



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL CASE NO 432 OF 2009

JUBILEE INSURANCE COMPANY LIMITED.....APPELLANT

VERSUS

SAMUEL KIMANI THUBE.....RESPONDENT

RULING

INTRODUCTION

1. The Respondent's Notice of Motion application dated and filed on 13th November 2018 was brought under Order 42 Rule 11 and 13, Order 51 Rule 1 of the Civil Procedure Rules and Section 1A,1B & 3A of the Civil Procedure Act. It sought the following prayers:-

1. That the Appellant's Appeal herein vide its Memorandum of Appeal dated 6th August 2009 be dismissed for want of prosecution.

2. That costs of the application be awarded to the Respondent.

2. His Written Submissions were dated and filed on 28th March 2019 and filed on 13th November 2019 while those of the Appellant were dated 2nd February 2019 and filed on 4th February 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 present application was supported by the Affidavit of the Respondent's advocate, Michael Ng'ang'a that was sworn on 13th November 2018.

5. The Respondent contended that the Appellant filed his Record of Appeal on 29th September 2010 and that the matter was fixed for directions twice before the Deputy Registrar, the last time being 20th September 2019.

6. He pointed out that since 20th September 2016, the Appellant had not bothered to fix the Appeal for directions or for the hearing of this case and hence, the delay herein had been inordinate and inexcusable.

7. He averred that it was fair and just that the application be granted under the provisions of Order 42 Rules 11 and 12 of the Civil Procedure Rules and thus urged this court so to grant.

THE APPELLANT'S CASE

8. In response to the said application, the Appellant's advocate, Zul Mohamed, swore a Replying Affidavit on 10th December 2018. The same was filed on even date.

9. The Appellant averred that the present application was fundamentally and incurably defective and bad in law because the same did not indicate who was the applicant and who was the respondent therein.

10. Further, it stated that the Respondent was at all times aware of its efforts to list its Appeal for directions as it had copied to him, all its letters to the court asking when the Appeal would be listed for directions. It was categorical that it was not indolent and that the present application was mischievous and made without checking the correct facts.

11. It therefore urged this court to dismiss the present application with costs to it.

LEGAL ANALYSIS

12. This court deemed it prudent to deal with the issues that had been raised herein under distinct and separate heads.

I. COMPETENCE OF OTHERWISE OF THE APPLICATION

13. To support its argument that the present application was incurably defective because it did not indicate who the applicant and who the Respondents were, the Appellant placed reliance on the case of **Stanbic Bank of Kenya Ltd vs Geoffrey Ndiku Mutisya [2008] eKLR.**

14. On his part, the Respondent relied on the provisions of Order 51 Rule 10(2) of the Civil Procedure Rules and Article 159(2)(d) of the Constitution of Kenya that both gives directions on how technicalities ought to be dealt with.

15. In that regard, he referred this court to the case of **David Kimani Karogo vs Thika Land Disputes Tribunal & 2 Others [2017] eKLR** where the court held that even if the Respondent therein was named as a respondent and not as an applicant, that was want of form that did not affect the substance of the application.

16. The court carefully analysed the two(2) cases that were relied upon by the parties herein and found that it was more persuaded by the decision of L. Gacheru J in **David Kimani Karogo vs Thika Land Disputes Tribunal & 2 Others** (Supra) for the following reasons:-

1. Order 51 Rule 10(2) of the Civil Procedure Rules provides that:-

“No application shall be defeated on a technicality or for want of form that does not affect the substance of the application.”

2. Article 159(2) (d) of the Constitution of Kenya states that:-

“justice shall be administered without undue regard to procedural technicalities.

17. Notably, the case of **Stanbic Bank of Kenya Ltd vs Geoffrey Ndiku Mutisya**

(Supra) was decided before the promulgation of the Constitution of Kenya, 2010 when courts liberally dismissed matters on technical grounds. That case cannot therefore offer a good guide post-Constitution of Kenya.

18. This court took the view that it was sufficient if a court was able to discern from an application before it who the applicant and who Respondent were. Insisting on setting out of the status of a party as a mandatory procedure would be giving undue prominence to form rather than substance of a matter.

19. This court was thus not persuaded by the Appellant’s submissions that the Respondent’s present application was incurably defective and bad in law.

II. MERITS OR OTHERWISE OF THE APPLICATION

20. The Respondent relied on Order 42 Rule 35 of the Civil Procedure Rules that unless an appeal has been set down for hearing three (3) months after directions have been given, the respondent shall be at liberty to apply for its dismissal for want of prosecution. Further, that if after one (1) 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.

21. It dismissed the Appellant’s argument that it had tried to fix the Appeal for directions as fallacious and in this regard placed reliance on the cases of **John Githinji Gichira vs Benard Munge Gichira [2017] eKLR and Saikas Contractors Ltd vs Kenya Petroleum Refineries Ltd [2004] eKLR** where appeals therein were dismissed for want of prosecution.

22. On its part, the Appellant only contended that it had made every effort and continued to make every effort to have the matter listed for directions.

23. Notably, 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. It is important to point out that 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. This court looked at the court file and noted that the matter was mentioned before the Deputy Registrar Hon Makungu on 21st July 2016 to confirm if the lower court had been availed. There were several letters from the Appellant’s advocates to the Deputy Registrar and the Senior Executive Officer culminating in a letter dated 29th October 2018 which showed that they were seeking release of the lower court file so that directions on the disposal of the Appeal herein could be given.

37. In the mind of this court, there could not have been any more effort on the part of the Appellant. The Appellant’s advocates conduct was sufficient to persuade this court to find that the Appellant was still keen in pursuing its appeal.

38. 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(1) of the Constitution of Kenya.

DISPOSITION

39. For the foregoing reasons, the upshot of this court’s decision was that the Respondent’s Notice of Motion application dated and filed on 13th November 2018 was not merited and the same is hereby dismissed. Costs shall be in the cause.

40. To progress this matter further, it is hereby directed that this file be placed before the Deputy Registrar High Court of Kenya Milimani Law Courts Civil Division on 23rd October, 2019 for her further orders and/or directions.

41. It is so ordered.

DATED and DELIVERED at NAIROBI this 15th day of October 2019

J. KAMAU

JUDGE