



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NUMBER 365 OF 2012

STEPHEN MBURU KIMANI. 1ST APPELLANT

MATHEKA FAULINER. 2ND APPELLANT

VERSUS

EVERLINE NJOKI MUCHOKI. RESPONDENT

RULING

1. The applicant Everline Njoki Muchoki filed a Notice of Motion dated 2nd February, 2016 where she sought orders to wit: -

a) That the appeal against the Respondent herein be dismissed for want of prosecution.

b) That the costs of this application and the entire Appeal be awarded to the Respondent.

2. The Respondents filed grounds of opposition and deponed a replying affidavit in response to the application. The court directed the parties to file written submissions which they did.

3. The Applicant submitted that the appeal herein was filed on 19th July, 2012 and the Appellants have not taken any action on the matter since filing their appeal. She contended that the delay is inordinate and continues to cause the applicant anxiety as it hovers indefinitely over her head with no end in sight. She further argued that the delay by the Appellants is an abuse of the court process and that the court ought to put an end forthwith. She averred that the onus to have an appeal placed before a judge for directions rests with the Appellant. She asserted that she has not usurped the role of the Deputy Registrar as provided under Order 42 Rule 35(2) to have the matter dismissed as alleged by the Respondents.

4. She argued that four years have lapsed since the Respondents filed their memorandum of Appeal. She added that the Appellants have not listed the appeal for the four years period and neither has the Registrar which leaves her with no option than to lodge the current application. She conceded to citing Order 42 Rule 20 of the Civil Procedure Rules instead of Order 42 Rule 35 which she claimed was an error on her part and that, that does not render the application fatally defective, but is a mere technicality that cannot defeat justice as per Article 159 of the Constitution of Kenya.

5. The Respondents on their part submitted that the Applicant erroneously brought the application under Order 42 Rule 20 instead of Order 42 Rule 35 which amounts to an abuse of the Court process. They contended that the requisites of Order 42 Rule 13 have not been met. Specifically, that service of the Memorandum of Appeal is after an appeal has been admitted under Section 79B of the Civil Procure Act, which directions have not been issued in this Appeal by the court. They averred that the application

herein is premature and misconceived as the appeal is not yet ripe for dismissal for want of prosecution since the same has neither been admitted nor directions issued.

6. Having considered the arguments advanced by the parties, I note that firstly, the Applicant has brought this application under Order 42 rule 20 but the order sought in the application is dismissal of the appeal for want of prosecution, which prayer can only be sought under Order 42 Rule 35. The Applicant claims that this was an error on her part, as she meant to bring the application under Order 42 Rule 35. Given that the prayer sought is one provided for under Order 42 Rule 35, I would invoke Article 159 (2) (d) of the Constitution which provides that justice shall be administered without undue regard to procedural technicalities. The erroneous citing of the wrong provision cannot defeat justice and it's not enough a reason to dismiss this application.

7. Secondly, the Respondents argue that the appeal should not be dismissed for want of prosecution since it's not their fault that they have not prosecuted the appeal. They argue that the court is yet to peruse the appeal and consider whether or not it will interfere with the decree of the subordinate court as provided under Section 79B of the Civil Procedure Act. They argue further that directions under Order 42 Rule 13 of the Civil Procedure Rules have not been issued. In particular, that 3 months must have elapsed after issuing of directions under Order 42 Rule 13 since the appeal must be set down for hearing within the three (3) months after issuing of directions.

8. Looking at Order 42 Rule 13 (1) of the Civil Procedure Rules. The Rule provides that: -

“On notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of Appeal, the Appellant shall cause the appeal to be listed for the giving of directions by a judge in chambers.”

9. This provision which is crafted in mandatory terms requires the Appellant to cause the listing of the appeal for giving of directions by a judge in chambers. It is upon the Appellant to move the court for directions after which the subsequent sub-sections shall apply, being Order 42 Rule 13(2) (3) and (4). Without the listing of the appeal for directions the following subsections will not apply.

10. In the present case, the appellant filed a Memorandum of Appeal on 19th July, 2012. Upon filing of the appeal, the Appellants were required under Order 42 Rule 11 to have the matter listed before the judge within 30 days. That was not done, the matter has never been listed for directions before any judge in the division to date. It is the responsibility of the Appellants to do so but they have not done so since 19th July, 2012.

11. The principles upon which a suit may be dismissed for want of prosecution are well settled. The court will consider, whether there has been inordinate delay on the part of the Plaintiffs in prosecuting the case, whether the delay is intentional, inexcusable, whether its an abuse of the court process, whether it gives rise to substantial risk to fair trial, or will cause prejudice to the Defendant and whether the Plaintiff has offered a reasonable explanation for the delay. The case of **Rajesh Rughani Vs Fifty Investment Ltd & Another [2016] eKLR** the Court of Appeal referred to the case of **Ivita Vs Kyumbu (1984) KLR 441** which provided for the test for dismissal of a suit for want of prosecution.

12. What amounts to inordinate delay will differ from case to case depending on the circumstances of the case. The litmus test is that the delay should be inexcusable. In the present case, it is almost 4 years since the Appellants filed their Memorandum of Appeal. Their explanation for delay is that the court has not given directions or listed the matter for hearing before a judge.

13. It is the duty of the Appellants to cause the appeal to be listed for directions. Had they done that, then the onus of the court would have been to admit it and set it down for hearing or general directions. However, the Appellants only filed the Memorandum of Appeal and sat back. They did not even take the initiative of writing to the Deputy Registrar to enquire on the status of their appeal. Four (4) years later and it is apparent that the Appellants have not taken any step to advance their case. They have not even compiled a record of appeal, and filed it. The only document on record is the Memorandum of Appeal.

14. This court is, however, alive to the fact that the powers of the court to dismiss a suit for want of prosecution is discretionary power though it should be exercised judicially. This was the holding in the case of **Moses Muriira Maingi & 2 Others Vs Mwangi Kamuru & Another**, Nyeri Civil Appeal 151/2010 and also in the case of **ET Monks and Co. Limited Vs Evans (1985) KLR 584**.

15. In the case of **inter Vs Kyumba** (Supra) the learned Judge held: -

“... Thus, even if the delay is prolonged, if the court is satisfied with the Plaintiff’s excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter in the discretion of the court.”

16. In the premises and in the interest of justice, the application dated 2nd February, 2016 is hereby dismissed with no orders as to costs. The appeal should be prosecuted within ninety (90) days failing which it shall stand dismissed.

Dated, signed and delivered in Nairobi this 15th day of September, 2016.

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L. NJUGUNA

JUDGE

In the Presence

..... **for the Appellants**

.....**for the Respondent**