REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO. 14 OF 2015

ROSE WANGUI GITHIONI.....APPELLANT /RESPONDENT

VERSUS

NANCY NYAMBURA MAINA.....RESPONDENT / APPLICANT

RULING

What is before me is the Notice of Motion dated 6th October 2016 brought under section 3 and 3A of the Civil Procedure Act and Order 51 rule 1 of the CPR (2010).

The applicant seeks orders that the appeal be dismissed with costs for want of prosecution.

The application is supported by the affidavit sworn by Andrew Kariuki (A.K) advocate for the applicant. The grounds for the application are that since the Memorandum of appeal was filed on the 30th October 2013, the appellant has not moved the court under Order 42 of the CPR nor complied with the provisions of section 79 G of the CPA.

In response the respondent's advocate James N. Nderi swore an affidavit on the 8th December 2016 stating that the appeal had not even been admitted to warrant dismissal.

The firm of Andrew Kariuki (A.K) advocates wrote to the firm of Nderi Kiingati on the 25th July 2015 demanding to be served with the record of appeal within 21 days in default of which they had instructions to strike out the appeal.

The firm of Nderi Kiingati wrote back on the 4th August 2016 telling them that they would not be able to serve them with the record of appeal within 21 days or any time because ''they had incessantly called for but had not received the typed proceedings". That they too were eager to prosecute the appeal but were unable to do so because they do not have the typed proceedings.

I have carefully considered the application, the affidavits and annexures placed before me.

Section 79G of the CPA provides for time for filing appeals from subordinate courts as follows;

> Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, **excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order**:

> Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

There is a memorandum of appeal which was filed on 31st July 2015. The appeal is with respect to the judgement in Nyeri CMCC 475 of 2006 delivered on the 15th July 2015.

The record of appeal has not been filed and it is the appellant's contention that the problem is not with them but with the lower court which has failed them by not supplying them with the proceedings of the lower court. It is clear from this provision that that delay is foreseeable hence the provision for extension of time.

It is however notable that Mr. Nderi has not attached a single letter addressed to the Chief Magistrate demanding the said proceedings to support his statement that his office has done so 'incessantly' since the Memorandum of appeal was filed on the 31st July 2015. Incessant connotes that the pursuit of the proceedings has been a ceaseless, continuous, persistent, never ending quest. Where is the evidence of that? I would have expected a bunch of letters to the CM running the last two years.

There is even no evidence that the appellant has paid for the proceedings as alleged. Nothing was attached to Mr. Nderi's affidavit to confirm that. So how is this court expected to take his submissions serious when they are not even standing on a toe?

In the supporting affidavit Mr. Andrew Kariuki (A.K) depones that it is only fair and just that the appeal be dismissed with costs for want of prosecution. He also referred me to Order 42 of the CPR which provides for the procedure in appeals. The rules say that the appeal will not be ready for consideration before certain requirements are met. It is the duty of the appellant to pursue all these processes and ensure that the appeal is ready.

Rule 1 provides;

> (1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.

Rule 13 (4) is of relevance to the application before me. It provides

> Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—
>
> (a) the memorandum of appeal;
>
> (b) the pleadings;
>
> (c) the notes of the trial magistrate made at the hearing;
>
> (d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
>
> (e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
>
> (f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal.

As it is now nothing has been placed before me to show that since the memorandum of appeal was filed the appellant has done anything to get the appeal ready for consideration by the court. It is one thing to blame the CM's registry, but it is another to substantiate those allegations.

The appellant appears to have filed the memorandum of appeal and proceeded into a deep slumber. I need not say what equity says about that but this is the making of back log and the court while bearing in mind that the appellant has a right of appeal, this one appears not to be interested.

The memorandum of appeal appears to have been filed without any intention of elevating it to the level of the prosecutable appeal. That is demonstrated by the lack of any evidence of follow up on the lower court proceedings to enable the preparation of the record of appeal. This in my view is one of the circumstances that amounts to an abuse of the process of court, filing the memorandum of appeal and keeping it there without any action at all. The court has the inherent power to stop the abuse of its own process by litigants.

I find expression of my view in the words of Kimaru J in STEPHEN SOMEK TAKWENYI & ANOTHER VS. DAVID MBUTHIA GITHARE & 2 OTHERS NAIROBI (MILIMANI) HCCC NO. 363 OF 2009 where he stated

> "But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances… But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it".

The current status of this appeal is that it is an abuse of the process of court.

The memorandum of appeal cannot be prosecuted by itself, without the complete record of appeal. Since the record of appeal has not been filed, the appeal is not whole and there is nothing to prosecute, hence nothing to dismiss for want of prosecution. The proper thing to do would be to strike out the memorandum of appeal for being an abuse of the process of court.

The fact that the blame was heavy on the court made me go out of my way to call for the lower court file. I found that the proceedings had been typed and the lower court file had been received in the High Court registry on the 19th April 2017. Except for the receipts paying for the proceedings, I found nothing in the file support the allegation of incessant follow up.

Be that as it may, there ought to be in place an agreed system where a party will be notified by the court when the typed proceedings are ready for collection. This is because the typing and certifying of the proceedings and judgement, and the decree, remains the domain of the court, crucial documents for the pursuit of an appeal. In the absence of this system, the party bears the whole burden of making a physical follow up of the proceedings in the court registry. The registry must of necessity bear its part of this burden by coming up with a visible and accessible system for dealing with availing of proceedings, for instance, simply diarising each matter coming up for typing and the expected date of completion, just like the courts do with all other causes, and notifying the parties, where the proceedings will not be ready and giving them the next possible date.

For the foregoing reasons, it is only fair that the appellant gets a chance to prepare the record of appeal and prosecute the appeal.

I therefor dismiss the application and order that the appellant to prepare, file and serve the record of appeal within 45 days from the date of this order.

In default, the Memorandum of appeal will stand struck out.

No orders as to costs.

DATED, SIGNED AND DELIVERED THIS 9TH MAY 2017.

RIGHT OF APPEAL 30 DAYS

TERESIA MATHEKA

JUDGE

IN THE PRESENCE OF

COURT ASSISTANT: HARRIET