REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 124 OF 2008

EZEKIEL SIRMA ..... 1ST APPELLANT

BEN KEMBOI …..... 2ND APPELLANT

VERSUS

MARK LETTING ..... RESPONDENT

(Being an appeal against the judgment/decree of the Hon. G. A. Mmasi (Senior Resident Magistrate) delivered on 23rd October, 2008 in Eldoret Chief Magistrate's Court Civil Case No. 686 of 2006)

RULING

The Notice of Motion for determination by the Respondent is dated 15th April, 2013 and is brought under Sections 1A, 1B and 3 of the Civil Procedure Act and Order 42 Rule 20 of the Civil Procedure Rules. The Applicant prays that the appeal be dismissed for want of prosecution and that in the alternative the decretal amount deposited in a joint interest earning account be released to the Applicant/Respondent. The Applicant also prays for costs of the application.

The application is premised on the following grounds:-

1. That counsel for the Appellants has not made any effort to move this honourable court since 29th October, 2009.

2. That the pendency of this appeal is undue, prejudicial and grossly unjust to the Applicants/Respondents.

3. That the institution of this appeal amounts to an abuse of court process aimed at delaying the Applicant/Respondent from enjoying the fruits of judgment awarded to them.

4. That in the premises it is only fair and just that this appeal be dismissed for want of prosecution.

It is further supported by the affidavit of Robert K. Limo, Advocate having the conduct of the matter on behalf of the Applicant.

He depones that the Respondents have lost interest in prosecuting the appeal. That he has reminded the Appellants' advocates to list the appeal for hearing but to no avail. He further states that the applicant is entitled to fruits of his Judgment.

The application is opposed vide a Replying Affidavit sworn by Jones Nyachiro advocate having the conduct of the appeal on behalf of the Respondents. He depones that the delay in prosecuting the appeal were beyond the control of the Appellants. He states that on several occasions they wrote letters to be furnished with the lower court proceedings but the proceedings were not provided to them as required. He also depones that Appellants' advocates mistakes of not getting the lower court proceedings should not be visited upon a party and that the Appellant is ready and willing to prosecute the appeal within the shortest time possible.

The application was canvassed before me on 25th June, 2013. The Applicant was represented by Mr. Mutai advocate and Respondents by Miss Cherotich advocate. They made oral submissions in support of, and opposition to the application respectively.

In addition, Mr. Mutai submitted that a letter dated 13th October, 2010 vide which counsel for the Respondents wrote to the Eldoret Chief Magistrate asking for the lower court file, was never served upon this court. The said letter is annexed to the Replying Affidavit and marked JN1. He also submitted that a similar letter dated 27th May, 2013 (Annexture JN2) written by the Respondents' counsel was so written after this application was filed. That accordingly the Respondents are not interested in prosecuting the appeal and the application should be allowed.

Miss Cherotich submitted that the delay was occasioned by the fact that the lower court file could not be availed to enable them (Respondents) compile the Record of Appeal.

I have accordingly considered the respective submissions made before me. I have noted that the Applicant has brought the application under Order 42, Rule 20 of the Civil Procedure Rules. Rule 20 thereof deals with dismissal of an appeal on grounds of non appearance of the Appellant. In this application, the Applicant seeks dismissal of the appeal for want of prosecution, in which case the applicable rule is 35. The same provides as follows:-

"35 (1) Unless within three months after the giving of directions under rule 13 the appeal shall have been set down for hearing by the appellant, the respondent shall be at liberty either to set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.

(2) If, within one 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."

Rule 13 which is referred to in sub-rule (1) of Rule 35 provides as follows:-

"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.

(2) Any objection to the jurisdiction of he appellate court shall be raised before the judge before he gives directions under this rule.

(3) The Judge in chambers may give directions concerning the appeal generally and in particular directions as to the manner in which he evidence and exhibits presented to the court below shall be put before the appellate court and as to the typing of any record or part thereof and any exhibits or other necessary documents and the payment of the costs of such typing whether in advance or otherwise.

