REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APEAL NO. 80 OF 2014

MUNICIPAL COUNCIL OF NYERI.....APPLICANTS/REPONDENTS

-VERSUS-

JOHN WACHIRA KAIREBI.....RESPONDENT/APPELLANT

RULING

1. The Applicant/Respondent brought a Notice of Motion application dated 26th February, 2018 under Order 42, Rule 35 (1) and (2) and Order 51 rule 1 of the Civil Procedure Rules. He seeks two orders: that the instant appeal be dismissed for want of prosecution and the appellant be condemned to pay costs.

2. The application is supported by the affidavit of the Applicant's Advocate Charles Wahome Gikonyo sworn on the 26th February 2018 and filed on 27th February 2018.

3. He depones that though the appeal was filed on 27th November 2014 it has never been fixed for hearing more than 3 years down the line, an obvious sign that the Appellant was not keen to prosecute the appeal. The application is opposed through the appellant's John Wachira Kairebi, 's Replying Affidavit sworn on 13th April 2018 sand filed on even date. He depones that:

4. He was notified by the Deputy Registrar of the High Court vide a letter dated 30th August, 2017 received on 8th September, 2017 that the appeal had been admitted for hearing. He was required to comply with **Order 42 Rule 12** of the Civil Procedure Rules, 2010.

5. In compliance with **Order 42 Rule 12** of the Civil Procedure Rules, 2010 he served the Memorandum of appeal on the County Secretary, County Government of Nyeri on 11th September 2017 through a Court Process Server as evidenced by the affidavit of service of the same date.

6. Upon service of the Memorandum of appeal on 11th September 2017 he had one year within which to set the appeal down for hearing as provided for by **Order 42 Rule 35 (2).**

7. By the time of filing the application on the 26th February 2018, one year had not lapsed hence, the appeal was not ripe for dismissal. He urged the court to dismiss the application as an abuse of the court process and instead give directions on the appeal.

8. When the application came up for hearing on 17th September, 2018 Parties made oral submissions in support of their positions. It was submitted for the applicant that the appellant had not complied with **Order 42 Rule 12** of the Civil Procedure Rules hence holding everyone else at ransom; the court, the respondent. Counsel argued that it should not be tenable foe an appellant to just file an appeal *'sit down, go to sleep and then come to argue that he did not serve the Memorandum of appeal because the appeal was not due for dismissal."* According to him appellant's inertia was apparently being rewarded by a gap in the rules which do not provide a remedy, where the appellant does not comply with the rule to serve the memorandum of appeal within seven days as required.

9. Counsel pointed out that the appellant had served the respondent directly yet the respondent had counsel on record contrary to Order 9 rule 13 of the Civil Procedure Rules.

10. Counsel urged the court to address the gap posed by the rules with the regard to order **42 rule 12**, if the appellant failed to serve the memorandum of appeal within seven days, the respondent was left without remedy. He submitted that the same had been communicated to the Rules Committee during their last circuit. He raised concern that it was against public policy for the rules to allow this kind of inertia. The Respondent acting in person submitted did not dispute that he filed the appeal on 27th November, 2014. However, he could not do anything before hearing from the Deputy Registrar as required by Order 42 rule 12 confirming that the appeal had been admitted for hearing. In compliance with Order 42 Rule 12, he served the memorandum of appeal on the respondent and filed a return of service dated 11th September, 2017. He submitted that he had one year, after serving the memorandum of appeal to set down the appeal for hearing and it was

Mr. Wahome's application that was pre empting that. He urged the court to give directions so that he could set the appeal down for hearing.

11. In his rejoinder Mr. Wahome submitted that even as they were arguing the application the appellant had not served the Memorandum of appeal as required by order 42 rule 35(2) and he was guilty of laches. This case was backlog and ought to be done away with.

12. The issue for determination is whether the application has merit to warrant the dismissal of the appeal for want of prosecution. The test for dismissal for want of prosecution is whether the delay complained of is prolonged and inexcusable.

