



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NUMBER 43 OF 2014

MASAI MARA SERVICE STATION.....FIRST APPELLANT

STEPHEN GITHUI WAMBUGU.....SECOND APPELLANT

VERSUS

MARY WAIRIMU NYUGUTO.....FIRST RESPONDENT

WANGUI MWANGI.....SECOND RESPONDENT

RULING

What is before me is the notice of motion dated 18th August 2017. It is brought under order 42, rule 35 (2) of the Civil Procedure Rules and section 3, 3(a) of the Civil Procedure Act.

It is supported by the affidavit of Mary Wairimu Nyuguto.

It seeks orders that;

- a) the court be pleased to strike out the memorandum of appeal dated 9th July 2014 and /or alternatively dismiss the appeal herein for want of prosecution.
- b) The cost of this application and appeal provided for.

The grounds for the application are that;

- i) the memorandum of appeal dated 9th July 2014 has been pending for the last three years and no action has been taken to set the matter down for directions and hearing,
- ii) the said appeal is calculated to delay or otherwise abuse the process of court as the respondents cannot obtain the fruits of their litigation,
- iii) no action has been taken since the admission of the appeal on 16 June 2017,
- iv) it is apparent that the appellant has lost interest in this matter,
- v) it is just and meet to enable the respondent enjoy the fruits of their litigation at the same time avoid the abuse of the process of court.

In her supporting affidavit sworn on 18th August 2017, the first respondent/applicant deponed that the memorandum of appeal was filed on behalf of the appellants/respondents on 9th of July 2014 and served on her advocates on 12th November 2014. The appellant then filed an application dated 16th July 2015 for stay of execution pending the hearing and determination of the appeal. Since then the appellants have taken no action either to have the appeal listed for directions, heard or determined. Further that the appeal was admitted on 16th June 2017 and even then no action had been taken in accordance with the rules.

The appellant /respondents filed grounds of opposition on 4th October 2017 under order 51 rule 14 (1) C of the Civil Procedure rules, opposing the application on the grounds that;

the application is bad in law unmeritorious and does not lie for the following reasons;

- (a) That the present application as it is, offends the mandatory provisions of order 42 rule 35 (2) of the civil procedure rules 2010
- (b) that it is only the deputy registrar who can list the appeal for dismissal in the circumstances
- (c) That in any event the application is overtaken by events as the record of appeal has already been filed and served upon the respondents
- (d) that directions how yet to be taken for the respondents to invoke the mandatory three months for the listing of the appeal for hearing.

When the matter came for hearing, the advocates, Mr. Nderi for the applicant and Mr. Ngige for the respondents agreed to dispose of the application by way of written submissions.

Counsel for the 1st respondent /applicant submits that the appellants/ respondents have failed to comply with order 42 through failing to take the steps essential to ensure the processing of the appeal. That since the appeal was admitted on 16th June 2017 the appellants took no steps to prepare the record of appeal until a day to the hearing of the application for its dismissal. That the delay of three months is inordinate as no explanation had been offered for the same.

Counsel for the respondent/appellants, arguing that the appeal is not ripe for dismissal under order 42 rule 35(2) of the CPR, relies on two cases **Bruce Mutie Mutuku T/A Diani Tour and Travel Center v Equity Bank Limited [2014] eKLR** and **National Bank of Kenya v Alfred Owino Bala [2017] eKLR**.

Order 42 rule 35 provides for the dismissal for want of prosecution in the following terms;

- (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.

It is not in dispute that directions have never been taken as required by Order 42, rule 11; that *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.*

The memorandum of appeal was filed on the 9th July 2014, and served on Nderi & Kiingati Advocates on the 12th November 2014.

The appeal and the lower court file were placed before the Judge on 12th June 2017 and the appeal admitted on the 14th June 2017. The appellant could not comply by December 12th 2014 because the Deputy Registrar was only able to comply with rule 12 on the 16th June 2017 when the appeal and the record of the lower court were placed before the Judge. The court in **Bruce Mutie Mutuku T/A Diani Tour and Travel Center v Equity Bank Limited [2014] eKLR** was of the view that though it was the appellant's duty to list the matter for directions, he could only do so if the appeal had been admitted by the availing of the lower court file and the proceedings to the high court. Hence the appellant herein cannot be held culpable for the delay in admittance of the appeal.

Be that as it may, upon admittance and notification by the registrar the appellants were expected to serve that appeal within 7 days by 23rd June 2017. They did not do so until 3rd October 2017. There was the delay in preparing the record of appeal. This is the same reason they could not comply with Rule 13 requires that *(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.*

The appellants had another 21 days as per rule 13 to list the appeal for giving of directions. This would have been by 14th July 2017. That did not happen and again there is no explanation.

However, it is only after this had happened, that is the taking of directions before the judge, that the respondent would now have the *locus standi* to set down the appeal for hearing or have it dismissed. The appeal not having reached that stage, the applicant cannot be heard on that issue.

With regard to rule 35(2); the memorandum of appeal was filed on the 9th July 2014, and served on Nderi & Kiingati Advocates on the 12th November 2014. Rule 35(2) provides that if within one year after the said service the Memo of appeal shall not have been set down for hearing, **the registrar shall on notice to the parties list the appeal before the judge for dismissal.**

While it is correct that the memorandum of appeal was served more than a year ago, it is also true that nothing could have been placed before the judge for dismissal before the whole record was ready. I do not think here it simply means the memorandum of appeal. It must mean the whole appeal. That is what it says- the appeal.

Secondly, the power to place the matter before the judge for dismissal, in the plain words of rule 35(2) is given to the registrar. That was the holding in **National Bank of Kenya v Alfred Owino Bala [2017] eKLR**, where the court stated that the respondent could not have moved

the court under the said provision for necessary orders, and that he should have moved the court under rule 35(1). That is the same position in this case and I am of the view although there is no explanation from the respondent, the orders sought are not available in the manner in which they are sought.

Despite this, the fact is, the appellants are guilty of unexplained delays in taking the steps set out in the rules to getting the appeal up and going. That is why they have in their submissions adopted the universal cry under Article 159 of the constitution for this court not to allow itself to be bound by technicalities, and the court's discretion to enlarge time. I say, rules are in place for a reason and in a case where the judgment appealed against was entered in 2014, it would be expected that the appellant would make an effort to expedite the process of the appeal. On their side is that the appeal was admitted in June and the application for dismissal in August. By October they had filed and the served the record of appeal. They ought to up and running with the appeal now.

Hence, though the application fails for the foregoing reasons, the appellants will bear half the respondents costs for this application for waiting until provoked, to do the necessary.

The appellants must know that the time under Order 42 rule (13) will start running with effect from the date of this ruling. They have 21 days to list the appeal for directions.

It is so ordered.

Dated, delivered and signed this 17th January 2017 at Nyeri

TERESIA M. MATHEKA

JUDGE

In the presence of;

Court Assistant: Hariet