



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 82 OF 2013

NGITARIOUS MWANGIAPPELLANT

VERSUS

WASHINGTON ODHIAMBO WANYANG (*SUING AS ADMINISTRATOR AND PERSONAL REPRESENTATIVE OF THE ESTATE OF MARY OKELLO – (DECEASED)*).....RESPONDENT

(Being an appeal from the Judgment of the Chief Magistrate's Court at Machakos by Hon. H. Gesora (SRM) in Civil Suit No. 637 of 2012 dated 12th April, 2013)

RULING OF THE COURT

The application

1. The Notice of Motion application before the court is filed by the respondent and is dated **20th April, 2016**. The application is pursuant to **Section 3A** of the **Civil Procedure Act**. The application prays for orders that the appeal herein be dismissed for want of prosecution and that the costs of this application be provided for.
2. The application is founded on the grounds that the appellant has failed or ignored to set the appeal down for hearing and or for directions three (3) years since the appeal was filed. Further there is no record of appeal. These failures are meant to frustrate and deny the respondent enjoyment of the fruits of the judgment and that the appeal is an abuse of the court process.
3. The application is supported by affidavit of **Kenneth O. Obae**, sworn on **20th April, 2016**. **Mr. Obae** deponed that he is an advocate herein for the respondent as has the authority to swear the affidavit. The applicant's case is that it is now three (3) years on and the appellant has refused/ignored and/or failed to compile and serve the Record of Appeal and have the appeal placed before a Judge for admission and directions. The delay in prosecuting the appeal has been inordinately long and this has caused a lot of prejudice to the respondent who has been denied the fruits of his judgment by a tactful and indolent appellant. From the appellant's action, it is apparent the appellant has lost interest in the appeal which otherwise has no chance of success. The respondent is entitled to a speedy expedition of justice under the constitution of Kenya and the said delay has prejudiced the respondent and thus it is necessary for the court to exercise its inherent jurisdiction for the ends of justice to be met and/or to prevent the abuse of the court process clearly demonstrated by the appellant's actions.

The Response

4. The application is opposed vide a replying affidavit of **Joan Oburu** sworn on **21st October, 2016**. The deponent is the claims manager at **Directline Assurance Company Ltd** who are the insurers of the motor vehicle registration number **KAN 098J** and at whose instance this claim is being defended. The respondent's case is that indeed, the appellants instituted this appeal vide a Memorandum of Appeal dated **3rd May, 2013** against the whole of the judgment of the honourable H. Gesora, Senior Resident Magistrate delivered on 12th April, 2013 in **Machakos CMCC No. 637 of 2012; Washington Odhiambo (suing as the legal representatives of the estate of the late Mary Okello) v. Ngitarious Mwangi**. Subsequently, the appellants/respondents wrote to the Executive Officer of the Lower court requesting for the certified copies of the decree, judgment and typed proceedings to enable them file Records of Appeal. That subsequently by a letter dated **17th May, 2014** the appellants advocates wrote to the Deputy Registrar Machakos and requesting that the lower court file be returned to the subordinate court to enable the appellants obtain a decree and certificate of Costs for purposes of filing the Record of Appeal. But to date the said letter has not elicited any response. That in view of the foregoing it is clear that the delay in prosecuting this suit was not by the fault of the appellants as they have already paid part of the decretal amount as ordered by this honourable court. The respondent is advised by the advocate on record aforesaid which he verily believes to be true and correct that the appeal is yet to be admitted in accordance with **Section 79B** of the **Civil procedure Act** and without being admitted as such, no step can be undertaken in the appeal. The respondent is advised 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, under **Order 42 Rule 35** which is the governing provision in dismissal of appeals for want of prosecution, directions ought to have been given as provided under **Section 79B** of the **Civil Procedure Act**. Since directions have not been given, the orders sought by the Respondent should not be entertained. The respondent's case is that under **Order 42 Rule 35(2)**, it is only the Registrar who can list an appeal before a judge in chambers for dismissal if directions under **Section 79B** of the **Civil Procedure Act** have not been issued. Since **Order 42 Rule 35(2)** is couched in mandatory terms, a party filing an application like the present one is considered to be usurping the duties of the Deputy Registrar. In the circumstances this application is premature. The respondent's case is that the mandatory and relevant steps which must be taken by appellants before setting down an appeal for hearing are provided for under **Section 79B** of the **Civil Procedure Act** and **Order 42 of the Civil Procedure Rules**. The said provisions cannot be complied with unless and until the appellant obtains typed and certified copies of the proceedings, judgment and/or decree which they are in the process of obtaining and also transfer of the lower court to this court. The Respondent's case is that in the event the application is allowed and the appellants are prevented from ventilating their grievances they will heavily suffer prejudice and hardship because the doctrine of the right to a fair hearing will not be considered, further, the appellants humbly believes they have a viable and arguable appeal with high chances of success.

Submissions

5. Parties made oral submissions in court which I have considered. The issue I raise for consideration is whether or not, in light of the fact that the appeal has not been ***“admitted to appeal, the court can exercise its discretion to save the appeal.”***

6. **Section 79B** of **Civil Procedure Act** requires an appeal from subordinate court to be admitted to appeal. Once this is done then the other process under **Order 42 rule 35** come into operation. **Order 42 rule 35(2)** states that within one (1) 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. On this basis, the appellant herein submits that this application by the applicant seeks to usurp the duties of the Deputy Registrar, and that in these circumstances this application is pre-mature. I do not accept this submission. The intent of the rule to ensure that no appeal stays in the shelf for an extended period of time without being heard, and the Deputy Registrar is given the duty to ensure that. If the Deputy Registrar cannot for whatever reason do that, then any party interested in the suit can apply for the dismissal of the appeal. To hold otherwise would be to mean that an appeal can stay in court forever if no party takes an action on it and the Deputy Registrar has not moved under **Section 79B of the Civil Procedure Act**. It is however the appellant's case that **Section 79B and order 42** aforesaid could not be complied with unless and until the appellants obtained typed and certified copies of the proceedings, judgment and/or decree, which documents they have not

obtained. It is noted, however, that the appellant has since obtained those documents and her filed a Record of Appeal herein on **24th October, 2016** well after this application was filed in **April, 2016**.

7. Under the circumstances, and given that the Record of Appeal is now in place, this court is of the view that despite the application herein having apparent merit, the said appeal should be given a chance to be ventilated on its merit.

8. In the upshot, the application herein by the respondent is dismissed with the following orders;

a. The appeal is hereby admitted under **Section 79B of the Civil Procedure Act**.

b. The appellant shall pay throw away costs assed at Shs. 10,000 to the Respondent/applicant herein within seven (7) days of this ruling.

c. The parties are directed to take directions for the appeal under **Order 42 rule 13** as soon as possible.

DATED AND DELIVERED AT MACHAKOS THIS 8TH DAY OF DECEMBER, 2016.

E. OGOLA

JUDGE

In the presence of;

Mr. Obae for Applicant/appellant

No appearance for Respondent

Court Assistant – Mr. Munyao