13. The process of the appeal starts with the filing of the appeal and order 42 rule 11 provides for directions under section 79B of the CPA as to whether the appeal merits as hearing or not. Under **S. 79B** it is a mandatory requirement for the appellant to fix the appeal for directions before the judge within 30 days of filing. It states:

> ***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.*

14. Section 79B **of the Civil Procedure Act in turn states:**

> *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.*

15. If the Judge finds that the appeal does not warrant summary dismissal, then the Deputy Registrar is to communicate that to the appellant so that he can start other processes in accordance with Order 42 Rule 12 of the Civil Procedure Rules which states

> ***After the refusal of a judge to reject the appeal under section 79B of the Act, the registrar shall notify the appellant who shall serve the memorandum of appeal on every respondent within seven days of receipt of the notice from the registrar.***

16. 21 days after service of the memorandum of appeal the appellant must fix the matter before a judge for directions in accordance with order 42 rule 13(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.*

17. The appeal will be dismissed in accordance with Order 42, Rules 35 (1) and (2) states: -

> ***"35. (1) 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.***
>
> ***(2) 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. (emphasis added)***

18. There are two avenues for dismissal of an appeal for want of prosecution. The first one is initiated by the Respondent where the appeal has not been set down for hearing 3 months after the giving of directions under Order 42 Rule 13 of the Civil Procedure Rules; The second is initiated by the Registrar where the appeal has not been set down for hearing a year after the service of the memorandum of appeal on respondents

19. The current application therefore falls under Order 42 Rule 35 (1) as it is initiated by the Respondent. For determination of an application under this rule, the following questions are pertinent: -

a) Have the provisions of order 42 rule 12 of the CPR been complied with by the Registrar and the appellant?

b) Has the Appellant complied with the provisions of order 42 rule 13(1) of the CPR by setting the appeal down for directions?

c) c) If directions have been given, have 3 months lapsed since without the Appellant setting the appeal down for hearing?

20. Before we come to the proceedings under the CPR it is noteworthy the after filing the appeal on the 27th November 2014 the appellant did not bother to fix the same before the judge within 30 days for directions. There is no minute in the file showing that the matter was ever before the judge for directions. It is important to note that these directions are different before those under order 42 rule 13(1) that come after service of the memorandum of appeal. It does not require any activity on the part of the Deputy Registrar or anyone. It is the duty of the appellant to get that date. Parties will sometimes say that proceedings have not been typed. At that point that is not the issue. It is mandatory that the matter be fixed before the Judge. The only thing is, it does not say what will happen if the appellant, like in this case fails, to fix the appeal for directions under s. 79B of the CPA.

21. In this case the matter had already crossed that bridge. The Deputy Registrar's notice was issued on 30th August 2017 and received by the appellant on 8th September 2017. The Appellant had 7 days up to 15th September 2017 to serve the memorandum of appeal. He served on

the Respondent directly on the 11th September 2017, within the 7 days. The only hitch is that he did not serve counsel for the Respondent contrary to the provisions of Order 5 Rule 8 (1) of the Civil Procedure Rules which provides that: -

> ***"Wherever it is practicable, service shall be made on the defendant in person unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient".***

22. The action of the appellant begs the question whether service on the respondent directly instead of his counsel on record would amount to no service? The wording of the above provision does not seem to suggest that. It gives a litigant option. The ideal would be service on the respondent in person, but it would suffice to serve his agent if he has one. Hence, though the firm of Wahome Gikonyo and Co advocates was not served, as is the requirement, there was service directly on the respondent. The appellant cannot therefor be accused of having not served the memorandum of appeal at all.

23. On the third question, the answer is in the negative. From 11th September 2017, the Appellant had 21 days up to 2nd October 2017, to set the appeal down for directions before a Judge in accordance with order 42 rule 12 and 13 of the Civil Procedure Rules. The Appellant did not set the appeal down for directions as required by law.

