



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO. 45 OF 1999

KARATINA MUNICIPAL COUNCIL

THOMAS THINWA KAROKI.....APPELLANTS/RESPONDENTS

VERSUS

KANYI KAROKI.....RESPONDENT/ APPLICANT

RULING

1. The Applicant, Kanyi Karoki, filed a Notice of Motion under a Certificate of Urgency dated the 22nd November, 2016; the application was brought under the provisions of Order 17 Rule 2(3), Order 42 Rule 35(1) and (2) and Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of law; the Applicant prayed for the following Orders;

a) Spent

b) That this appeal be dismissed with costs for want of prosecution.

c) That this Honorable Court be pleased to order the Manager, Kenya Commercial Bank, Nyeri Branch to release the decretal amount of Kshs.152,121.50 computed with interest deposited in KCB Ltd. Bank Nyeri Branch, Account No. [particulars withheld] to **GACHECHE WA MIANO**, Advocate for onward transmission to the respondent/ applicant.

d) That the respondent be condemned to pay costs of this application.

APPLICANTS SUBMISSIONS

2. The application is premised on the grounds found on the face of the application and on a supporting affidavit made by the applicants advocate Gacheche wa Miano and is dated the 22nd November, 2016.

3. Counsel submitted that the last time this matter was in court was on the 18/11/2015 when it had been listed for mention; this translates to approximately one year and three months; since then the appellant had not taken any steps to canvass the appeal;

4. The provisions of Order 42 Rule 35 are very clear that 3 months after directions the respondent can apply for dismissal or set down the matter for hearing; sub-rule (2) provides that within one year after service of the Record of Appeal the Registrar can on its own motion give notice for dismissal;

5. Judgment was delivered in 1999 and the decretal sum arising from the accident is lying in the bank; the respondent is entitled to the fruits of the judgment;

6. On the 24/01/2017 the respondent was granted seven days to file a response; the time was to lapse on the 31/01/2017; the respondent filed the Grounds of Opposition and the Replying Affidavit on the 13/02/2017 which was two weeks after the time had lapsed;

7. The Grounds of Opposition and the Replying Affidavit have been filed out of time without the courts leave; Counsel prayed that they be expunged from the court record and the application be allowed.

RESPONDENTS RESPONSE

8. Counsel responded by giving a history of the matter from the time the appeal was filed to date;

9. The appeal was admitted by order of this court; which order has never been the subject of an appeal nor had it been set aside;

10. That Counsel for the applicant filed a series of applications all aimed at blocking the early disposal of the appeal; the court heard all these applications and dismissed them and ordered the appeal to proceed to hearing;

11. Counsel then moved to the Court of Appeal and the appeal was heard and dismissed and the previous orders of the High Court were confirmed; Counsel then applied for a certificate to allow the matter proceed to the Supreme Court; this was declined and the Court of Appeal gave a very comprehensive and detailed ruling.

12. Counsel then moved to the Supreme Court to challenge the order made by the Court of appeal stating that the matter was of public interest;

13. That the appeal herein had been listed for hearing on the 25/01/2016 but Counsel for the Respondent Mr. Gachehe raised the issue of the pending matter before the Supreme Court and requested that the matter be stood over generally pending the outcome; the order was granted and the outcome of the pending application before the Supreme Court is still being awaited;

14. That the court had granted the respondent 14 days and not seven (7) days to file and serve the replying affidavit and grounds of opposition; the same was filed, served and acknowledged and that there is nothing in the grounds of opposition and replying affidavit that will take the applicant by surprise;

15. Counsel submitted that the correct position would be to let the appeal before the High Court proceed to hearing and determination and reiterated that the order admitting the appeal had not been overturned; that counsel for the respondent was placing hurdles on the way to prevent the hearing and disposal of this matter;

16. Historical events have happened and due to transition the case had been inherited by the County Government; Counsel prayed that the appeal be allowed to proceed to hearing to dispose of and put the matter to rest;

REJOINDER

17. That the issues before the Court of Appeal and the Supreme Court are different; the issue on appeal was that the appeal was filed out of time and is an abuse the court process; this application was dismissed but the Supreme Court matter is still pending; there being no order for stay then the matter should be listed for hearing;

18. Counsel reiterated that the appeal was filed on the 7/05/1999 and there had been no prosecution of the appeal; that the matter only moved when the respondent pushed the appellant;

19. Counsel prayed that the application be allowed.

ISSUES FOR DETERMINATION

20. Taking into consideration the above submissions this court has framed the following issues;

(i) Whether the instant application is frivolous and vexatious;

ANALYSIS

21. This court has had occasion to peruse the court record and noted that there have been previous and similar applications that have been made by the applicant that have been adjudicated upon and rulings rendered relating to the dismissal of the appeal for want of prosecution.

22. The term frivolous and vexatious was defined by Ringera J in the case of **Trust Bank Limited vs Amin Company Limited & Anor (2000) KLR 164** as;

“A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party anxiety trouble or expenses. A pleading which tends to embarrass or delay the trial is a pleading which is ambiguous or unintelligible on which states the material matters and raises irrelevant issues which may involve expenses which will prejudice the fair trial of the action.”

23. The court record shows that;

(i) on the 30th June, 1999 the respondent filed an application to inform the court that no appeal had been filed;

(ii) on the 19th March, 2003 the respondent fixed the appeal for hearing ex-parte; the date scheduled for hearing was on the 19th November, 2003 and due to the non-attendance of the appellant herein the appeal was dismissed;

(iii) on the 22/11/2003 an application for reinstatement was made by the appellant and the application was allowed on the 30/01/2014 ‘*ex debito justitiae*’ but on condition that the appeal be fixed for hearing within 30days; in default the appeal stood to be dismissed for want of prosecution;

(iv) On the 24/04/2013 the respondent filed an application for the release of the decretal amount which application was disallowed on the same date as the appeal was re-instated that is on the 30/01/2014;

(v) In between the respondent had filed an appeal in the Court of appeal on the competence of the dismissed appeal and its reinstatement which appeal was dismissed and the High Court’s decision was upheld;

(vi) Thereafter on the 18/07/2014 the respondent moved the court to strike out the appeal on the grounds that it was frivolous, vexatious, scandalous and an abuse of the court process; which application was dismissed on the grounds that the issues are ‘*res judicata*’.

(vii) There is also a pending appeal centered on the competence of the instant appeal in the Supreme Court that is awaiting hearing and determination ;

24. This court has taken time to peruse the court record and taken time to set out the numerous applications made by the respondent to have the appeal dismissed and even the pending ones have no prospect of success; it is trite law that re-litigation of the same issues has been held to be vexatious and an

abuse of the court process; the current application is no better as it also raises matters that have already been adjudicated upon; this action can best be described as vexatious as it is calculated to cause the appellant unnecessary anxiety and added expenses in defending the numerous applications; and is calculated to prejudice and delay the fair hearing and determination of the appeal;

FINDINGS AND DETERMINATION

25. For the forgoing reasons the application for dismissal of the appeal for want of prosecution is found to be frivolous, vexatious and lacking in merit and is hereby dismissed.

26. The applicant is hereby condemned to pay the costs of this application.

27. The appeal herein be fixed for hearing within 90 days from the date hereof.

Orders accordingly.

Dated, Signed and Delivered at Nyeri this 15th day of June, 2017.

HON.A.MSHILA

JUDGE