



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 271 OF 2015

PATRICK PARMISA MORERA APPELLANT

VERSUS

JASMIEL NDUNGU KANGETHE RESPONDENT

RULING

1. *Jasmiel Ndungu Kangethe*, the applicant in the Notice of Motion dated 20th July 2018 and the respondent in the appeal herein, seeks that the appellant's Notice of Motion dated 11th January 2016 and the entire appeal be dismissed for want of prosecution and that he be awarded costs of the application and the appeal.

2. The application in the Motion dated 20th July 2018 is anchored on grounds that the appellant has not taken any step to prosecute his application dated 11th January 2016 since it was filed over two years ago or to prosecute his appeal which was filed on 4th June 2015 about three years ago. The applicant contends that the appeal was filed solely to delay and frustrate the course of justice and that the pendency of the application and the appeal was occasioning him great injustice. These grounds are replicated in the affidavit sworn by the applicant in support of the application.

3. The application is opposed through the replying affidavit sworn by *Mr. Philip Muoka*, learned counsel for the appellant. In a bid to explain the delay in prosecuting the application dated 11th January 2016 and the appeal, counsel deposed that the appellant is a pastoralist who goes in search of pasture to the hinterland of Tanzania which has poor telecommunication network and that for this reason, he lost contact with his client. He also lost track of the case after it was inadvertently omitted from his diary; that the appellant has resurfaced and is ready to prosecute the appeal; that the appeal has high chances of success and should therefore be sustained; that if the application was dismissed, the applicant does not stand to suffer prejudice which cannot be compensated by an award of damages.

4. On the hearing date which was fixed in court by consent of the parties, the appellant or his counsel did not attend the court. Consequently, hearing of the application proceeded *ex parte*.

In his submissions, learned counsel for the applicant *Mr. Kamwende* expounded on the grounds founding the motion and emphasized that the appellant had only filed the appeal to frustrate the applicant and to deny him the fruits of his judgment obtained in Kikuyu CMCC No. 242 of 2013; that the application should be allowed as the appellant was not interested in pursuing the appeal.

5. I have carefully considered the application, the submissions made by *Mr. Kamwende* as well as the court record.

The court record shows that the appellant filed his memorandum of appeal on 4th June 2015 challenging the ruling of the trial court which dismissed the appellant's application seeking to have proceedings conducted *ex parte* on 30th September 2014 set aside and that case be heard *de novo*. The record of the trial court reveals that on 30th September 2014 which is the date the suit was scheduled for hearing, the plaintiff's case proceeded *ex parte* as the appellant then the defendant or his advocate failed to attend the court.

6. The court record further reveals that five months after filing the memorandum of appeal, the appellant presented a Notice of Motion which was filed under a certificate of urgency on 11th January 2016. The application was fixed for hearing on 5th July 2016 but hearing did not proceed as there was no evidence of service on the respondent who was not represented in court. The court record shows that since 5th July 2016, the appellant has not taken a single step to either prosecute the application or to facilitate the hearing of his appeal.

7. Though the applicant sought dismissal of the aforesaid application and the appeal, I have decided to first deal with the prayer for dismissal of the appeal because if the same is allowed, it will automatically lead to the dismissal of the application. If the court however finds reason to exercise its discretion in favour of salvaging the appeal, I will then address my mind to the prayer seeking dismissal of the application.

8. The law governing dismissal of appeals for want of prosecution is found in *Order 42 rules 35 (1) and (2) of the Civil Procedure Rules (the*

Rules). Order 42 Rule 35 (1) and (2) provides as follows:

“(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.”

9. A reading of the above provisions show that they envisage two situations in which an appeal can be dismissed for want of prosecution, that is, where an appeal has been admitted for hearing and three months after the taking of directions under *Order 42 Rule 13* of the Rules, no date has been fixed for its hearing or where the appellant has failed to set down the appeal for hearing one year after the memorandum of appeal was served on the respondent.

10. In this case, the record shows that for over three years after filing the memorandum of appeal, the appellant has not taken any step to facilitate hearing of the appeal including the most basic step of filing the record of appeal leave alone causing it to be listed for mention for directions on admission under *Section 79 B* of the *Civil Procedure Act* or for the directions contemplated under *Order 42 rule 13* of the rules.

11. The above shows clearly that the instant appeal does not fall under any of the situations envisaged by *Order 42 Rule 35* of the Rules. The question that then arises is whether this court the above notwithstanding still has discretion to dismiss the appeal for want of prosecution as sought by the respondent.

12. In my considered opinion, the answer to the above question is in the affirmative. Under *Sections 3A, 1A and 1B* of the *Civil Procedure Act (the Act)*, this court has inherent jurisdiction to make orders that are necessary to meet the ends of justice and to prevent abuse of its process. The overriding objective of the Act as set out in *Sections 1A and 1B* enjoins the court to determine civil disputes including appeals in a manner that facilitates their just, expeditious, proportionate and affordable resolution.

It cannot be in the interest of justice to allow a party to file an appeal and leave it hanging indefinitely over the neck of the respondent by refusing to take any step towards its prosecution including as noted earlier, the most basic step of filing the memorandum of appeal.

13. The circumstances surrounding the filing of the instant application paints the picture of an appellant who either lost interest in the appeal the moment he filed it or an appellant who filed the appeal without any intention of ever prosecuting it with the aim of scuttling hearing of the primary suit in the lower court. It is important to note that the same disinterest exhibited by the appellant in this appeal was also displayed in the lower court where the hearing proceeded *ex parte* as the appellant did not attend the court on the hearing date.

14. In view of the foregoing and considering that the application is not opposed, I agree with the respondent that the appellant has demonstrated a clear lack of interest in pursuing his appeal. Though the court has wide discretion in deciding whether or not to dismiss appeals for want of prosecution, the court’s discretion must be exercised judiciously and should not be exercised in favour of a party whose conduct clearly shows that he or she has deliberately sought to obstruct the course of justice.

15. In this case, I find that the appellant has not demonstrated any good cause to warrant the exercise of the court’s discretion in his favour. He has not advanced good or sufficient reasons to justify the delay in prosecuting either the application dated 11th January 2016 or the appeal. I am thus satisfied that the respondent’s application is merited and it is hereby allowed as prayed. The result is that the appeal and the application therein are hereby dismissed for want of prosecution with costs to the respondent.

It is so ordered.

DATED, DELIVERED and SIGNED at NAIROBI this 13th day of December, 2018.

C. W. GITHUA

JUDGE

In the presence of:

Miss Opiyo holding brief for Mr. Kamwende for the respondent/applicant

Mr. Karanja holding brief for Mr. Njoroge for the appellant/respondent

Mr. Fidel: Court Assistant