



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL APPEAL NO. 75 OF 2012

RICHARD NGETICH1ST APPELLANT

NJOROGE IRANYA2ND APPELLANT

VERSUS

FRANCIS VOZENA KIDIGARESPONDENT

RULING

On 23rd January, 2014 the respondent (Francis Vozena Kidiga), filed the notice of motion dated 22nd January, 2014 seeking inter alia, the dismissal of the appeal herein for want of prosecution.

The application is premised on, among other grounds, the grounds that it's over one year since the appeal was before this court; that the appellant has not taken any step to set down the appeal for hearing or even for directions and that the pendency of the appeal is clear indication that the appellant is disinterested in the appeal and is just enjoying the stay at the expense of the respondent.

The application is supported by the affidavit of the respondent's advocate, Wambeyi Makomere, in which the grounds thereon are reiterated. Besides reiterating the grounds on the face of the application, Mr. Wambeyi has deposed that the applicant is an aged man (57 years of age) and his greatly affected by the accident and that the pendency of the appeal is causing anxiety to the applicant who requires the proceeds of the judgment to enable him seek further medical attention.

In reply, counsel for the appellants, Thomas Ogutu Onyambu, filed the replying affidavit sworn on 28th April, 2014 in which he has deposed that the application is bad in law; that the appellants have on several occasions engaged the court registry by applying for typed proceedings and paying for them and visiting the court's registry to check the status of the typed proceedings. Further that the failure to type the proceedings is not the mistake of the appellants and that the appellants' appeal having not been admitted for hearing or been taken for directions is not ripe for dismissal.

Mr. Onyambu, argues that under the Civil Procedure Rules, an appeal cannot be set down for hearing before it is admitted and directions taken and that it is the Deputy Registrar of this court who should notify the parties to an appeal whether the appeal has been admitted. Explaining that the deputy registrar has not notified him of admission of the appeal, he contends that the appeal cannot be dismissed.

When the application was called for hearing on 25/03/2014, Mr. Wambeyi reiterated the averments contained in his supporting affidavit. Further, he gave the genesis of the appeal by pointing out that it began with the respondent's application for leave to file appeal out of time. That application was allowed on 19th December, 2012. He contended that after the application was allowed and an order of stay

granted, the respondent took no steps to have the appeal admitted or to have directions in respect thereof taken. Further, that the non-prosecution of the appeal is causing a lot of anxiety to the applicant who is very old. He laments that no explanation has been provided for the delay in getting the appeal admitted or taken for directions.

While admitting that there has been some delay in prosecution of the appeal, counsel for the appellant, Mr. Onyambu, exonerated the appellant from blame by arguing that the appellant has done all he could do, namely by filing the appeal, applying for typed proceedings and visiting the registry to confirm whether the proceedings have been typed.

Arguing that the appellant has not received any notice to the effect that the lower court's file has been forwarded to the High Court since it was requested for, he contended that the appellant has no duty to play in getting the appeal admitted or in moving the court for issuance of directions.

Citing the decisions in **Jurgen Paul Flash v. Jane Akoth Flash; Nakuru HCCC No. 119 of 2012; Joseph Kiiru Gachuiga & Another v. John Wagura Ikiki t/a Kenya Motor Garage Nyeri HCA No. 132 of 2010 (2014)eKLR** and **Joseph Nyambu v. Director General NEMA & Another Mombasa HCA NO. 200 OF 2011 (2014)eKLR** Mr. Onyambu argued that the appeal cannot be dismissed because it has not been admitted to hearing. Directions in respect thereof have also not been given.

In **Jurgen Paul Flash v. Jane Akoth Flash** (*supra*), this court declined to dismiss the appeal for want of prosecution because directions had not been taken. In **Joseph Kiiru Gachuiga & Another** (*supra*) the presiding judge (J. Wakiaga J.) declined to dismiss the appeal because it had not been admitted to hearing.

In the latter, (**Joseph Nyambu v. Director General NEMA & Another**), M. Muya J., declined to dismiss the appeal because directions had not been given as envisaged under order 42 rule 35. Noting that the stay granted to the respondent was affecting other matters pending before the National Environment Tribunal, the judge held that there was need to expedite the appeal and consequently, granted the appellant fourteen days (14) days to file and serve the memorandum of appeal and subsequently to cause the appeal to be listed before a judge for directions within thirty (30) days.

In a rejoinder, Mr. Wambeyi referred to the decision (**Joseph Nyambu v. Director General NEMA & Another**) and reiterated his contention that it was the duty of the appellant to list the appeal for admission and later for directions. He argued that the appellant having failed to take any steps to ensure the administrative acts were carried out, the only recourse the applicant had was to apply for its dismissal.

The law applicable to the application

The law concerning dismissal of an appeal for want of prosecution is contained in Order 42 Rule 35 of the Civil Procedure Rules.

