



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL APPEAL NO.29 OF 2014

NYAMIRA LUXURY EXPRESS COMPANY LTD.....APPELLANT

VERSUS

KIPTALAM MUSA CHEBAITUK &

ANNETH CHEPKEMOI KETER

(Suing as Legal Representative of:

FESTUS KIPSANG TALAAM (DECEASED).....RESPONDENTS

***(Being an Appeal from the judgment delivered by the Honourable Magistrate, Mr. Olengo, PM Sotik
in CC No.159 of 2013)***

AND

CIVIL APPEAL NO.30 OF 2014

NYAMIRA LUXURY EXPRESS COMPANY LTD.....APPELLANT

VERSUS

JOSEPH KIPKORIR LANG'AT &

CHRISTOPHER KIPRONO

(Suing as Legal Representative of:

VINCENT KORIR - (DECEASED).....RESPONDENT

***(Being an Appeal from the judgment delivered by the Honourable Magistrate, Mr. Olengo, PM Sotik
in CC No.117 of 2013)***

RULING

1. This ruling relates to the applications dated 10th June 2016 in which the respondents seek the dismissal of **Civil Appeals Nos. 29 and 30 of 2014**. The appeals arise out of the decisions of the Principal Magistrate in Sotik (Hon P. Olengo) in which the court made awards in damages to the two respondents respectively in **Civil Suit No. 159 of 2013** and **117 of 2013**.

2. In their application, the respondents seek the dismissal of the appeals on the following grounds:

1. That it is almost 2 years since this appeal was lodged but the appellant has not taken any step to prosecute the appeal.

2. That this court has the inherent jurisdiction to make such orders as may be necessary for the end of justice and or prevent abuse of the process of the Court.

3. In his affidavit sworn in support of the application on 10th June 2016, Mr. Don Z. Ogweno, an Advocate of the High Court practicing as such in the firm of M/s Khan and Associates, Advocates, who have the conduct of the matter on behalf of the respondents, avers that the present appeal was lodged on 29th August 2014. Further, that two years down the line, no steps had been taken to prosecute the appeal despite attempts by Counsel for the respondents to wake the appellants from their slumber. He relies on correspondence addressed to the appellant's Advocates' firm by his firm, and urges the court to grant the orders sought in the application.

4. In response, the appellant opposes the application by way of an affidavit sworn on 24th November 2016 by Ms. Dorothy A. Adhiambo, an Advocate practicing as such in the firm of M/s Kairu & McCourt Advocates who are on record for the appellant.

5. In her affidavit, Ms. Adhiambo avers that she is aware from her learning of the law that a respondent cannot apply for the dismissal of an appeal for want of prosecution prior to the taking of directions. She submits therefore that the respondent has failed to set out sufficient grounds for the orders they seek. In her view, the present application is an abuse of the court process.

6. It is also her averment that while the court is vested with wide inherent and unfettered discretion in the exercise of its duties, it is nonetheless vested with the paramount duty of ensuring that justice is administered without undue regard to procedural technicalities. She contends that in this case, the appellant has been hampered from strictly adhering to the procedures of setting this appeal for hearing.

7. She asserts that the appellant has been able to request for and procure certified copies of the typed proceedings for purposes of compiling the record of appeal. However, the appellant has been unable to compile the record of appeal as the decree in the matters is yet to be signed and certified despite the appellant's advocates having requested several times for it to be signed and certified. She relies on letters annexed to her affidavit as "DAO – 1(a) - (c)" requesting for the certified decree.

8. It is her averment therefore that in the circumstances, it is not true that the appellant is disinterested in prosecuting the appeal. She avers that the appeal is viable and with a high probability of success, and it would be greatly prejudicial if it were dismissed without according the appellant the right to a fair trial, the appeal having been admitted and the only impediment to its being heard being the absence of a certified decree which has prevented the appeal from being listed for hearing.

9. She prays that the application be dismissed and the appellant be allowed to prosecute the appeal.

The Submissions

10. Both applications came up for hearing before me on 30th November 2016. Counsel for the parties submitted on the application in **Civil Appeal No. 29 of 2014** and requested the court to rely on the submissions in rendering its decision on both applications in respect of the two appeals.

11. In her submissions, Ms. Kusa for the respondent stated that the appeal was filed on 9th August 2014, but up to the time the respondents filed their applications on 10th June 2016, no step had been taken to set down the appeal for hearing. Her submission was that this is a demonstration that the appellant has no interest in having the appeal prosecuted and determined.

12. With respect to the affidavit filed in response to the application, her submission was that the court in this case was not dealing with technicalities but with the question of delay, which is injustice to the respondent. While the appellant was putting the delay down to delay by the lower court in providing proceedings, there was no evidence that the letter relied on by the appellant dated 21st September 2016 which was asking for proceedings had been sent to Sotik Law Courts.