(4) Before allowing the appeal to go for hearing the Judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say:

(a) the memorandum of appeal;

(b) the pleadings;

(c) the notes of the trial Magistrate made at the hearing;

(d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;

(e) all affidavits, maps and other documents whatsoever put in evidence before the Magistrate;

(f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:

Provided that -

(i) a translation into English shall be provided of any document not in that language;

(ii) the Judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f)."

The above provisions places the obligation of preparing the appeal for hearing solely in the hands of the Appellant. That is to say that the Appellant ought to have taken the necessary steps as provided by the law so as to ensure that the appeal is listed for hearing within a reasonable time.

From the record, the Memorandum of Appeal was filed on 21st November, 2008 whereas the Judgment of the lower court was delivered on 23rd October, 2008. Attached to the first page of the court file is an instruction sheet on which should be written all steps taken by the parties upon filing of the appeal. The same shows that the lower court file proceedings were requested for on 22nd November, 2008 and reminders sent on 20th July, 2010 and 31st August, 2010. The above letter and reminders were written by the Deputy Registrar and copies thereof are borne in the court file. From the same instruction sheet, it is indicative that the lower court proceedings were received by the High Court registry on 10th January, 2012.

On the Applicant's part, his counsel exhibited a letter dated 14th June, 2010 (annexture RK1 to Supporting Affidavit) addressed to the Deputy Registrar in which he requested the matter to be placed before the Judge for directions. Annexture RK2 is another letter he wrote to the Chief Magistrate requesting that the original file be forwarded to the High Court. Again on 23th August, 2012, he wrote a letter to counsel for the Appellants inquiring on the progress made towards having the appeal set down for hearing.

The Respondents' counsel on the other hand only wrote two letters. One is dated 13th October, 2010 (Annexture SN1) and another dated 27th May, 2013 (Annexture JN2).

Under Order 42 Rule 11 an appeal should be listed before a Judge for directions within 30 days of its filing. It reads:-

"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."

In my view however, such directions can only be taken after the Judge has admitted the appeal pursuant to section 79B of the Civil Procedure Act. This is so because, under this law, a Judge will admit or summarily reject the appeal upon perusal of the lower court record. The said

section provides as follows:-

"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."

The instant appeal was admitted on 25th January, 2012 by Hon. Justice Azangalala after lower file was availed on 10th January, 2012 (see the instruction sheet). What ought to have followed after admission of the appeal was service of the Memorandum of Appeal as provided by Rule 12 in the following words:-

"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 theregistrar."

It is therefore the obligation of the Appellant upon admission of the appeal to ensure that the same is listed and set down for hearing. If the Appellant is indolent in doing so, certainly the court cannot come to his aid.

In the High Court decision of Musinga, J as he then was in **EUNICE NJERI KIMANI -VS- MUIRURI KARIUKI (2005) e KLR** while relying on decision of the Court of Appeal in **KARIUKI WAITHAKA -VS- LOLDIA LIMITED, NAIROBI CIVIL APPLICATION NO. 67 OF 2004**, he said as follows:-

"The appellant in this matter applied for the proceedings, judgment and decree on 18th November, 2003 and was supplied with the proceedings and judgment only. She re-applied for the decree on 1st April, 2004 but there was no response. Since then, she never sent any other reminder or took any other step towards procuring the decree. For more than a year she never followed up the matter to know why the decree had not been drawn and furnished to her. She is represented by counsel who knows very well that usually one has to be pro-active to get the court to act in many instances. In KARIUKI WAITHAKA VS LOLDIA LTD Civil Application No. NAI 67 of 2004, in an application to strike out a notice of appeal, the Court of Appeal stated as follows:-

"Apart from the letter of 2nd December, 1999 there is nothing Mr. Karanja has done to expedite the preparation of proceedings. In these circumstances when 31/2 years have elapsed we are satisfied that he has shown less than proper diligence to prosecute his appeal. It is not enough for one to apply for proceedings and then go to sleep with nothing more done. For these reasons, the application succeeds. The notice of appeal filed on 6th December, 1999 is struck out with costs to the applicant and the order of stay granted by the superior court is hereby vacated"

Again Mutungi, J in **AME W. CHEGE & ANOTHER -VS- PETER KISUNA MUSASYA (2006) e KLR**, said:-

