



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CIVIL APPEAL NO. 93 OF 2014**

**NATIONAL BANK OF KENYA.....APPELLANT**

**VERSUS**

**ALFRED OWINO BALA.....RESPONDENT**

*(Appeal from the Judgment and Decree in Kisii CM Civil Case No. 210 of 2012(Hon. Kibet Sambu - PM.)*

**RULING**

1. The notice of motion dated 12<sup>th</sup> December 2016, by the respondent, **Alfred Owino Ballah**, against the appellant, **National Bank of Kenya Ltd**, seeks orders that the appellant's appeal filed herein be dismissed for want of Prosecution and that the orders of stay of execution granted on the 27<sup>th</sup> November 2015 be in the alternative varied, rescinded and/or discharged.

The respondent is also asking for the costs of this application and the appeal.

2. The application is essentially made under Order 42 Rule 35(2) of the Civil Procedure Rules which provides that:-

***“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.”***

In effect, this provision gives power to the registrar to take necessary action with a view to having an appeal dismissed for failure by the appellant to set down the appeal for hearing within one year after service of the memorandum of appeal. The respondent could not therefore have moved this court under this provision for necessary orders. He should instead have come under Rule 35(1) of Order 42 if warranted.

3. The said Rule 35(1) of Order 42 provides that:-

***“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.”***

4. Be that as it may, the grounds in support of the application are contained in the appropriate notice of motion and are fortified by the averments in the respondent's supporting affidavit dated 16<sup>th</sup> December 2016.

The appellant opposed the application on the basis of the grounds contained in the replying affidavit of its branch manager, **Peter O. Siwolo**, dated 7<sup>th</sup> February 2017.

As prompted by the parties, the court directed that the application be canvassed by way of written submissions and in that regard the applicant/respondent filed his through the firm of **Oguttu Mboya & Co. Advocates**, while the respondent/appellant did so through the firm of **Nyachae & Asitiva Advocates**.

5. This court has given due consideration to the application and its supporting grounds in the light of the submissions by either party for or against.

With regard to the first segment of the application as to whether the appeal ought to be dismissed for want of prosecution, it has already been observed herein above that the respondent wrongly moved the court under Rule 35(2) of the Civil Procedure Rules instead of Rule 35(1).

Nonetheless, the error was more of a procedural technicality which ought not be hoisted above substance of the case.

6. The record shows that the appeal arises from the judgment of the principal magistrate made on 31<sup>st</sup> July 2014 in Kisii CMCC No. 210 of 2014, in which the appellant and another were sued by the respondent for damages arising from alleged unlawful arrest, wrongful confinement and malicious prosecution of the respondent at the instance of the appellant.

It was pleaded that the appellant through its Kisii branch manager unjustifiably made a complaint against the respondent to the police through its Criminal Investigation Department (C.I.D) to the effect that the respondent had misappropriated and/or stolen and/or failed to account for a sum of Kshs.424,530/= belonging to the appellant.

7. It was pursuant to that complaint that the respondent was arrested and arraigned in court for theft by servant contrary to S.281 of the penal code under Kisii CM Criminal Case No. 258 of 2010. He was tried for the offence and eventually found not guilty and acquitted on 17<sup>th</sup> January 2012. He contended that he suffered loss and damage in the process and hence, instituted this civil suit against the appellants who were found liable to him in damages and ordered to pay a sum of Kshs. 1,000,000/= (one million shillings) as damages for unlawful arrest, wrongful confinement and malicious prosecution as well as sum of Kshs. 160,000/= as special damages together with costs and interest in a judgment delivered on 31<sup>st</sup> July 2014.

8. The appellant was aggrieved by the said judgment and preferred the present appeal on the basis of the grounds in the memorandum of appeal dated 13<sup>th</sup> August 2014 and filed herein on 7<sup>th</sup> February 2017. Thereafter, the appellant was expected to serve the memorandum of appeal upon the respondent and fix a date for the hearing of the appeal within one year after service. But, instead of setting in motion the hearing process, the appellant just prior to the expiry of one year from the 7<sup>th</sup> February 2014 moved the court with a Notice of Motion dated 15<sup>th</sup> January 2015 for stay of execution of the judgment and decree issued by the lower court on 31<sup>st</sup> July 2014.

9. The motion was allowed by this court (**Nagillah J.**), on the 27<sup>th</sup> November 2015 with the issuance of an order for stay of execution of the judgment and decree of the lower court issued on 31<sup>st</sup> July 2014 pending the hearing and determination of this appeal. It was further ordered that the appellant do set down the appeal for hearing within a period of thirty (30) days.

Considering that the period was spilling over to the month of December 2015, which is generally a short month in view of the court's Christmas Vacation, the parties were reasonably on time when their representatives appeared in the court's registry on 22<sup>nd</sup> January 2016 and fixed the matter for mention on 1<sup>st</sup> March 2016 for directions.

10. It transpired on that 1<sup>st</sup> March 2016, that the matter was not ready for directions with a view to fixing a hearing date since the proceedings of the lower court had not been supplied to the parties. A further mention date was given and this was the 9<sup>th</sup> May 2016, when it was indicated that the lower court proceedings were not ready to facilitate preparation of the record of appeal. The situation persisted even by the time the matter was mentioned on 8<sup>th</sup> June 2016 and on the 13<sup>th</sup> July 2016 parties were directed by the court to complete the registry preliminaries prior to fixing the matter for further mention for directions.

11. There was no further progress of the case upto the 13<sup>th</sup> January 2017, when the respondent filed the present application which was then fixed for hearing on 8<sup>th</sup> February 2017 and then adjourned to 27<sup>th</sup> March 2017.

It is instructive to note that the long awaited record of appeal was eventually filed herein on 7<sup>th</sup> February 2017 and what now remains in respect thereof is for the court to give directions on the mode of hearing of the appeal.

It is without doubt that there has been unnecessary delay on the part of the appellant in having the appeal fixed for hearing. However, from what has been indicated hereinabove the delay was not deliberate and was largely occasioned by the court's registry in failing to provide to the parties particularly the appellant, the lower court proceedings.

12. The appellant attested to the foregoing fact in its replying affidavit dated 7<sup>th</sup> February 2017 and its written submissions dated 23<sup>rd</sup> March 2017.

Since the record of appeal is now ready and the delay in filing it for necessary directions was not attributable to the appellant, it cannot be said that the appellant was not diligent and deliberately failed to take necessary steps to set down the appeal for hearing. It cannot also be said that the appellant has not been keen on having the appeal heard and determined.

It is for all the foregoing reasons that this court would disallow the respondent's application to dismiss the appeal for want of prosecution.

13. This court would also disallow the second segment of the application to set aside or otherwise the orders for stay of execution issued herein on 27<sup>th</sup> November 2015 for reasons that there was no fault on the part of the appellant in having the appeal heard within the period ordered by the court and in any event, no good grounds have been advanced by the applicant for this court to exercise its discretion and vary, rescind or discharge the orders of stay at this stage. The fate of those orders would be determined after the hearing of the appeal which this court now directs will be heard by a single judge here in Kisii on a date to be agreed upon by the parties today.

**[Delivered and signed this 4<sup>th</sup> day of April 2017].**

**J.R. KARANJAH**

**JUDGE**

**In the presence of**

Mr. Godia for Respondent/Appellant

Mr. Kaburu holding brief for Mr. Oguttu for Applicant/Respondent CC Raymond

**Mr. Godia/Kaburu** – We have agreed to have the appeal heard on 22/5/17.

**Court:** Confirmed. Appeal fixed for hearing on 22/5/17