



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 28 OF 2016

ATHI RIVER STEEL PLANT LIMITED.....APPELLANT

VERSUS

PHILLIP MUKALA MOKI.....RESPONDENT

RULING

INTRODUCTION

1. The Respondent's Notice of Motion application dated 19th October 2018 and filed on 23rd October 2018 was brought under Order 42 Rule 35(2), Section 1,1A, 2A of the Civil Procedure Act and all enabling provisions of the law. It sought the following prayers:-

1. That the appeal herein be and is hereby dismissed for want of prosecution.

2. That in the alternative and without prejudice to prayer 1, the appeal herein be dismissed for being filed out of time and without leave of the court.

3. That in the alternative and without prejudice to the prayers above, the appeal herein be dismissed for being in violation of the express consent order filed with the court on the 21st March 2016.

4. That the consent of stay of execution granted on 22nd March 2016 be vacated and the deposit held as security at KCB A/C No. 1181182085 in the joint names of the counsels on record be released to the Applicant's counsel.

5. That the costs of the application be provided for.

2. His Written Submissions were dated and filed on 10th April 2019 while those of the Appellant were dated 25th March 2019 and filed on 27th March 2019.

3. Parties asked this court to deliver its decision based on the 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 application was supported by the Affidavit of his advocate, Cosmas Ngala Stephen, that was sworn on 19th October, 2018.

5. He pointed out that the appeal was filed out of time and without leave of the court, judgment having been delivered on 10th December 2015 and the Memorandum of Appeal having been filed on 29th January 2016. It was his averment that because the Appeal herein was filed out of time, then the same should be automatically dismissed.

6. He added that on 22nd March 2018, together with the Appellant, they recoded a consent where the Appellant was to file a Record of Appeal within ninety (90) days from the date of the consent failing which the stay was to lapse and he be at liberty to execute.

7. He averred that the Appellant had never requested for the certified copies of proceedings to enable it file its Record of Appeal yet the same had been ready from 4th September 2017.

8. It was his contention that it had violated the terms of the aforesaid consent and Order 42 Rule 35(2) of the Civil Procedure Rules thus entitling him to the funds which had been deposited as security instead of ordering for execution.

9. He was emphatic that litigation must come to an end and thus urged this court to allow his application as he had sought.

THE APPELLANT'S CASE

10. In response to the said application, on 7th November 2018, the Appellant's advocate, Phillip M. Mulwa, swore a Replying Affidavit on its behalf. The same was filed on 14th November 2018.

11. While admitting that it filed its Record of Appeal late, the Appellant averred that the delay was occasioned by the fact that it never received notification that the certified copies of the proceedings were ready for collection. It pointed out that after learning that the said proceedings were ready, it collected the same and that its Record of Appeal was ready for filing.

12. It averred that the delay for prosecuting the Appeal could be cured by it being granted thirty (30) days or any other time the court deemed fit for it to file its Record of Appeal and the taking of a date for directions.

13. It added that the Respondent was paid half of the decretal sum amounting to Kshs 200,000/= while the balance in the sum of Kshs 269,523/= was in a joint interest earning account in the name of its advocate and those of the Respondent.

14. It was its contention that it was in the interest of justice that the Appeal herein be heard on merits and that justice be substantively done to both parties as it would be greatly prejudiced if its Appeal was not heard on merit.

LEGAL ANALYSIS

15. The Respondent relied on the provisions of Order 42 Rule 35(2) of the Civil Procedure Rules and argued that the Appeal herein had not been set down for hearing and that there was no Record of Appeal. It averred that whatever was on record was filed immediately he lodged the present application, which woke the Appellant up from slumber.

16. He submitted that the Appellant had not done equity and its hands were tainted. In this regard, he placed reliance on the cases of **Protein & Fruits Processors Ltd vs Patrick Kiari Mwaura [2015] eKLR** and **John Wachanga Kiama vs Daniel Kiboro Muchai [2016] eKLR** where the courts therein allowed applications that had been brought under similar facts and circumstances such as in their application.

17. On its part, the Appellant argued that it had duly complied to the best of its ability. It pointed out that it filed its Record of Appeal to mitigate the prejudice suffered by the late filing which signified its intention to prosecute its Appeal. It was its submission that its Appeal could not be dismissed before directions could be given.

18. It placed reliance on the cases of **Njai Stephen vs Christine Khatiala Andika [2019] eKLR** and **Morris Njagi & Another vs Mary Wanjiku Kiura [2019] eKLR**, where the holding of the two (2) courts were that allowing such an application would be shutting out an appellant from accessing the court as enshrined in Article 50 of the Constitution of Kenya, 2010 and that it was only the Registrar who could initiate a dismissal of an appeal for want of prosecution respectively.

19. As this court held in the case of **Njai Stephen vs Christine Khatiala Andika** (Supra), every person is entitled to have a fair trial as envisaged under Article 50(1) of the Constitution of Kenya. The said Article 50(1) 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.”

20. 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.

21. Appreciably, **“equity aids the vigilant and not the indolent.”** It was evident from the court file that the Appellant did not appear to have made any effort to have pursued the typing of the certified copies of the proceedings. It was indolent in this regard.

22. However, a perusal of the court file showed that the Deputy Registrar High Court of Kenya wrote several letters to the lower court requesting for the original record and certified copies of proceedings culminating in the letter dated 7th October 2016. There was no indication that the Deputy Registrar informed the Appellant that the proceedings were ready to enable it file its Record of Appeal.

23. Both the court and the Appellant were to blame for having caused hardship to the Respondent herein as he was being kept away from the fruits of judgment. This was of course, in the event the Appeal herein was dismissed.

24. Having said so, it is important to note that 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. 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 Appellant herein was formally notified that the lower court file and proceedings had been forwarded to the High Court for the Registrar to proceed as aforesaid.

34. There was therefore no justification in the court dismissing the appeal herein for want of prosecution and/or for the release of half of the decretal sum to the Respondent herein on the ground that the Appellant had not complied with the consent that they had both entered into.

DISPOSITION

35. For the foregoing reasons, the upshot of this court’s decision was that the Respondent’s Notice of Motion application dated 19th October 2018 and filed on 23rd October 2018 was not merited and the same is hereby dismissed. Costs of the application will be in the cause.

36. To progress this matter further, the Appellant is hereby directed to file and serve its Record of Appeal within fourteen (14) days from date of Ruling. Notably, the Record of Appeal dated 16th November 2018 was filed in court outside the time lines that the parties had agreed upon in the consent that they recorded on 22nd March 2018. Consequently, as the said Record of appeal was filed without the leave of the court, it is hereby expunged from the court record.

37. Orders accordingly.

DATED and DELIVERED at NAIROBI this 17th day of October 2019

J. KAMAU

JUDGE