REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO. 63 OF 2016

TAIFA SACCO SOCIETY LTD........................1ST APP./RESP.

M/S GREEN BELLS AUCTIONEERS............2ND APP.RESP.

VERSUS

SYMON GACHOKA KIAGO..........................RESPONDENT

RULING

The respondent moved this court on 24th January, 2018 for orders for, inter alia, striking out the appellants' appeal with costs to him or in the alternative, for the dismissal of the appeal for want of prosecution. There is an affidavit of service showing that the motion endorsed with the hearing date was served on the appellants' counsel on the same date that it was filed. However, when the application came up for hearing on 7th February, 2018 neither the appellants nor their counsel attended court; meanwhile, no response of any sort had been filed in opposition to the application. In the absence of the appellants or their duly appointed counsel; and, in the absence of any response to the respondent's application, it was deemed that the latter was not opposed and on that note the application was allowed.

Soon after the respondent's motion was allowed and more particularly on 18th February, 2018, the appellants filed a motion dated 7th February, 2018 seeking, in principle, orders to set aside the order allowing the respondent's application; the effect of that order was to dimiss the appellant's appeal for want of prosecution and consequently paved way for release of the decretal sum that had hitherto been deposited in court by the appellants as a condition for stay of execution. It is this appellant's motion that is the subject of this ruling.

The motion is made under Order 12 Rule 7 and Order 51 Rule 1 of the Civil Procedure Rules; the appellants have also invoked article 159(2) of the Constitution in the quest for the orders.

In the affidavit sworn in support of the motion, the appellants' counsel has sworn that she could not attend court when the respondent's application was scheduled for hearing because she had a sick child whom she had to take to hospital for treatment on the material day. She also deposed that though she tasked her court clerk to find an advocate and hold her brief, the clerk could not find any advocate to represent her.

The respondent opposed the application and filed a replying affidavit in that respect. His main contention is that the appellants have been indolent and only move court whenever adverse orders are made against them. Failure by their counsel to attend court when the respondent's application came up for hearing, so the respondent has deposed, must be seen in this light. In his view, the excuses given are not sufficient reasons to set aside the orders granted by this court on 7th February, 2018. In any event, his application was not opposed.

Order 12 which the appellants have invoked appears to me to be inapplicable in the present circumstances because it basically deals with hearing of suits and consequences of non-attendance by either of the parties to the suits. To be specific, where judgment has been entered or a suit has been dismissed as a result of non-attendance, rule 7 thereof provides that the court, on application, may set aside or vary the judgment or order upon such terms as may be just.

This is not the case here. What the court dismissed was an appeal; assuming the appeal had been set down for hearing, it would have been dismissed under Order 42 rule 20 of the rules if the appellant failed to show up on the date of the hearing. In that event, the appellants would have invoked order 42 rule 21 for readmission of the appeal.

But the appeal was dismissed on the basis of Order 42 Rule 35 (1) which provides that if an appeal has not been set down for hearing within three months after giving of directions under rule 13, the respondent is at liberty either to set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution. No rule has specifically been provided to set aside or vary any order made under this rule; in such case the court will be moved to invoke its inherent jurisdiction under section 3A of the Civil Procedure Act. I suppose this is the

appropriate provision that the applicant ought to have cited.

The record shows, and it has not been denied, that this appeal was admitted on 6th April, 2017 and by a letter dated 3rd May, 2017, the contestants' representatives were notified accordingly. Despite this notification, the appellants did not take any step towards prosecution of their appeal. As matter of fact, the only step taken was by the respondent when he filed his application for dismissal of the appeal for want of prosecution on 24th January, 2017, six months down the line. But even after they were served with this application, the appellants were still unmoved; they did not bother to file any sort of response to the respondent's application. For all intents and purposes, the application was not opposed.

