



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 148 OF 2016

WELLS FARGO LIMITED.....1ST APPELLANT

DOMINIC MUDANDA.....2ND APPELLANT

VERSUS

MAXINE BOSIBORI GEKE.....RESPONDENT

RULING

The matter herein came up for Notice to show cause why it should not be dismissed for want of prosecution, on the 16th October, 2018, when the court gave the respective counsels time to file affidavits in response to the notice to show cause.

Counsel for the Appellants filed her affidavit on the 2nd October 2018 sworn by Noel Ngoloma on 29th September 2018 whereas the Respondent filed his on the 24th October 2018 sworn by Rose Obaga on the 23rd October, 2018.

In the Appellants' affidavit, it is deponed that since the Appeal was filed on the 31st March 2016, the Appellant has been making numerous visits to the Registry in pursuit of the typed proceedings, judgment and the decree, for purposes of filing the Record of Appeal and has done numerous letters to that effect. (The said letters are annexed to the said affidavit and marked as annexures NN 2-6). However, the Respondent listed the matter for directions on the 19th July 2018 in an attempt to have the appeal dismissed for want of prosecution on the ground that the proceedings had been typed long time ago.

That, on the said date, Counsel for the Appellants informed the court that the proceedings were not yet ready and the court scheduled the matter for mention on 19th September 2018 to confirm the position with regard to the proceedings. It is averred that the representative of the Appellants' advocate visited the registry on several other occasions to follow up the matter but he was told the file was still not available.

That, on 19th September 2018, the court directed that the matter be set down for Notice to show cause and scheduled it for 11th October 2018 during which date counsel for Appellants still maintained that the proceedings had not been typed while counsel for the Respondent insisted that the proceedings were ready.

The Appellants contended that they are desirous of prosecuting the Appeal and urged the court not to dismiss the same but rather, allow it proceed for hearing.

On the other hand, the Respondent avers that the Appellants have not been candid in seeking the court's

discretionary powers and the same should not be exercised in their favour. That, after filing the Appeal, the Appellants applied and obtained an order for stay of execution on 11th May 2016 pending the hearing and determination of the Appeal and since then, the Appellant has not moved the court and/or taken any steps towards the hearing and final disposal of the Appeal or at all.

The Respondent contends that the Appeal has never been admitted as the Appellants have not yet extracted and filed a copy of the decree of the suit appealed from, and that the Appellants have not been pro-active in following up the proceedings and have only been writing letters without any personal follow up and/or inquiry. That there is no evidence of any payments and/or deposit having been made for the proceedings.

It was further deponed that contrary to assertions by counsel for the Appellants that the proceedings had not been typed, the same are ready and they are in the court file pending payment of the requisite fees. (A copy of the same was annexed to the affidavit and marked as annexure "RO1")

That, in the premises, the Appellants are not interested in prosecuting the Appeal and the delay has caused a lot of prejudice to the Respondent who has been denied enjoyment of fruits of the judgment by indolent Appellants.

The court has considered the application and the material before it. The Appellants aver that they have not yet prosecuted the Appeal because the court file has been missing and that the proceedings have not yet been typed. They have annexed correspondences to the Chief Magistrate's court seeking to know the position with regard to the typed proceedings resting with the one dated 19th September 2018.

The court notes that two of those letters were done after 19th July 2018 when the matter had been scheduled for mention for directions after counsel for the Respondent moved the court. The ruling, the subject of this Appeal, was delivered on 15th March, 2016 and proceedings were first applied for, on the 22nd August, 2016 and thereafter, the Appellants did not follow up letters dated 4th November 2016 and 1st August 2017. Those letters were received at the registry and they are duly stamped.

According to the Appellants, as late as 19th September, 2018, the proceedings were not ready whereas according to the Respondent, the same were ready. I have perused a certified copy of the proceedings marked as annexure "RO1" to the Respondent's Replying affidavit and I note that they were certified on the 25th October 2018. Though the court has not been told when the proceedings were ready for collection, on record is a letter dated 25th October 2018 by the Respondent's counsel applying for certified copies of the proceedings and a receipt for Kshs.1,020/- for payment of the same. This confirms the assertion by counsel for the Respondent that the proceedings had been typed because it could not have been possible for the proceedings to have been typed and certified on the same day that they were applied for. I am persuaded by the submission by Counsel for the Respondent that the proceedings had not been paid for and that is why they had not been certified earlier, for collection by the Appellants. It is the duty of an Appellant to not only apply but also follow up and ensure that proceedings are typed so that the Appeal can be heard. The Appellants herein have not been pro-active in doing so. However, in the interest of justice, the court will not dismiss the Appeal but an order is hereby made that the Appellants do file a record of Appeal within 15 days from the date of this ruling after which they should list the matter for directions within another 15 days from the date of filing of the Record of Appeal. Failure to comply with any of the above orders, the Appeal shall stand dismissed.

The Respondent has been instrumental in moving the Appeal forward. He even applied and paid for a certified copy of the proceedings. The court awards him costs of Kshs.10,000, to be paid within 7 days from the date of this ruling.

It is so ordered.

Dated, signed and delivered at NAIROBI this 6th day of December, 2018.

L. NJUGUNA

JUDGE

In the presence of:

..... for the Appellants

..... for the Respondent