24. Here lies another gap. What happens if the appellant does not serve the memorandum of appeal within 7 days of receipt of the notice or set the appeal down for directions before the Judge within the 21 days, what is the respondent to do? Or the court? According to the rules where the memorandum of appeal has been served, and ***before directions are given***, both the court and the respondent have to ***wait for one year*** for an appellant sleeping on their rights, before dismissal proceedings can be initiated. Where directions have been taken, and ***there is delay of up to three months AFTER the directions have been given in accordance with Order 42 Rule 35 (1)*** then the RESPONDENT gets the go ahead to initiate dismissal proceedings

25. Mr. Wahome's concern lies on the silence of the rules where the appellant does not serve the Memorandum of appeal within 7days. That by not providing a sanction, or a recourse for the respondent, or the court, it creates a leeway for delay of justice for the other party, for backlog and other related inefficiencies. If the same is not served, the matter cannot be listed for directions, and before directions are taken, the appeal cannot proceed to hearing, and an appellant guilty of laches will easily argue that, directions have not been taken, so the appeal is not ready for hearing as it is the duty of the Appellant to move the court in prosecution of the appeal. In the case of ***Haron E Ogechi Nyaberi vs British American Insurance Co. Ltd [2012] eKLR,*** the High Court held that:-

> ***"It is however, clear to this court that the Registrar cannot give notice of directions to the parties of an appeal and cannot himself fix an appeal for directions before a judge unless and until the Appellant has caused it by first complying with rules 11 and 13 thereof. Appellant's compliance to those rules is the gate-opening for admission of appeal and for the taking of directions. It is to be observed, therefore, that it will be the Appellant who shall really cause the appeal to be listed for giving directions before a judge by:***
>
> ***a) Serving the Memorandum of appeal; and***
>
> ***b) Filing and serving the Record of Appeal."***

In this case **Order 42 Rule 35 (1)** is not available to the Applicant as directions have not been given and the rules are silent on what happens where he fails to serve the memorandum within 7 days. In the case of **Kirinyaga General Machinery vs Hezekiah Mureithi Ireri HCCC No. 98 of 2008** as cited in **Attorney General vs Lucy Nduta Nganga (2017) eKLR** the Court observed thus: -

> **"It is clearly seen from that rule that before the respondent can move the court either to set the Appeal down for hearing or to apply for dismissal for want of prosecution, directions ought to have been given."**

26. The applicant also invoked the provisions of Order 42 rule 35(2) of the Civil Procedure Rules. By 27th February 2018 when this application was filed one year has not lapsed since service of the memorandum of appeal on 11th September, 2017.

27. In determining whether the application for dismissal of the appeal in the circumstances of this case is warranted, and what to do with the gap in procedure, I find myself drawn to the overriding objective of the CPA and the CPRs there under. The overriding objective of the CPA and the rules made thereunder is *'to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act."* That is what s. 1A of the Act states and to further this objective, the Court is bound by the provisions of s. 1B inter alia in that i *t 'shall handle all matters presented before it for the purpose of attaining the following aims—*

> *(a) the just determination of the proceedings;*
>
> *(b) the efficient disposal of the business of the Court;*
>
> *(c) the efficient use of the available judicial and administrative resources;*
>
> *(d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and*
>
> *(e) the use of suitable technology.*

28. Rules of procedure have been described as handmaidens rather than mistresses of justice. I find the exposition of the Oxygen Rule by the

Court of Appeal in **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others [2013] eKLR** apt in the circumstances of this case in addressing both the application before me and the gap in the rules as to what happens where appellant fails to comply with the rules within the set timelines. The Judges citing from other case law demonstrated the proper place for rules of procedure. In

'Abdirahman Abdi also known as Abdirahman Muhumed Abdi V. Safi Petroleum Products Ltd. & 6 others, Civil Application No. Nai. 173 of 2010 where a notice of appeal was served on the respondent out of time and without leave of the court, upon being asked to strike it out, the Court (Omolo, Bosire and Nyamu JJ. A) observed that:' (all emphasis added)

> "*The overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantive justice… The former provisions introduced the overriding objective in civil litigation in which the court is mandated to consider aspects like the delay likely to be occasioned, the cost and prejudice to the parties should the court strike out the offending document. In short, the court has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision one way or the other. Article 159 (2) (d) of the Constitution makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. That is not however to say that procedural improprieties are to be ignored altogether. The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the court strikes out its document. The court in that regard exercises judicial discretion." In*

'Abok James Odera t/a A.J. Odera & Associates V. John Patrick Machira t/a Machira & Co. Advocates, Civil Appeal No. 161 of 1999 in an appeal raising, inter alia, the question whether a record of appeal not containing Memorandum of appeal, as required by Rule 82 (1) (a) of the Court of Appeal Rules, was competent. In answer to this, the Court (Githinji, Nambuye & Koome, JJ. A) in one of the most comprehensive review of case law on the application of the overriding objective principle stated the law in this area as it is today.'

