



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO. 2 OF 2020

DANIEL KAMAU KAGAI.....APPELLANT/RESPONDENT

VERSUS

ANDREW GITHAE KAMAU.....RESPONDENT/APPLICANT

RULING

1. This application dated 1st April 2021 is brought under **Section 1A, 1B and 3A of the Civil Procedure Act and Order 51 Rule 4 of the Civil Procedure Rules** seeking for orders that this appeal be dismissed for want of prosecution.

2. In opposition to the application, the respondent filed a replying affidavit on 7th July 2021.

The Applicant's Case

3. According to the applicant, judgment in Nyeri CMCC No. 221 of 2018 was delivered on 16th December 2019 to which an appeal was lodged on 14th January 2020. It has been over a year since the memorandum of appeal has been filed and the appellant has not set down the appeal for hearing or directions.

4. The applicant contends that the respondent is guilty of prolonged and inordinate delay in prosecuting her appeal and has lost interest in prosecuting his appeal. As such, the applicant contends that it is prejudicial to him if the application is not granted. He prays that the appeal be dismissed for want of prosecution.

The Respondent's Case

5. The respondent contends that he has not lost interest in prosecuting the appeal but that he applied for certified copy of the judgment and typed proceedings on 6th March 2020 and that is what is causing the delay. He states that the delay is not inordinate and he prays that the application ought to be dismissed for being immature, unnecessary and a waste of the court's time and resources.

6. Parties hereby disposed of the application by way of written submissions. A summary of their rival submissions is as follows:-

Applicant's Submissions

7. The applicant relies on Article 50 of the Constitution, Section 79G of the Civil Procedure Act and Order 42 Rule 35 of the Civil Procedure Rules and submits that the applicant has not taken the essential steps to file the Notice of Appeal and the Record of Appeal within the prescribed time. As such, the applicant has lost interest in the appeal and the same ought to be dismissed. The applicant contends that the onus is upon the appellant to move the court to progress the hearing of an appeal. The applicant relies on the case of **K. Ventures Limited vs Peter Otumati [2018] eKLR** to support his contention.

The Respondent's Submissions

8. The respondent submits that the delay has been caused in obtaining a copy of typed proceedings and judgment from the registry. The respondent adds that the court registry has not responded to his emails and physical attendances to make enquires have proven futile. The respondent has relied on the cases of **Pinpoint Solutions Limited & Another vs Lucy Waithegeni Wanderi (as the Legal Administrator of the Estate of James Nyanga Muchangi) [2020] eKLR** and **Pyramid Hauliers Co. Limited vs James Omingo Nyaaga & 3 Others [2017] eKLR**.

Issues for determination

9. After careful analysis, the main issue for determination is whether the appeal ought to be dismissed for want of prosecution.

The Law

Whether the appeal ought to be dismissed for want of prosecution.

10. Order 42 Rule 35 (1) of the Civil Procedure Rules provides:-

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.

11. Rule 35 (2) provides:-

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.

12. Therefore, Order 42 Rule 35 envisages two 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 79B 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 service of the memorandum of appeal the appeal would not have been set down for hearing, the registrar shall on notice of the parties list the appeal before the judge for dismissal.

13. This principle has been enunciated in the case of **Pinpoint Solutions Limited & Another vs Lucy Waithegeni Wanderi (as the legal administrator of the Estate of James Nyanga Muchangi) [2020] eKLR** where the court elaborated on the procedure relating to dismissal of appeals for want of prosecution, saying:-

“The provisions of the law relating to dismissal cannot be read in isolation. The bottom line is that directions must have been given before an appeal can be dismissed for want of prosecution. Indeed, there does not appear to be any penalty where an appellant fails to proceed as per Order 42 Rule 11 and Rule 13 of the Civil Procedure Rules, 2010.

This court took the view that an appeal cannot be dismissed before directions had been given. As there was no indication that directions had been given herein, the Appeal herein could not be dismissed under Order 42 Rule 35(1) of the Civil Procedure Rules. In any event, there was also no evidence that the Registrar had issued a notice under Order 42 Rule 12 of the Civil Procedure Rules. There was also no indication that the lower court file and proceedings had been forwarded to the High Court for the Registrar to proceed as aforesaid.”

