



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 559 OF 2016

SAMUEL KARIUKI.....1ST APPELLANT

GABRIEL MUHORO GATHE.....2ND APPELLANT

VERSUS

JOHN WAIGWA KIMATHI.....RESPONDENT

RULING

INTRODUCTION

1. The Respondent's Notice of Motion application dated 25th May 2018 and filed on 29th May 2018 was brought pursuant to the provisions of Order 42 Rule 13 and 35 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of the law. It sought the following orders:-

- 1. THAT the Appeal herein filed on 25th August 2016 be dismissed for want of prosecution.**
- 2. THAT the total amount held as security of the decretal sum in the joint interest earning account be released to the Respondent.**
- 3. THAT the costs of this Application and the appeal be borne by the Appellants.**
- 4. THAT this honourable court grants any further orders as it deems fit.**

2. The Respondent's Written Submissions were dated 19th November 2018 and filed on 21st November 2018 while those of the Appellants were dated and filed on 21st November 2018.

3. The parties requested this court 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 Respondent's affidavit in support of the present application was sworn on 25th May, 2018.

5. He pointed out that the Appellants deposited the decretal sum of Kshs 1,500,000/- in an interest earning amount in the names of their advocates and his advocates on 10th April 2017 which was outside the thirty (30) days period that had been ordered by the court and that they had also failed to file their Appeal within ten (10) days of the date of the court's ruling that was delivered on 19th August, 2016.

6. He added that despite the Appellants having filed the Memorandum of Appeal on 25th August 2016, they had not set the same down for directions or for hearing which was proof that they were no longer keen on prosecuting the Appeal herein.

7. He was emphatic that the delay only stood to deny him enjoyment of the fruits of his judgment and consequently, that it was only fair and just that the Appeal herein be dismissed with costs to him.

THE APPELLANTS' CASE

8. In response to the said application, the Appellants' advocate, Allan Odongo, swore the Replying Affidavit on their behalf on 16th June 2018. The same was filed on 20th June 2018.

9. He stated that the delay in depositing the decretal amount into an interest earning account in their in the name of the Respondent's advocate was occasioned by his advocates' delay in forwarding duly executed account opening forms to them.

10. He, averred that on 25th August 2016, the Respondent's advocates informed them that the decretal sum that was to be deposited was Kshs 2,086,287/- and not Kshs 1,500,000/- as had been ordered by the court.

11. It was his contention that the Respondent's advocates informed his firm that they would only return the duly executed bank account opening forms on condition that they filed a Memorandum of Appeal, which they duly filed on 25th August 2016. He stated that his firm only managed to deposit the monies on 10th May 2017 once it obtained all the documentation from the Respondent's advocates.

12. He added that they had been unable to file a Record of Appeal because despite their vigorous efforts, they had not obtained the certified copies of the Decree, Judgment and typed proceedings. It was the Appellant's contention that the Appeal had not been admitted for hearing and no directions had been given as stipulated under Section 79B of the Civil Procedure Act and Order 42 of the Civil Procedure Act respectively.

13. They pleaded with the court to be allowed to prosecute their Appeal to the logical conclusion as they had an arguable appeal which should be determined on merit and therefore urged this court to dismiss the present application.

LEGAL ANALYSIS

14. To support its application, the Respondent relied on several cases. In the case of Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium vs M/D. Popatal & Others [2016] eKLR, it was held as follows:-

“In ET Monks & Company Ltd vs Evans (1985) 584 the court made it clear that public policy interest demands that the business of the court be conducted with expedition.”

15. He also placed reliance on the case of Ivita vs Kyumba [1984] KLR 441 where it was stated that:-

“The test applied by the courts in the application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay, and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of and in the discretion of the court.”

16. He also relied on the case of Naftali Opondo Onyango vs National Bank of Kenya Ltd [2005] eKLR where it was held that a party who applies for dismissal of proceedings must show that:-

- i. there had been inordinate delay;**
- ii. the delay was inexcusable;**
- iii. the defendant was likely to be prejudiced by the delay.**

17. It was his submission that the long delay from the time the Appellants filed their Memorandum of Appeal was long and inexcusable.

18. On their part, the Appellants relied on the case of Jurgen Paul Flach vs Jane Akoth Flach [2014] eKLR wherein Kasango J held that before an appeal could be set down for dismissal for want of prosecution, directions ought to have been given.

19. They 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.

20. They distinguished the case of Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium vs M/D Popatal & Others (Supra), in which there was inaction by the plaintiff therein for five (5) years and failure by the plaintiff to respond to the defendant's application to dismiss the suit for want of prosecution.

21. They therefore urged this court to exercise its discretion and balance interests of both parties and allow them to prosecute their appeal.

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 Notice of Motion application dated 25th May 2018 and filed on 29th May 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. Either party is at liberty to apply.

42. Orders accordingly.

DATED and DELIVERED at NAIROBI this 16th day of May 2019

J. KAMAU

JUDGE