



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 186 OF 2014

WANANCHI INDUSTRIES LIMITED.....APPELLANT

VERSUS

NICODEMUS NZOMO KALUKU.....RESPONDENT

RULING

INTRODUCTION

1. The Respondent's Notice of Motion application dated 23rd July 2018 and filed on 27th July 2018 was brought pursuant to Section 1A, 1B & 3A of the Civil Procedure Act, Cap 21, Order 42 Rule 35, Order 51 Rule 1,3 & 4 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law. It sought the following orders:-

- 1. THAT this Honourable Court be pleased to dismiss the instant appeal for want of prosecution.**
- 2. The costs of this application and the entire appeal be awarded to the Respondent/Applicant.**

2. The Respondent's Written Submissions were dated 8th November 2018 and filed on 9th November 2018 while those of the Appellant were dated 12th November 2018 and filed on 11th December 2018.

3. The parties requested the court to render its decision based on their 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 present application was supported by his affidavit that was sworn on 23rd July 2018.

5. He stated that it was four (4) years since the Appellant filed its Memorandum of Appeal and it had not taken any steps to prosecute its Appeal. He contended that the delay and indolence in its part was inexcusable and inordinate.

6. He added that the delay had occasioned him delay in realising the fruits of his judgment and consequently, it would be in the interests of justice that the appeal be dismissed as justice demands timelines for the reason that justice delayed is justice denied.

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

THE APPELLANT'S CASE

8. In opposition to the present application, the Appellant's advocate, Shaban Osman, swore the Replying Affidavit on its behalf on 9th October, 2018. It was filed on even date.

9. The Appellant averred that though it complied with the consent in which it was granted an order for stay of execution, the lower court filed and typed proceedings had not been availed thus deterring it from commencing the prosecution of the Appeal herein.

10. It pointed out that its Appeal had raised triable issues with a high probability of success and since the delay in availing the typed proceedings which it applied for in 2014 was not occasioned by any fault on its part, it was in the interest of justice that it be allowed to

prosecute its Appeal.

11. It therefore asked this court to dismiss the present application.

LEGAL ANALYSIS

12. In support of its case, the Respondent relied on the provisions of Order 42 Rule 35 of the Civil Procedure Rules which he submitted provided for two (2) scenarios for the dismissal of an appeal due to want of prosecution.

13. He pointed out that the first scenario was that an appeal could be dismissed if directions had been given and three (3) months elapsed before the matter is set down for hearing. The second scenario, which he argued obtained in this case, was where one (1) year from the date of lodging and serving the Memorandum of Appeal, the appeal shall not have been set down for hearing.

14. It was his contention that since the Appellant lodged its Appeal on 15th April 2014 and served the same upon him on 20th April 2014 and no Record of Appeal had been filed, then this Appeal ought to be dismissed for want of prosecution. He pointed out that it had also not demonstrated that it wrote any letter calling for the proceedings of the lower court.

15. In this regard, he relied on the case of **Charity Wangechi Rukwaro vs Josphat M Thiongo [2018] eKLR** where Ngaa J in dismissing an appeal, rendered himself as follows:-

“...A question that may arise is this; what if the appeal has not been admitted and directions given within one year of the service of memorandum of appeal” Would the court still dismiss it”. In my humble view, the court is perfectly in order to dismiss the appeal because the burden is always on the appellant to set in motion the necessary steps to have the appeal admitted and directions given in preparation for the hearing of the appeal. The assumption is that a year is time enough to have such steps taken...”

16. He also placed reliance on the case of **K.Ventures Ltd vs Peter Olumati [2018] eKLR**, where Mboghli Msagha J stated thus:-

“That said, it is the duty of the appellant to move the court towards admission of an appeal in order to pave way for the issuance of directions. Rule 11 of Order 42 requires that once an appeal has been filed, the appellant should, within thirty days, cause the matter to be listed before a judge for directions under [section 79B](#) of the Act.”

17. On the other hand, the Appellant submitted that a party can only apply for dismissal of an appeal for want of prosecution if directions had been given under Order 42 Rule 35(1) of the Civil Procedure Rules.

18. It relied on the case of **Elem Investment Limited vs John Mokora Olwoma [2015] eKLR** where Aburili J stated as follows:-

“A reading of the above provision shows that it is clear that an appeal can be dismissed for want of prosecution in two instances. Firstly, where there has been a failure to admit the appeal for hearing three months after directions have been given under Order 42 rule 13 Civil Procedure rules or secondly if after one year of service of memorandum of appeal the appeal has not been listed for hearing.

In these two scenarios, the procedure is different. In the first scenario, the respondent is given the option to either list the appeal for hearing or apply for its dismissal. Under that scenario however, the appeal can only be dismissed if it has been admitted and directions have been given”

19. It also referred this court to the case of **Rosarie (EPZ) Limited vs Stanlex Mbithi James (2015) eKLR** where Aburili J also came to a similar conclusion. It asked this court to exercise its discretion not to dismiss its Appeal because even if the delay herein had been prolonged, it was excusable because it could not file a Record of Appeal without the proceedings in the lower court being availed.

20. 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.

21. 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”.

22. 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).

23. 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”.

24. 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.

25. 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.

26. 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.

27. 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.

28. 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”.

29. 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”

30. 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.

31. 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.

32. 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.”

33. 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.

34. 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

35. For the foregoing reasons, the upshot of this court’s decision was that the Respondent’s Notice of Motion application dated 23rd July 2018 and filed on 27th July 2018 was not merited and the same is hereby dismissed. Costs shall be in the cause.

36. 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

37. 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.

38. 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.

39. Either party is at liberty to apply.

40. Orders accordingly.

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

J. KAMAU

JUDGE