13. In her view, the letters relied on by the appellants had been done to justify the delay, and were written after the application was filed. She further observed that the letters had no stamp from the Sotik Law Courts, and there was no explanation for what the appellant was doing in the period from August 2014 to September 2016. She therefore urged the court to dismiss the appeal as the appellant had no interest in prosecuting it.

14. In response, Mr. Kemboi for the appellant submitted that the delay in prosecuting the appeal was not as a result of fault on the part of the appellant as was demonstrated by the letters seeking certified copies of proceedings for the purpose of compiling a record of appeal. He denied that the appellant had requested for the proceedings after they were served with the proceedings, noting that the application is dated 10th June 2016 while their letters are dated 21st September 2016.

15. It was his submission further that the respondent cannot apply for dismissal for want of prosecution prior to taking directions, and the respondent had failed to set out sufficient ground for the application. According to the appellant, without certified copies and the decree, the appellants could not compile the record of appeal. He reiterated the contents of the affidavit in opposition to the application, submitting that if the appellant obtains the certified copies, the appeal is viable with high chances of success. He urged the court to allow the appellant to ventilate its appeal as it would be highly prejudicial if the appeals were dismissed, and he urged the court to dismiss the respondent's application and allow the appellant to prosecute its appeal.

Determination

16. I have considered the two applications in respect of both appeals, the affidavits in response which are similar in content save for the parties, and the submissions made by Counsel for the parties before me.

17. No authorities were cited by the parties in support of their respective cases, and so before going into the particular facts of these two appeals and the applications before me, I believe it is useful to consider the law relating to dismissal of appeals for want of prosecution.

18. The applications have been lodged pursuant to section 1A and B and section 3A of the Civil Procedure Code, as well as Order 51 rule 1 of the Civil Procedure Rules 2010. Section 1A contains the overriding objectives of the Act as follows

(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

19. Section 1B sets out the duty of the Court as follows:

(1) For the purpose of furthering the overriding objective specified in section 1A, the Court 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) ...

20. Section 3A preserves the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

21. Order 42 Rule 35 of the Civil Procedure Rules provides as follows with respect to dismissal of appeals for want of prosecution:

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.

22. In **Nakuru Civil Appeal No. 119 of 2012- Jurgen Paul Flach vs Jane Akoth Flach**, Omondi J stated as follows:

“The law concerning dismissal of an appeal for want of prosecution is contained in Order 42 Rule 35 of the Civil Procedure Rules.

Under Rule 35 aforementioned, the law contemplates two different scenarios for issuance of an order for dismissal of an appeal for want of prosecution. These are:-

A situation where three months after issuance of directions under Order 42 Rule 13, no steps have been taken by the appellant to fix the appeal for hearing. In such a situation, the respondent has two options, one, to fix the appeal for hearing or to apply by summons for the dismissal of the appeal. See Order 42 Rule 35(1).”

23. The Learned Judge cited with approval the decision of Kasango J in **Kirinyaga General Machinery vs Hezekiel Mureithi Ileri HCC No.98 of 2008** where the Court, in interpreting Order XLI 31 (now Order 42 rule 35), observed that:

“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 as provided under rule 8B. Directions have never been given in this matter. The directions having not being given the orders sought by the respondent cannot be entertained.”

24. The second scenario referred to by Omondi J is set out in Order 42 Rule 35 (2), which I have set out above. The Learned Judge observed as follows with respect to this second option:

“Unlike Rule 35(1) which requires directions to have been issued before the appeal can be dismissed for want of prosecution, under sub rule (Rule 35(2), if, within one year after 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.”

25. In the two cases before me, directions had not been taken with respect to the hearing of the appeals, and on the basis of the option open to the respondents under Order 42 Rule 35(1), the appellant’s appeals

cannot be dismissed for want of prosecution. While, therefore, it appears that the appellant did indeed go to sleep on its appeal-the letters seeking the pleadings and proceedings having been written on 21st September 2016, after the application for dismissal was filed in June 2016 - the appellant does have an escape hatch in the requirement for directions to have been taken first.

26. In the circumstances, I must perforce dismiss the applications for dismissal of the appeals for want of prosecution. However, bearing in mind the provisions of section 1B of the Civil Procedure Code which impose on the Court the duty to do justice and ensure timely and expeditious disposal of proceedings, I direct that the appellant prepares and lodges its records of appeal, and takes a date for directions with respect to the hearing of the appeals, within the next forty five (45) days from the date hereof. Should this order not be complied with, given that the memorandum of appeal in both appeals were filed and served in August 2014, close to three years ago today, then the matters may be placed before the Court for dismissal.

27. Each party shall bear its own costs of the applications.

Dated, Delivered and Signed at Kericho this 15th day of March 2017.

MUMBI NGUGI

JUDGE