"The steps preceding the applicability of the above provision is entirely within the control of the appellant, not the respondent. For its the duty of appellant after launching the appeal by filing the memorandum of appeal to; obtain certified copy of the proceedings from the lower court; prepare the Record of Appeal before the appeal goes for admission by the judge in charge of the civil Appeals. Once the appeal has been admitted, the file goes back to the Registrar who through a notice, summons parties to the appeal, to appear before the judge for directions. It is only after the directions that appeal can be set down for hearing, as per the above order 41 rule 31(1) of the civil procedure rules"

Under the old Civil Procedure Rules, Order 41 rule 31 (1) is Order 42 Rule 13 (1) under the

current Civil Procedure Rules.

I am of the view that the Appellants seem not to have done enough in ensuring that the lower court proceedings were provided on time and that the appeal was set down for hearing. Indeed counsel for the Appellant was still writing a letter (letter dated 27th May, 2013) requesting for proceedings from the lower court long after the appeal had been admitted. It seems he was completely not interested in what the position of the file in the registry was.

Counsel for the Appellants appear to concede that it was his mistake in failing to set the appeal down for hearing. However, it must be borne in mind that an advocate is the representative of the party and he takes full control of the appeal on appointment. Therefore all steps that needed be taken in ensuring that the appeal is set down for hearing were to be taken by him. For the prolonged period, this file lay in the registry unacted for, thereby comprising a backlog in our registry. This kind of delay is inexcusable. In this respect I borrow the words in **KETTLEMAN - VS- HANSEL PROPERTIES (1988) 1 ALL ER, 62**, also cited by Kwach, JA (as he then was) in **MAWJI LALJI & OTHERS (NBI CIVIL APPLICATION NO. 236 OF 1992 (Unreported)** and **OMWOYO -VS- AFRICAN HIGHLANDS & PRODUCE CO. LTD (2002) 1 KLR, 700**;

"Another factor that the a judge must weigh in the balance is the pressure on the courts caused by great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall on their own heads rather than allowing an amendment at a very last stage of the proceedings".(See Lord Griffins, the Learned Lord of Appeal in Kettleman vs, Hansel Properties[1988] 1 ALL ER 38, at pg 62. cited by Kwach JA in Mawji Lalji & Others [Civil Application No. 236 of 1992 (Unreported) and also cited by Ringera J.(as he then was) in Omwoyo vs. African Highlands & Produce Co. Ltd (2002)1 KLR. at Pg. 700)

- ***In Omwoyo vs. African Highlands & Produce Co. Ltd Ringera J as he then was noted as follows;***

"Even if the matter involved an exercise of discretion (and not want of jurisdiction as in the case here) I would have declined to exercise the courts discretion in favour of the applicant on the grounds that he found himself in a predicament as a result of his advocates alleged mistake'.(See Omwoyo vs. African Highlands & Produce Co. Ltd, ibid,at Pg. 701)

I am accordingly not persuaded to rule in favour of the Appellants merely because the Appellants' counsel sat indolently and failed to wake up even on provocation by counsel for the Respondent (Applicant).

Lastly, the Appellants' counsel has submitted that the application is fatally defective and does not disclose any cause of action. Although this assertion was not expounded on in orally submissions, I opine, it is made because the application is brought under Rule 20 as opposed to Rule 35 of Order 42.

The mistake is one attributable to want of form as opposed to addressing substantive justice. In the spirit of Article 159 (2) (d) "**that justice shall be administered without undue regard to procedural technicalities**", I hold that such an error should be disregarded.

Again, under Order 51 rule 10 (2) "no application shall be defeated on a technicality or for want of form that does not affect the substance of the application.

In the result the application is allowed. The Appeal is dismissed for want of prosecution with costs to the Applicant. The decretal sum deposited in a joint interest earning account should be

released to the party in whose favour the decree was made within fourteen (14) days.

It is so ordered.

DATED and **DELIVERED** at **ELDORET** this 3rd day of October, 2013.

G. W. NGENYE - MACHARIA

JUDGE

In the presence of:

Mr. Namiti holding brief for Nyachiro for Respondents

No appearance for Limo for Applicant