



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 463 OF 2017

KAMAU PAUL.....1ST APPELLANT

ISACK GAKUNJU MUTHONI..... 2ND APPELLANT

VERSUS

LYDIA MURINGE WAIKWA.....RESPONDENT

RULING

1. *Lydia Muringe Waikwa*, the respondent in this appeal approached this court through a Notice of Motion dated 5th March 2014 seeking that the appeal be dismissed with costs for want of prosecution and that the amount deposited in the parties' joint account held at *ABC Bank* together with all accrued interest be released to the respondent's advocates.

2. The application is based on grounds that since the appeal was filed on 31st August 2017, the appellants have failed to take any action to facilitate its prosecution as the appellants have to date not filed the record of appeal; that the delay is inordinate and has caused prejudice to the respondent who has been denied enjoyment of fruits of her judgment. These grounds are reproduced in the supporting affidavit sworn by *Ms Shelmith Wangui*, learned counsel for the applicant.

3. The application is opposed. Learned counsel for the appellant *Mr. Dominic Njuguna Mbigi* swore a replying affidavit on 10th May 2019 in which he deposed that he has been unable to file the record of appeal since the lower court despite several requests has failed to supply him with a copy of the lower court's proceedings; that the appellant cannot therefore be blamed for the delay in prosecuting the appeal. Counsel also deposed that the application was premature as the appeal had not been admitted and directions had not been issued.

4. By consent of the parties, the application was prosecuted by way of written submissions. The appellants filed their submissions on 22nd October 2014 while those of the respondent were filed on 15th October 2019.

5. I have considered the application as well as the rival written submissions filed on behalf of both parties. The law governing dismissal of appeals for want of prosecution is set out in *Order 42 Rule 35 Rules (1) and (2)* of the *Civil Procedure Rules*. Under *Order 42 Rule 35 Rule (1)*, an appeal can be dismissed for want of prosecution on application by the respondent if three months after the taking of directions under *Order 42 Rule 13*, the appeal had not been fixed for hearing. The Deputy Registrar is also empowered under *Order 42 Rule 35 (2)* to list the appeal before a judge for dismissal with notice to the parties if within one year of service of the memorandum of appeal, the appeal had not been set down for hearing.

6. It is not disputed that indeed the appeal in this case has not yet been admitted and consequently, no directions have been issued for its hearing. It is also evident from the record that the Deputy Registrar has not yet utilized the option of placing the appeal before a judge for dismissal despite the fact that the appeal was filed on 31st August 2017 over two years ago.

7. There is therefore no doubt that the appeal does not fall under any of the situations envisaged under *Order 42 Rule 35 (1) and (2)* of the *Civil Procedure Rules* (the Rules). This does not however mean that the court is powerless and lacks jurisdiction to dismiss an appeal for want of prosecution simply because an appellant has absconded his or her responsibility of ensuring that an appeal is admitted and causerlisted for directions within the time lines set under *Order 42 Rule 13* of the Rules or within a reasonable time.

8. The court in the exercise of its inherent jurisdiction under *Sections 1A and 3A* of the *Civil Procedure Act* is empowered to make orders that meet the ends of justice or prevents abuse of its process in any matter before it and can in appropriate cases dismiss an appeal for want of prosecution even if the appeal was not admitted and directions had not been issued if it was satisfied that the appeal was filed in bad faith with the aim of obstructing the course of justice.

9. In this case, the appellants have claimed that they have been unable to take any step to facilitate prosecution of the appeal since they have been unable to obtain certified copies of proceedings from the lower court to enable them file the record of appeal as the lower court's file

could not be traced. To substantiate this claim, the appellants annexed two letters to the replying affidavit. The first one is dated 25th May 2018 authored by the respondent's counsel and the second one dated 1st October 2018 written by the applicant's counsel both addressed to the Executive Officer of Milimani Law Courts seeking his intervention in having the lower court file traced.

10. I note that the two letters do not have the lower courts registry stamp and it is not clear whether the same were actually received in the registry. There is no other evidence tendered by the appellants to show what other effort they have made after 25th May 2018 to follow up with the trial court to find out whether the court file had been traced.

11. The appellants having filed the appeal had a responsibility of ensuring that it was heard expeditiously so that the respondent who was the successful party in the lower court was not unnecessarily and unreasonably delayed in the realization of fruits of her judgment. Even though the appellants have a right to exercise their rights of appeal and to have that right safeguarded and protected by the court, that right must be weighed against the right of the respondent to enjoy the fruits of her judgment.

12. After balancing these competing interests and considering the reasons advanced by the appellants for the delay, I will grant the appellants another opportunity to prosecute their appeal but on condition which will ensure its expeditious disposal. I thus decline to allow the application on condition that the appellants will file and serve their record of appeal within the next 60 days failing which the appeal will stand dismissed for want of prosecution with costs to the respondent.

13. Regarding the prayer seeking an order that an undisclosed amount allegedly deposited in an account held at *ABC Bank* together with all accrued interest be released to the respondent's advocates, the applicant has not annexed any evidence to show under what circumstances the alleged amount was deposited and whether such an account actually exists. In the absence of such evidence, I find no basis upon which I can grant the order sought. Prayer 2 of the motion is accordingly dismissed.

14. Though as a general rule costs follow the event, given the context in which the application was filed, I will exercise my discretion and award the respondent costs of the application.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 21st day of November, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Odawa holding brief for Mr. Mwaniki for the applicant

Mr. Gachoka holding brief for Mr. Mbigi for the respondent

Mr. Salach: Court Assistant