Under Rule 35 aforementioned, the law contemplates two different scenarios for issuance of an order for dismissal of an appeal for want of prosecution. These are:-

A situation where three months after issuance of directions under Order 42 Rule 13, no steps have been taken by the appellant to fix the appeal for hearing. In such a situation, the respondent has two options, one, to fix the appeal for hearing or to apply by summons for the dismissal of the appeal. See **Kirinyaga General Machinery v. Hezekiel Mureithi**

Ireeri HCC No.98 of 2008 where while interpreting Order XLI 31 (now Order 42 rule 35), Mary Kasango J., 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 as provided under rule 8B. Directions have never been given in this

matter. The directions having not being given the orders sought by the respondent cannot be entertained."

The second scenario is that contemplated under Order 42 Rule 35 (2).

Unlike Rule 35(1) which requires directions to have been issued before the appeal can be dismissed for want of prosecution, under subrule 2 if, within one year after service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar is obligated, after giving notice to the parties, to list the appeal before a judge in chambers for dismissal.

In the instant application, the applicant has pointed out that the appeal has not reached directions stage as contemplated under order 42 Rule 11 as read with section 79B of the Civil Procedure Act. Owing to that state of affairs, the applicant has invoked the powers of this court under Sections 3A of the Civil Procedure Act. The applicant contends that the respondent having failed to take any steps to procure the admission of the appeal, the only option he was left with was to list the appeal for dismissal.

The Position taken by the applicant is contested by counsel for the respondent who argues that the duty to cause the appeal to be admitted lies with the court, Mr. Onyambu is of the view that, it is the Registrar of this court who should list the appeal for admission and later on for directions.

From the foregoing submissions, the question to answer is:-

Who bears the burden of getting the appeal admitted and later on listed for directions?

The answer to this question is found in Order 42 rules 11, 12 and 13 as read with Section 79B of the Civil Procedure Rules and Act respectively.

Under Order 42 rule 11, upon filing of the appeal, the appellant is obligated to within thirty days, cause the matter to be listed before a judge for directions under Section 79B of the Act.

Section 79B, requires that before an appeal from a subordinate to the High Court is heard, a judge of the High Court to it, and if he considers that there is no sufficient ground for interfering with the decree, part of the decree or order appealed against, notwithstanding Section 79C, gives the judge the discretion to reject the appeal summarily.

After the refusal of a judge to reject the appeal under Section 79B of the Act, when the Registrar is required to notify the appellant of the admission of the appeal. After the appellant is notified by the Registrar about the admission of the appeal, he/she is is obligated to serve the memorandum of appeal on every respondent within seven days of receipt of the notice from the registrar. See Order 42 rule 12.

Under rule 13 thereunder, the appellant is obligated, within twenty-one days after the date of service, after giving notice to the parties, to cause the appeal to be listed for giving of directions by a judge in chambers. It is clear from the aforementioned provisions of the law that the appellant bears the obligation to list the application for directions before a judge. The law requires him to do so within thirty days from the date of filing of the appeal.

The Purpose of the directions under order 42 rule 11 is to give the judge an opportunity for purposes of perusing the appeal and determining whether to admit it or reject it summarily. Under rule 12 of order 42, it is only after the judge has declined to summarily reject the appeal when the appellant can lawfully serve the memorandum of appeal on the respondents.

In my view where the appellant files an appeal and fails to cause it to be listed for admission within the time stipulated under order 42 rule 11, he cannot be heard to say that the appeal is properly on record. I say this because, it is after directions are issued under Order 42 rule 11 when an appeal can lawfully be served on other parties.

In the circumstances of this case, the appellant filed a memorandum of appeal on 29th June 2012. The law required him to cause it to be listed for directions within thirty days from the date it was filed (that is by 29th July, 2012). It's my considered This means that the time within which the appellant was supposed to list the appeal for hearing has expired, he cannot list it for admission unless he first seeks for enlargement of time under Order 50 rule 6 of the Civil Procedure Rules. This is the ideal situation under the rules.

However I recognise that in practice, it is quite the opposite, once memorandum of appeal is filed and the proceedings are typed, it is the court registry on its own motion which takes the file to the Judge for admission or otherwise. This has been fortified by many past decisions of various Judges and I think it would be unfair to penalise the appellant for the scenario obtaining. I would under the circumstances invoke the provisions of section 1A of the Civil Procedure Act regarding the overriding objectives of the rules which is intended to facilitate the just and proportionate resolution of civil disputes; and decline to dismiss the application on the basis that it is not just or proportionate to do so.

I direct that:

(1)The applicant must take steps to have the file placed before a Judge within 14 days hereof for purposes of directions on whether the appeal should be admitted or rejected.

(2) Once directions above have been given, if positive results, then the appellant herein must within 60 days thereafter, take steps to have the appeal given a hearing date.

Dated this 7th day of October, 2014 at Nakuru.

H.A. OMONDI

JUDGE