Just like the Court of appeal I quote extensively from that case to fortify the point I am making -

> "*The complaint on lack of inclusion of the memorandum of appeal as a primary document in the record of appeal is genuine. We also wish to confirm that the defects noted in the notice of appeal on which this appeal is premised, were not cured as advised by this court in its rulings of 20th April, 2000 and 24th May, 2002.*
>
> *The question we have to ask ourselves is whether we can take refuge under the oxygen rule enshrined in section 3A and 3B of the Appellate Jurisdiction Act (Supra) which underpins the overriding objective principle introduced in the appellate jurisdiction in 2009, long after the appeal subject of this Judgment had been filed in order to breathe life into an otherwise incurably defective appeal as per the contention of the respondent.*
>
> *On the applicability of the overriding objective principle in the appellate jurisdiction, we wish to draw guidance from case law. The principle confers on the courts considerable latitude in the exercise of its discretion in the interpretation of the law and rules made thereunder... The aim of the overriding objective principle is to enable the Court achieve fair, just, speedy, proportionate, time and cost saving disposal of cases before it... that the application of the overriding objective principle does not operate to uproot established principles and procedures but to embolden the court to be guided by a broad sense of justice and fairnes s... that in applying or interpreting the law or rules made thereunder, the Court is under a duty to ensure that the application or interpretation being given to any rule will facilitate the just, expeditious, proportionate and affordable resolution of appeals... that there is a mandatory requirement that the Court of Appeal rules of procedure should also be construed in a manner which facilitates the just, expeditious, proportionate or affordable resolution of appeals… that the overriding objective principle is intended to re-energize the process of the court, encourage good management of cases and appeals, and ensure that interpretation of any of the provisions of the Act and the rules made there under are compliant... that the principal aim of the overriding objective principle is to give the court greater latitude to overcome any past technicalities which might hinder the attainment of the overriding objective And, lastly, that the "O2" principle does not cover situations aimed at subverting the expeditious disposal of cases or appeals, mistakes or lapses of counsel, or negligent acts, or dilatory tactics or acts constituting abuse of the court processes.*

29. The case law cited above speaks to me in two ways; one that the technicalities of procedural processes should not stand between a litigant and substantive justice, however, the court's discretion is not taken away in situations where the rules of procedure are being applied to deal with the subversion of the expeditious disposal of cases and ensuring the fair, just, speedy, proportionate, time and cost saving disposal of cases. The case law supports the respondent's position. The fact that he committed some procedural error of not serving the memorandum of appeal on counsel for the appellant is not grave enough to deny him a place at the seat of justice. At least the party to the appeal was aware of the appeal and will not suffer any prejudice. The second voice of this case law is with regard to the gap in Order 42 rule 12 and 13(1). It is neither just nor fair that the appellant should have literally a blank cheque after receiving the notice from the Registar and failing to serve the memorandum of appeal within time or not serving the memorandum of appeal and before the taking of directions. It is my considered view that that gives the opportunity for unnecessary delay as in this appeal, and amounts procedural condoning of the creation of delay and backlog in dealing with civil appeals. There ought to be a sanction or recourse for the respondent or the court, where the appellant fails to serve the memorandum of appeal within the requisite period or fix the appeal for directions within 21 days of service of the memorandum appeal.

30. Having stated the foregoing, it is my view that the applicant has made its point however the application must fail.

31. The appellant has 21 days from the date hereof within which to set down the appeal for directions.

32. The Rules Committee ought to relook at Order 42 rules 12 and 13(1) with a view to ensuring that failure to comply will have consequences, perhaps similar to those provided for under Order 42 rule 35(1) so that failure to serve the memorandum of appeal within 7 days or set the appeal down for directions will give lee way to the respondent to initiate dismissal proceedings.

33. Costs in the appeal.

Dated, delivered and signed at Nyeri this 16th day of November 2018.

Mumbua T Matheka

Judge

In the presence of: Ms. Macharia for Wahome for the applicant