



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 590 OF 2015

SYLVESTER SULE NYAGWETH

T/A YASUL AUTOMOBILE & SPARES.....APPELLANT

VERSUS

RICHARD KIMELI.....1ST RESPONDENT

BARCLAYS BANK OF KENYA.....2ND RESPONDENT

(Being an appeal from the judgment and decree of the Chief Magistrate's Court at Nairobi by the Hon. Wachira (Mrs), Senior Principal Magistrate delivered on 6th December 2015 in CMCC No 10877 of 2005)

RULING

INTRODUCTION

1. The 2nd Respondent's Notice of Motion application dated on 18th February 2017 and filed on 20th February 2017 was brought pursuant to the provisions of Order 42 Rule 35 (2) of the Civil Procedure Rules, (sic) and Sections 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of the law. The application sought the following prayers:-

- 1. THAT the Appeal herein be dismissed for want of prosecution.**
- 2. THAT in the alternative, the registrar be directed to list the appeal before a judge in chambers for dismissal.**
- 3. THAT the costs of this application and of the suit be borne by the Appellant.**

2. The 2nd Respondents Written Submissions were dated and filed on 5th June 2018. The Appellant's Written Submissions were dated 12th June 2018 and filed on 13th June 2018.

3. When the matter came before the court on 19th June 2018, the parties requested that the court deliver its decisions based on their respective Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions. The 1st Respondent did not participate in the proceedings herein.

THE 2ND RESPONDENT'S CASE

4. The 2nd Respondent's application was supported by the Affidavit of Karen Muthee that was sworn on 15th December 2017.

5. Its case was that since the Appellant filed his Memorandum of Appeal on 4th December 2015, he had not served them with a Record of Appeal, which omission was greatly prejudicing it.

6. It was emphatic that the overriding objective of the Civil Procedure Act was that the Appellant has a duty to expeditiously dispose of his case because litigation must come to an end one way or the other.

7. It therefore urged this court to allow its application as prayed.

THE APPELLANT'S CASE

8. In opposition to the said application, the Appellant's lawyer, Hedaya Malesi Ndago, swore a Replying Affidavit on 20th March 2017. The same was filed on even date.
9. The Appellant's case was that he had not managed to obtain the proceedings to enable him file a Record of Appeal because the lower court file could not be traced at the Registry.
10. He stated that he had been unable to set down his Appeal for directions due to factors that were beyond his control. He was categorical that his appeal ought not to be dismissed because directions under Order 42 Rule 35 of the Civil Procedure Rules, 2010 had not been given.
11. He therefore urged this court to dismiss the 2nd Respondent's application as the same was premature.

LEGAL ANALYSIS

12. The 2nd Respondent relied on the provisions of Order 42 Rule 35 (2) of the Civil Procedure Rules, 2010 that provides 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”.

13. It relied on the cases of Njoki Gachugu & 3 Others vs Francis Githii & 3 Others [1977] eKLR, Century Oil Trading Co Ltd vs Gerald Mwaniki Mbogo & Another [2001] eKLR, Republic vs Commissioner of Lands & Others HCMA No 47 of 1999 (full citation not given), National Industrial Credit Bank Ltd vs Freshco International Limited & 4 Others [2005] eKLR to buttress its argument that a Plaintiff has to expeditiously prosecute his case and that his or her case will be dismissed for want of prosecution if there is inordinate delay in prosecuting his or her claim because litigation causes anxiety to parties.

14. On his part, the Appellant relied on the provisions of Articles 48 and 50 of the Constitution of Kenya, 2010 that provide for the right to fair hearing in a competent court or tribunal. Further, he submitted that although the overriding objective is for expeditious disposal of cases, a party must not be put under hardship or have his or her case dismissed if the delay that was been occasioned was not deliberate.

15. He relied on the cases of National Bank of Kenya Ltd vs Alfred Owino Bala [2017] eKLR and Abdrihman Abdi vs Safi Petroleum Products Ltd & 6 Others to buttress his arguments.

16. It was not in dispute that the Appellant filed his Memorandum of Appeal dated 4th December 2015 on even date. What was in contention was whether or not the failure to have prosecuted his appeal was justified.

17. A perusal of Exhibit “HMN 1” attached to the Replying Affidavit of Hedaya Malesi Ndago shows that the Appellant's advocates applied to be furnished with typed proceedings on 11th May 2016. Exhibit “HMN 2” was an internal memo from the Chief Magistrate dated 5th July 2016 informing litigants that the judiciary had acute shortage of secretarial staff to type proceedings and urged them to obtain handwritten copies to type the same and return them to the Judiciary for proof reading and certification.

18. The Appellant did not appear to have obtained the handwritten copies of the proceedings for typing which he would have returned to the Judiciary for proof reading and certification. He stated that he did not do so as the court file was missing.

19. In its Affidavit, the 2nd Respondent did not present any documentary evidence to suggest that the proceedings had already been typed and the court file was readily available. To this end, this court was hesitant not to have accepted the Appellant's explanation as to why he had not filed and served his Record of Appeal.

20. Notably, the Appeal herein was yet to be admitted for hearing as is required under Section 79 of the Civil Procedure Act. The said Section 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.”

21. Directions under Order 42 Rule 35(1) of the Civil Procedure Rules, 2010 had not been given by the court when the 2nd Respondent would have had a right to seek for the dismissal of the Appeal herein within three (3) months of directions having been given by the court.

22. In addition, the provision of Order 42 Rule 35(2) of the Civil Procedure Rules 2010 had not been applicable herein. The same provides 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.”

23. Indeed, allowing the present application would be shutting out the Appellant from accessing the court when the delay was clearly on the part of the lower court in forwarding certified copies of proceedings to this court. In addition, the provision of Order 42 Rule 35(2) of the

Civil Procedure Rules 2010 had not been applicable herein. The same provides 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.”

DISPOSITION

24. For the reasons foregoing, the upshot of this court’s Ruling was that the 2nd Respondent’s Notice of Motion application that was dated on 18th February 2017 and filed on 20th February 2017 was not merited and the same is hereby dismissed with no order as to costs.

25. However, to avoid any further delays in this matter, the Deputy Registrar High Court of Kenya Milimani Civil Division is hereby directed to facilitate the tracing and typing of the proceedings of the lower court file.

26. This matter will be mentioned on 11th December 2018 for the Appellant to inform this court of the position as regards filing its Record of Appeal.

27. It is so ordered.

DATED and DELIVERED at NAIROBI this 16th day of October 2018

J. KAMAU

JUDGE