



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL NO. 031 OF 2019

SCRUB AND SURF CLEANING SERVICES.....APPELLANT/RESPONDENT

VERSUS

CAROLINE ALIVITSA.....RESPONDENT/APPLICANT

RULING

1. The Respondent/Applicant filed a notice of motion application dated 22nd February, 2021 praying for an order in the following terms:-

(i) That this Honourable Court be pleased to dismiss the appeal filed on 21st August, 2019 for want of prosecution.

(ii) That the Applicant's Advocate be allowed to access the money that was deposited in the joint account with any accrued interest.

(iii) That costs of this application and costs of the Appeal be awarded to the applicant.

2. The application is premised on grounds set out on the face of the notice of motion and buttressed in the supporting affidavit of **Eunice Lumallas**, advocate for the Applicant, the nub of which is that the applicant is a decree- holder of a judgment in her favour dated 5th August 2019. That the Appellant filed a memorandum of Appeal on 21st August, 2019 and obtained interim orders for stay of execution on the 6th December, 2019 but has since then failed, neglected and or refused to set up the appeal for hearing.

3. That the appeal has never been set down for hearing. That on 5th October, 2020 the respondent served on the Appellant's advocate a letter to the Executive Officer requesting for certified typed proceedings. That this letter is by itself insufficient to excuse the undue delay in prosecuting the appeal since the follow up was done due to the Applicant's prodding.

4. That this failure is inexcusable, unduly prolonged and has continued to cause great injustice to the Applicant. That the Applicant needs to enjoy the fruits of his judgment and that litigation must come to an end. That the delay is deliberate and an abuse of the Court process.

Response

5. The respondent filed a replying affidavit sworn to on 8th April, 2021 by **Migui Mungai**, Advocate for the appellant in which he deposes that the application is premature, grossly misconceived and bad in law.

6. That the Appellant has been diligent and keen to prosecute the appeal which is arguable and ought to be heard on merit.

7. That the appellant on diverse dates wrote to the Executive Officer of the Chief Magistrates' Court of Milimani, seeking to be furnished with certified typed copies of proceedings and judgment to enable the appellant file the record of appeal but the same never elicited any response.

8. That the appellant has for that reason been unable to prepare a record of appeal.

9. That the efforts by the clerks of the Advocates have not borne any fruit to date.

10. That this matter is guided by Rule 8(3) and (4) of the Employment and Labour Relations Court (**procedure**) Rules, 2016 and Civil Procedure Rules Order 42, Rule 13(4). That from the aforesaid, the judge shall not allow a matter to proceed to hearing unless the Record of Appeal is duly filed.

11. That it is only upon such filing that the appeal is admitted and direction given in accordance with Section 79 B of the Civil Procedure Act before it could be listed for hearing.
12. That an appeal cannot be dismissed for want of prosecution before directions have been given.
13. That the threshold for dismissal has not been met and the Application be dismissed.

Determination

14. The parties filed submissions and list of authorities which the Court has duly considered.
15. In this respect, Rule 8(4) of Employment and Labour Relations Court (Procedure) Rules, 2016 provides that:-

“A memorandum of appeal shall be accompanied by copies of the proceedings, all documentary evidence relied on and a copy of the judgment from the proceedings of the matter being appealed against. “

16. The rules of the Court do not provide for dismissal of Appeal for failure to prosecute and so resort must be had to Order 42, Rule 35 of the Civil Procedure Rules, 2010.
17. In the High Court decision of Njai Stephen –vs- Christine Khatiala Andik – Civil Appeal No. 248 of 2017, the Court laid out the criteria for dismissal of an appeal under Order 42, Rule 35 of the Civil Procedure Rules, 2010 as follows:-

“Order 42, Rule 35 of the Civil Procedure Rules, 2010 envisages two (2) scenarios for the dismissal of an appeal for want of prosecution. The first scenario is when an appellant fails to cause the matter to be listed for directions under Section 78 B of the Civil Procedure Act as is envisaged in Order 42, Rule 11 of the Civil Procedure Rules. The second scenario is that if after the service of Memorandum of Appeal, the Appeal would not have been set down for hearing, the Registrar shall on notice to the parties list the appeal before the judge for dismissal.”

18. The Court further stated:-

“It is evident from the provisions of Section 79 B of the Civil Procedure Act that a judge has to peruse the appeal before he can summarily reject the same. These are the directions contemplated in Order 42, Rule 11 of the Civil Procedure Rules.”

19. Order 42, Rule 11 of the Civil Procedure Rules provides:-

“Upon filing of the appeal the appellant shall within 30 days cause the matter to be listed before a judge for directions under Section 79 B of the Act.”

20. In the present case, the appellant has not obtained the record of Appeal since the 21st August, 2019 when the Memorandum of Appeal was filed and interim orders obtained by the appellant on 6th December, 2019. More than two (2) years have lapsed since the Memorandum was filed and it is now about one and half years since the interim orders staying execution of judgment were obtained.
21. From the record before Court, the last step taken by the appellant in this matter was writing a letter to the Executive Officer requesting for certified typed proceedings by a letter dated 5th October, 2020.
22. This application was filed on 22nd February, 2021 and the Appellant has not demonstrated that it took any further steps to prosecute the Appeal in the intervening period.
23. Having said that, it is apparent that the registrar had not listed the appeal for directions before the judge in terms of Section 79 B of the Civil Procedure Act, and therefore, the Appeal cannot be dismissed for want of prosecution under Order 42, Rule 35(1) of the Civil Procedure Rules.
24. There is no indication after all that the lower Court has forwarded the Court file and proceedings to the Employment and Labour Relations Court for the Registrar to proceed to place the file before the judge for directions.
25. The Court in the circumstances of this case places the Appellant on terms to the effect that if the record of Appeal is not placed before Employment and Labour Relations Court within 30 days and a request made to the registrar to place the Appeal before a judge for directions within 14 days of the expiry of 30 days aforesaid, the Appeal shall stand dismissed and the interim stay orders deemed discharged.
26. It is so ordered.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 9TH DAY OF DECEMBER, 2021.

Mathews N. Nduma

Judge

Appearances

M/s Lumallas for Respondent/Applicant

Mrs Macharia for Appellant/Respondent

Ekale: Court clerk