



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO.23 OF 2008

BETWEEN

ROSELINE ADHIAMBO.....APPELLANT/RESPONDENT

AND

JOSEPH KIAGE MAHUBE.....RESPONDENT/APPLICANT

(Being an appeal the judgment and decree of Hon. S.M.S. Soita, PM, in

Kisii CMCC NO.1026 of 2005 dated and delivered on 6th February, 2008)

RULING

1. By a Notice of Motion dated 2nd of June 2010 Joseph Kiage Mahube who is the Respondent in this appeal seeks to have the appeal dismissed for want of prosecution and/or for being an abuse of court's process. The notice of motion is brought pursuant to **Section 1 (A), (B) and 79 (g)** of the **Civil Procedure Act Cap 21 Laws of Kenya** and the then **Order XLI and L** of the **Civil Procedure Rules** and all other enabling provisions of the Law.

2. It is the Respondent's contention that since the appeal was launched on or about the 4th March 2008, it is yet to be admitted since a certified copy of a decree from the subordinate court has not been lodged. Further that the proceedings in the lower court were ready for collection by February 2009 yet more than 30 days thereafter the appellant was yet to prepare a record of appeal. The Respondent also avers that the appellant herein has lost interest in pursuing her appeal and is stopped from extracting a certificate of delay since for almost two years the proceedings had been ready for collection but not collected. Lastly the respondent contends that the appeal is malafides as it purports to appeal against liability whilst parties counsel entered into a consent on liability at 70%:30% in favour of the Respondent in the subordinate court on 28th June 2007.

3. The motion is further supported by an affidavit sworn by Don Z. Ogweno an advocate of the High Court of Kenya dated 2nd June 2010.

4. The motion is opposed. There are grounds of opposition by the appellant dated 16th July 2010 which in summary state that the appeal is yet to be either admitted or rejected under **Section 79 B** and that directions have not been taken as required by provisions of **Order XLI Rule 8 (A) and (B)**. It is also the appellant's contention that there was delay on the part of the court and that there is no inherent power under **Section 3A** of the **Civil Procedure Rules** to dismiss an appeal which has not been admitted for

want of prosecution. That dismissal of an appeal can only be done pursuant to the provisions of **Order LI Rule 31 (2)** of the **Civil Procedure Rules** which are not applicable here.

5. It is also stated in the Grounds of Opposition that there is a record of appeal prepared and duly filed by the appellant and therefore she should be allowed to prosecute her appeal as she is desirous of having the same heard and determined on merit; she has not lost interest in the same.

6. Lastly it is the appellant's case that there has not been inordinate delay in prosecuting the appeal given the fact that the court is yet to admit or reject the same as is required by the rules.

7. The appellant's counsel thereafter sought to introduce into the record their 3 letter to the Deputy Registrar by way of an affidavit dated 31st day of May 2013 which attempt was objected to by the Respondent's counsel as being an afterthought since the appellant had chosen to file grounds of opposition. The court on the 31st May 2013 made a ruling which allowed the appellant to file and serve on the respondent an affidavit attaching the duly stamped copies of letters dated 3rd February 2010, 13th July 2010 and 23rd March 2009.

8. Parties agreed to canvass the notice of motion dated 2nd June 2010 by way of written submissions. The submissions together with authorities were duly filed and exchanged. Briefly it was submitted by Mr. Ogweno for the respondent/applicant that they filed the motion herein which was served upon the appellant on 6th July 2010 and on the 19th July 2010, they (appellant) filed grounds of opposition which practically meant the averments of the respondent's motion and the supporting affidavit of Don Z. Ogweno were not controverted by way of affidavit evidence. Further it was submitted by Mr. Ogweno that the grounds of opposition filed by the appellant raised points of law at paragraphs 1, 2, 3, 4, 5 and 6 only and the further grounds from 7 to 9 raised matters of fact which cannot be entertained as points of law. He contends in his submissions that **Section 1A** and **B** are a replica of **Section 3 (A)** and further that the said positions had been qualified by **Section 1(A) (3)**. On this point, counsel relied on various authorities which I have had the opportunity of reading. I appreciate counsel's industry in this regard.

9. On his part, Mr. Odhiambo for the appellant/respondent submitted that the appeal ought not to be dismissed for want of prosecution as it would be against the overriding objective of **Sections 1A** and **1B** of the **Civil Procedure Act** in view of the attempts made by the appellant to prepare the record of appeal. Further it was submitted by Mr. Odhiambo that the court had not complied with **Order XLI Rule 88** of the **Civil Procedure Rules** which requires the Registrar to list the matter for directions before a judge and lastly that the honourable court has no inherent power under **Section 3A** of the **Civil Procedure Act** to dismiss an appeal for want of prosecution when the appeal has not been admitted.

10. I have read the application herein and looked at the record as a whole. It is evident that certified decree appealed against has been filed as required by **Rule 2** of **Order 42**. I am also satisfied that the Record of Appeal has been prepared and filed though no directions under **Rule 11** of **Order 42** have been sought or taken.

11. By **Section 79 B** of the **Civil Procedure Act** before an appeal is heard, it has to be taken before a judge in chambers for directions under **Order 42 Rule 11**. That has not been done. Although rather belatedly, the appellant compiled his Record of Appeal and filed it on 5th July 2010. There is however no indication on the record that final directions have been given or that a judge had been satisfied that all the required documents have been filed and are on record.

12. The law cited by the Respondent/Applicant, namely **Sections 1A, 1B** and **79G** of the **Civil Procedure Act** would appear to be irrelevant in this case. Section 1A provides for the overriding objective of the entire **Cap 21** which is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the **Act**. The just determination of disputes is at the centre of these provisions. In deciding what is just it is the duty of the court to consider all parties to the suit, in this case, both the appellant and the respondent.

13. Section 79G of the **Civil Procedure Act** provides for time for filing appeals from the subordinate courts; which is 30 days from the date of the decree or order appealed from provided that an appeal may be admitted out of time if the appellant satisfies the court that there is good and sufficient cause for not filing the appeal in time. In my considered view, this section is not applicable in the instant application since the appellant has not applied for extension of time for filing of the appeal.

14. Since the application was filed under the repealed Civil Procedure Rules, the relevant rule would have been **Order XLI Rule 31 (2)** thereof which provided that:-

“If, within one year after service of the Memorandum of Appeal, the appeal shall not have been set down the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal.”

15. Under the above stated rule, it was the registrar to cause the appeal to be placed before the judge in chambers for dismissal. It was not the duty of the respondent or any other party to the appeal to do so.

16. In the circumstances of this case, and considering the provisions of **Section 1A** and **1B** of the **Civil Procedure Act**, which donate inherent power to the court to issue such orders as would prevent abuse of the due process of the court, I am not satisfied that the Respondent/Applicant should get the orders sought. By compiling and filing the Record of Appeal, the appellant has expressed her desire to proceed with the appeal. Whether the appeal succeeds or not is a matter for the court which shall hear the appeal. In any event, it is clear from the record that the appellant is not wholly to blame for the delay in prosecuting the appeal or even placing the appeal before the judge for dismissal.

17. For the above reasons, I decline to grant the orders of dismissal sought by the Respondent/Applicant vide the application dated 2nd June 2010. The appellant must however not go to sleep in this matter. The application is accordingly dismissed but with no order as to costs.

18. Orders accordingly.

Dated, signed and delivered at Kisii this 16th day of September, 2014

R.N. SITATI

JUDGE

In the presence of:

Mr. Odhiambo Kanyangi for Appellant/Respondent

M/s Khan & Associates - absent for Respondent/Applicant

Mr. Bibu - Court Assistant