



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KABARNET

CIVIL CASE NO. 22 OF 2017

INSPECTOR GENERAL OF POLICE1ST APPELLANT
ATTORNEY GENERAL.....2ND APPELLANT

VERSUS

JAMES KIPKEMBOI CHERUIYOT.....1ST RESPONDENT
KASIO MUTUKU.....2ND RESPONDENT
KENYA POST OFFICE SAVINGS BANK.....3RD RESPONDENT

RULING

The Application

1. By a Notice of Motion dated 21st December 2016, the Respondent seeks an order that the Appeal be dismissed with costs for want of prosecution on the principal grounds that the appeal had ever been listed for hearing since it was filed in court on 12.8.2015, that the record of appeal had not been filed and the respondent had been unjustly and inordinately been denied the fruits of his judgment in Kabarnet PMCCC No. 23 of 2013
2. There was no attendance for the appellant when the application came up for hearing on 13th June 2017.
3. By an acknowledged hearing notice and an affidavit of service sworn by George M. Nyambane on 8th May 2017, it was demonstrated that the appellant’s counsel, the Office of the Attorney General, Eldoret had been notified of the hearing of the Notice of Motion on the 5th May 2017.

Determination

4. I have considered the application and the brief submission of Counsel for the respondent at hearing when he urged that the appeal be dismissed with costs for want of prosecution. Under section 79G of the Civil Procedure Act, an appellant has 30 days with which to file the record of appeal, subject to extension of time in a proper case as follows:

“79G. Time for filing appeals from subordinate courts

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.

[Act No. 10 of 1969, s.]”

5. The appellant in this case, despite service of the application and its hearing date did not attend court to demonstrate that they had sought and obtained a certificate of delay in the preparation of decree and proceedings of the trial court to warrant the extension of time to lodge a record of appeal.

6. This court has, therefore, no material before it to rebut the contention by the respondent that the appellant had failed to prosecute the appeal with the prescribed time. Order 42 rule 35 of the Civil Procedure Rules provides for dismissal for want of prosecution of an appeal as follows:

“[Order 42, rule 35.] Dismissal 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.”

7. Moreover, under section 1A of the Civil Procedure Act, the Overriding objective of the court’s civil process is decreed as follows

“1A. Objective of Act

*(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.”

8. The Court inherent jurisdiction to prevent abuse of the court process by litigants who lodge appeals and fail to prosecute them with the result that the successful party is kept out his judgment seat and from the fruits of judgment by the trial court, as follows:

“3A. Saving of inherent powers of court.

Nothing in this Act shall limit or otherwise affect 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.”.

Pursuant to the overriding objective under section 1A of the Civil Procedure Act, a party affected by an appeal may in my view move the Court for dismissal of an appeal for want of prosecution in exercise of its inherent jurisdiction of the Court under the section 3A of the Civil Procedure Act to the same effect as

a Deputy registrar under Order 42 rule 35 (2) of the Civil Procedure Rules.

9. The Memorandum of Appeal was filed on 12th August 2015, and the motion to dismiss for want of prosecution was filed on 21st December 2016 and the hearing notice therefor served on the Attorney General's Office, Eldoret on 5th May 2017. No explanation is available for the more than 1½ years delay in prosecuting the appeal since the filing of the Memorandum of Appeal to the hearing of the motion to dismiss appeal for want of prosecution. The Court, therefore, finds that the appellants are guilty of want of prosecution of the appeal in contravention of the overriding objective of the Civil Procedure Act.

Orders

10. Accordingly, for the reasons set out above, I find that the appellant has failed to prosecute the appeal with prescribed time and is guilty of want of prosecution in accordance with the rules of the Court, and the appeal is consequently dismissed with costs to the respondent.

Dated and delivered this 13th day of July 2017.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr Nyambane for Respondent

N/A for the Appellant