14. Similarly on the principles governing dismissal for want of prosecution, the court in **Mwangi S. Kimenyi vs Attorney General & Another, Civil Suit Misc. No. 720 of 2009** held that:-

“When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the act straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all parties- the plaintiff, the defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties. Invariably, what should matter to the court is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues; 1) whether the delay has been intentional and contumelious; 2) whether the delay or the conduct of the plaintiff amounts to an abuse of the court; 3) whether the delay is inordinate and inexcusable; 4) whether delay is one that gives rise to a substantial risk to a fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the defendant; and 5) what prejudice will the dismissal cause to the plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties.”

15. In analysing the instant case, the matter was concluded in the trial court on 16th December 2019. The respondent filed the memorandum of appeal on 14th January 2020 and applied for certified proceedings on 6th March 2020. The respondent contends that the court has not responded to his enquiries on the status of the typed proceedings and judgment. From the e-mails attached by the respondent, it is evident that the court has not responded as to the status of the typed proceedings. However, the last email sent by the respondent is dated 28th August 2020. The respondent has not explained to what has caused the delay since 28th August 2020.

16. Further, as discussed above, it would appear that an appeal cannot be dismissed for want of prosecution before directions are taken. However, a party is not allowed to file an appeal and then go to sleep. I am persuaded by the case of **Abraham Mukhola Asitsa vs Silver Style Investment Company Limited [2020] eKLR** where the court stated:

“However, I am not persuaded that there is any justification for the party to file an appeal, and thereafter go to sleep. An appeal is not filed for the sake of it. It should not be left parked at the appeals registry for times on end, without any action being taken. I believe a party who files an appeal and goes to sleep and takes no action on it for a long time, cannot hide above the provisions and argue that since directions had not been taken then the appeal cannot be dismissed. An appeal should not be left to hang over the head of a respondent endlessly, where the appellant is unwilling to take action on it. Justice demands that the same be resolved one way or the other. I believe dismissal of such stale appeals is one of the

resolutions. There is no point of populating appeals registries with appeals that are not being prosecuted, yet the courts are being told that they cannot dismiss them before directions are taken. This creates unnecessary backlog. If parties are not moving their cases, the courts should dismiss them. There is no reason for them to clog the system. It is an untenable position. I believe there is inherent power to dismiss such appeals.”

17. The respondent has annexed a letter dated 6/3/2020 requesting for proceedings to which no response was sent from the Deputy Registrar. This was five (5) months after judgment was delivered. This shows that the respondent had not made up his mind on whether to appeal or not. From the court record, no reminders were sent to the court after the request of the proceedings.

18. This application for dismissal was filed in court on 6/4/2020 and served on the applicant on 21/5/2020 but no replying affidavit was filed until fourteen (14) months later. The memorandum of appeal was filed on 17/1/2020 which was about a month after the judgment was delivered.

19. The failure to send any reminder to the Deputy Registrar following the request of the proceedings is an indication of lack of seriousness by the respondent with his appeal. This contributed to delay of over one (1) year which led to the filing of this application. This is inordinate delay on the part of the respondent. It is unfortunate that this delay was not satisfactorily explained.

20. However, I have looked at the memorandum of appeal that shows that the appellant was dissatisfied with the judgment appealed against. Although I have not seen the judgment of the court, I appreciate that the grounds raised against the judgment are weighty in nature. I am convinced that the respondent may suffer prejudice if this application is allowed. In my view, he may be given a chance to pursue his appeal with timelines of filing and serving the record of appeal to prevent further delay.

21. I hereby disallow this application and give the following orders/directions:-

- a. That the record of appeal be filed and served within 30 days from the date of this ruling and in default this appeal to be automatically dismissed.
- b. That the appellant to cause the admission of the appeal within 15 days after filing the record and thereafter cause the taking of directions.
- c. That the respondent do meet the costs of this application to be in the cause.

22. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 25TH DAY OF AUGUST, 2021

F. MUCHEMI

JUDGE

Ruling delivered through videolink this 25th day of August, 2021.