



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**CIVIL APPEAL NO 304 OF 2018**

**NAIROBI CITY COUNTY.....APPELLANT**

**VERSUS**

**HERMATON LITSWA.....RESPONDENT**

**RULING**

**INTRODUCTION**

1. The Respondent's Notice of Motion application dated 28<sup>th</sup> February 2019 and filed on 7<sup>th</sup> March 2019 was brought pursuant to the provisions of Sections 1A, 1B, 3A of the Civil Procedure Act, Order 42 Rule 11, 13 & 35 of the Civil Procedure Rules 2010. It sought the following orders:-

**1. THAT the Memorandum of Appeal dated 27<sup>th</sup> June 2018 and lodged in the High Court of Kenya at Nairobi in the High Court Civil Appeal Case Number 304 of 2018 be struck out.**

**2. THAT the costs of this Application be awarded to the Applicant.**

2. On 29<sup>th</sup> April 2019, this court gave directions on the filing of affidavits and Written Submissions. The matter was mentioned on 13<sup>th</sup> June 2019 when counsel for the Appellant informed the court that they had been having problems with their instructing client as they had been completely unable to get a deponent to swear the Replying Affidavit. The Respondent's Written Submissions were dated and filed on 28<sup>th</sup> May 2019.

3. The court therefore reserved its Ruling based on the Respondent's Written Submissions only. The Ruling herein is thus based on the said Respondent's Written Submissions.

**LEGAL ANALYSIS**

4. The Respondent's present application was supported by his Affidavit that was sworn on 28<sup>th</sup> February 2019.

5. He contended that the Appellant was granted leave to appeal out of time subject to a condition that it deposits the entire decretal sum of Kshs1,721,917.80 in a joint interest earning account of the advocates within a period of thirty (30) days from 11<sup>th</sup> June 2018, which had not been done to date.

6. It was his contention that it had also not demonstrated any action to ensure that the Record of Appeal was filed. He averred that it was inexcusably indolent, guilty of laches and undeserving of any favourable orders from this court and thus urged this court to strike out the Memorandum of Appeal that was filed on 3<sup>rd</sup> July 2018.

7. He referred this court to the case of **Evans Nyambaso Zedekiah & Another vs Independent Electoral and Boundaries Commission & 2 others [2013] eKLR** where it was held that non-compliance in depositing decretal sum deprived the court of jurisdiction of the matter.

8. He also placed reliance on the case of **Awadh Yusuf & Another vs Pilipeter Rugwamba [2014] eKLR** where it was held that it was the duty of the appellant to cause the appeal to be listed for directions twenty one (21) days after service of the memorandum of appeal.

9. 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 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.

10. 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”.**

11. 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).**

12. 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”.**

13. 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.

14. 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.

15. 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.

16. 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.

17. 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”.**

18. 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”**

19. 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.

20. 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.”**

21. 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.

22. This court took the view that an appeal cannot be dismissed before directions had been given. There was no indication that directions had been given herein. The Appeal herein would ordinarily not have been dismissed under Order 42 Rule 35 (1) of the Civil Procedure Rules. It would not also have been dismissed as there was 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.

23. Having said so, this court noted that although no person should be shut out from accessing court, he cannot keep a respondent and court waiting. He must prosecute his case expeditiously so as not to deny a successful party the fruits of his enjoyment.

24. The Appellant’s counsel had given up as they were unable to get instructions to oppose the present application which was unopposed. This court took the position that the grounds for dismissing an appeal for want of prosecution and/or striking out a memorandum of appeal where an appellant had failed to initiate the process of having the appeal heard and determined were the same.

#### **DISPOSITION**

25. For the foregoing reasons, the upshot of this court’s decision was that the Respondent’s Notice of Motion application dated 28<sup>th</sup> February 2019 and filed on 7<sup>th</sup> March 2019 was merited and the same is hereby allowed with costs.

26. It is so ordered.

**DATED and DELIVERED at NAIROBI this 23<sup>rd</sup> day of July 2019**

**J. KAMAU**

**JUDGE**