



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 7 OF 2014

JAMAL ISAPAAPPELLANT

VERSUS

SWALEH MUHSIN SHIGOG RESPONDENT

RULING

1. The respondent/applicant through an application by way of chamber summons dated 23rd March, 2016 seeks the following orders:-

i. That the appeal against the respondent herein be dismissed with costs for want of prosecution; and

ii. That the costs of this application and the entire appeal be awarded to the respondent.

2. The application has been brought under Order 2 rule 15(b), (c) and (d), order 42 rules 11, 13(1), 35 of the Civil Procedure Rules and section 3A of the Civil Procedure Act and all other enabling provisions of the law. The application is supported by the affidavit of Swaleh Muhsin Shigog and the grounds in support of the application. The appellant/respondent filed a replying affidavit and grounds of opposition on 25th August, 2016.

3. Mr. Mohammed, Learned Counsel for the respondent/applicant contended that the appeal was filed in February, 2014 but the respondent has been guilty of inordinate delay for failing to list the appeal for directions under order 42 rules 11 and 13 of the Civil Procedure Rules which are cast in mandatory terms. For the said reason of dormancy, it was submitted that the provisions of order 42 rule 35 come into play, and the appeal should be dismissed.

4. Mr. Omwenga, Learned Counsel for the respondent relied on the replying affidavit and the grounds of opposition filed by the respondent. The latter were to the effect that:-

i. The application is an afterthought, bad in law, ingeniously crafty, devoid of any triable issues and only designed to evade the full trial of the matter;

ii. The application is bad in law, scandalous, evasive, inept, self-defeating, hollow and an abuse of the court process for failing to raise a pure point of law;

iii. The appellant's Advocates filed and served the Memorandum of Appeal in the month of

February, 2014; and again on the same month (sic), they applied to be supplied with typed and certified proceedings;

iv. Despite several visits to the lower court civil registry, the proceedings have never been typed and certified on the ground that the handwriting of the trial magistrate is not legible and therefore cannot be typed;

v. It is a matter of notoriety and the court ought to take judicial notice that the hand writing of the trial magistrate is not legible; and there are so many matters in which the new Judicial officers have had to ordered (sic) to be heard denovo in view of the challenges faced therein;

vi. Certified copies of the proceedings will not serve any purposes since they are not legible;

vii. Neither the appellant nor his Advocates on record have contributed to the failure to conclude the appeal on time;

viii. The application is bad in law for being subversive to this court's overriding objective and the just and fair determination of disputes;

ix. The application herein is prematurely before the court since directions have not been taken under order 42 rule 13(1) of the Civil Procedure Rules, 2010; and

x. The application dated 23rd March, 2016 ought to be dismissed with costs.

5. Mr. Omwenga invited the court to look at the provisions of section 79B of the Civil Procedure Act, which requires the court to give directions on whether an appeal has been summarily dismissed or admitted. He stated that this has not been done as the lower court record was not before this court. He submitted that directions are taken after a record of appeal has been prepared and under order 42 rule 35, dismissal of an appeal is only done after directions have been given. He added that the replying affidavit of the respondent shows that there have been problems in getting proceedings typed, as the trial Magistrate's handwriting is not legible.

6. In response to the foregoing, Mr. Mohamed submitted that section 79B of the Civil Procedure Act provides that an appellant should list an appeal before a Judge for directions. In this instance, the respondent should have sought directions before a Judge and brought to the court's attention the issue of the magistrate handwriting.

ANALYSIS AND DETERMINATION

The issue for determination is if the appeal herein should be dismissed for want of prosecution.

7. The Memorandum of appeal was filed on 3rd February, 2014. Since then the only thing that has transpired is the hearing and granting of orders for stay of execution on 26th February, 2015 in Mombasa CMCC No. 2177 of 2012, until the hearing and determination of the present appeal. As observed by Mr. Mohamed, the respondent did not list the matter for mention after it came to his attention that the handwriting of the magistrate who was seized of the lower court matter was not legible.

8. Order 42 rules, 11, 12 and 13 of the Civil Procedure Rules sets out the processes to be followed by an appellant and the court after the filing of an appeal, in the following terms:-

"11. upon filing of the appeal the appellant shall within thirty days, cause the matter to be listed before a Judge for directions under section 79B of the Act.

12. After the refusal of a judge to reject the appeal under section 79B of the Act, the registrar shall notify the appellant who shall serve the Memorandum of appeal on every respondent within seven days of receipt of the notice from the registrar.

13 (1) 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. Section 79B of the Civil Procedure Act provides that:-

“Before an appeal from a subordinate court to the high Court is heard, a Judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against he may, notwithstanding section 79C reject the appeal summarily.”

10. The respondent herein has explained that the sole reason for not filing the appeal for directions is that the lower court proceedings have not been typed and certified due to the handwriting of the trial magistrate which is not legible and that the court ought to take Judicial notice of the state of the said handwriting as it is a matter of notoriety.

11. This court is unaware of the state of the handwriting of the said trial magistrate and the least that the respondent could have done was to list the appeal for mention and bring the issue of difficulty of having the proceedings typed to the attention of the court. Order 42 rule 35(1) of the Civil Procedure Rules Provides for the respondent to either set down the appeal for hearing or apply for its dismissal for want of prosecution if within three months after the giving of directions under rule 13 of the same order, the appellant shall not have set the appeal for hearing. Such directions have not been given in this appeal, which has not even been admitted to hearing. The applicant cannot as such invoke the provisions of order 42 rule 35(1) in its favour.

12. In the case of **Kirinyaga General Machinery vs Hezekiah Mureithi Ileri** HCCC No. 98 of 2008 the Judge observed:-

“It is clearly seen from that rule that before the respondent can move the court either to set the Appeal down for hearing or to apply for dismissal for want of prosecution, directions ought to have been given.”

13. This court is however not powerless when dealing with dismissal of appeals for want of prosecution under the provisions of order 42 rule 35(2) of the Civil Procedure Rules. This procedure was however not followed by the applicant to move this court for dismissal of the appeal. This court finds that the failure by the respondent to bring to the attention of the court the state of the lower court record is an act in bad faith which means that the appeal would have remained unprosecuted in the foreseeable future. It is not lost to this court that the respondent enjoys the order for stay of execution pending the hearing of the appeal herein.

14. I hereby make the following orders:-

- i. The application dated 23rd March, 2016 is hereby dismissed;
- ii. Each party will bear its own costs;
- iii. The appellant will list the appeal for mention within 30 days from the date of this ruling.

DELIVERED, DATED and SIGNED at MOMBASA on this 5th day of October, 2016.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Omwenga for the appellant/respondent

Ms. Okumu holding brief for Mr. Abeid for the respondent/applicant

Mr. Oliver Musundi Court Assistant