The lackadaisical attitude with which the appellants have approached their appeal is further demonstrated by their representative's failure to attend court for the hearing of the respondent's application. I am less convinced by the reasons given by the learned counsel for the appellants for her failure to attend court on 7th February, 2018 because, first, there is no evidence that her child was attended to in any hospital on the material date. I should not be mistaken to doubt the indisposition of counsel's child; all I am saying is that if the learned counsel could not attend court because she took her sick child to hospital there has to be proof that indeed the child was taken to hospital as alleged. Second, the court clerk who is alleged to have been asked to request an advocate to hold the learned counsel's brief has not sworn any affidavit to the effect that he or she was in court and could not find any advocate to make representations on the learned counsel's behalf. In any event, I suppose it is upon counsel, not her clerk, to instruct her colleague in the profession to hold her brief whenever circumstances so demand.

In short, I do not find the reasons given by counsel for the appellants explaining her failure to attend court plausible or sufficient.

I note that counsel has, in her affidavit in support of the appellants' application, purported to respond to the respondent's motion which, as noted, was allowed unopposed. The purported response has, no doubt, been overtaken by the order of 7th February, 2018 allowing the application. But even if it was to be assumed that the application was pending or if the order of 7th February, 2018 was to be vacated, I am still not convinced why the appellants have not taken any step towards prosecution of their appeal. From what I gather, this court could still have invoked order 42 rule 35(2) of the Civil Procedure Rules and dismissed the appeal.

The memorandum of appeal was filed on 22nd December, 2016 and since then the appellants appear to have simply sat back, doing nothing. It is true, and the record bears the appellants' counsel out that by a letter dated 26th October, 2015, she enquired from the court whether the appeal had been admitted for hearing. The record shows that this letter was received at the civil registry on 5th April, 2017. It is not clear why it took more than one and half years for the letter to be delivered but whatever the reason there is, the court, on its part, wrote to the parties' counsel on 3rd May, 2017 informing them that the appeal had been admitted. Although the appellants' counsel has admitted receiving this notification, there is no explanation why she did not take any steps to set in motion the hearing and determination of the appeal.

The reasons given in the counsel's affidavit that '*the Nyeri High Court and the Othaya Law Court have been taking us round in circles*' as far as preparation of the proceedings is concerned is, to say the least, ridiculous. I say so because on 14th February, 2017, the Deputy Registrar wrote to the Senior Resident Magistrate at Othaya Law Courts acknowledging receipt of the original record from the magistrates' court. This letter was copied to both counsel for the appellants and the respondents. As a matter of fact, the appellants' counsel acknowledged receiving her copy and it is in the same acknowledgement that she sought to be informed whether the appeal had been admitted.

As noted the court confirmed to the parties that the appeal had been duly admitted. It is obvious that the original record would not have not been received from the lower court and, more importantly, the appeal would not have been admitted if it did not contain a certified copy of the proceedings; on the contrary, these proceedings, which counsel alleges are out of reach, have always been available. There is no evidence that counsel has made any efforts to obtain the proceedings since the 17th May, 2017 when she wrote to the Deputy Registrar asking for them and a copy of the judgment.

In any case, there is no evidence that besides the proceedings and the judgment, counsel ever applied for a certified copy of the decree. Section 79G of the Civil Procedure Act, cap 21 makes it mandatory that this document must be filed alongside the memorandum of appeal and if not, at the earliest opportunity possible. It states as follows:

79G.

> ***Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:***
>
> ***Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.***

If the appellants have not applied for the decree, how can it be said that they have an appeal, properly, so called on record? At the very least, the appellants have not complied with section 79G of the Act. In these circumstances, even if the appellants present application was allowed, the appellants would be hard pressed to persuade the court that there is a valid appeal eligible for directions for hearing under Order 42 rule 13 of the rules.

In conclusion therefore, I do not find any merit in the appellants' application dated 7th February,2018; it is hereby dismissed with costs.

Signed, dated and delivered in open court this 20th July, 2018

Ngaah Jairus

JUDGE