Order 42 Rule 35 of the Civil Procedure Rules that provides the instances when an appeal may be dismissed for want of prosecution.

16. They relied on the case of **Protein & Fruits Processors Ltd & Another vs Diamond Trust Bank Kenya Ltd [2015]** in this regard and added that the court therein held that the "**right of appeal must be balanced against an equally weighty right of the applicant to enjoy the fruits of judgment delivered in his favour...**" In the said case, the court dismissed the Appeal therein.

17. They also placed reliance on the case of **K. Ventures Ltd vs Peter Olumati [2018] eKLR** where the court held that it was the duty of the appellant to move the court towards admission of an appeal in order to pave way for the issuance of directions.

18. It was their submission that the inordinate delay in admitting the Appeal under Section 79B of the Civil Procedure Act was fully caused and/or occasioned by the indolence of the Appellants herein.

19. On their part, the Appellants were emphatic that the issue of typed proceedings was a systematic challenge that was acknowledged by different courts.

20. They relied on the cases of **Jurgen Paul Flach vs Jane Akoth Flach [2014] eKLR** where the court held that an appeal could not be dismissed for want of prosecution if directions had not been given. They stated that this was the same conclusion that was reached in the case of **Kirinyaga General Machinery vs Hezekiel Mureithi Ireri [2007] eKLR** that they also relied upon to buttress their case.

21. They further referred this court to the case of **Allan Otieno Osula vs Gurdev Engineering & Construction Ltd [2015] eKLR** where the court therein acknowledged an appellant's constitutional right to appeal and held that even if there had been an unexplained delay in prosecuting an appeal, the court had to weigh the cost and prejudice a respondent would suffer if an appeal was not dismissed.

22. They distinguished the case of **Proteins & Fruits Processors Ltd & Another vs Diamond Trust Bank Kenya Ltd (Supra)** where an appeal had not been prosecuted for eight (8) years despite the typed proceedings having been available.

23. It was their argument that the Respondents had not demonstrated what prejudice they had suffered or continued to suffer and consequently the present application ought to be dismissed for being premature and grossly misconceived.

24. 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”.**

25. 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).**

26. 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”.**

27. 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.

28. 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.

29. 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.

30. 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.

31. 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”.**

32. 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”**

33. 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.

34. 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.

35. 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**

36. For the foregoing reasons, the upshot of this court’s decision was that the Respondents’ Notice of Motion application dated 17<sup>th</sup> January 2018 and filed on 19<sup>th</sup> January 2018 was not merited and the same is hereby dismissed. Costs shall be in the cause.

37. 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 its Record of Appeal as aforesaid, the Appeal herein will stand as automatically dismissed and the funds in the account in the joint names of Kiruki and Kayika and Kairu McCourt Advocates account number 1004951488 domiciled at NIC Bank Limited, Kenyatta Avenue Branch be released to the Respondents’ Advocates herein Messrs Kiruki & Kayika Advocates

38. 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.

39. Either party will be at liberty to apply.

40. Orders accordingly.

**DATED and DELIVERED at NAIROBI this 8<sup>th</sup> day of April 2019**

**J. KAMAU**

**JUDGE**