



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYAHURURU**

**CIVIL APPEAL NO. 05 OF 2018**

**KINGE SIMON.....1<sup>ST</sup> APPELLANT/RESPONDENT**

**SIMBA COLD CO-OPERATION...2<sup>ND</sup> APPELLANT/RESPONDENT**

**PAULINE MWANGI.....3<sup>RD</sup> APPELLANT/RESPONDENT**

**-VERSUS-**

**LUCY NJOKI KAMAU.....RESPONDENT/APPLICANT**

**RULING**

1. Before court is an application for dismissal of Appeal under *Order 17 Rule 2(3) & Order 51 Rule 1 Civil Procedure Rules 2010 inter alia*.

2. It is grounded on the grounds the grounds on the face of the application namely that a period of 3 years & 3 months has lapsed since memorandum of appeal was filed with no action being taken or appeal being unprosecuted.

3. The same is supported by affidavit of **Lucy Njoki Kamau** sworn on 26<sup>th</sup> April, 2021 reiterating same grounds.

4. It is opposed and Respondent has filed a replying affidavit sworn by **Kiongo P. Murimi** and filed on 09/07/2021 which emphasis that the delay was occasioned by compiling record of appeal, getting copy of proceedings and documents thereof after supply of proceedings.

5. A further affidavit to respond to replying affidavit was filed by **Lucy Njoki Kamau** sworn on 09/07/2021 denying service and knowledge of service of documents mentioned in replying affidavit. She reiterates that the accident subject of suit recurred 16<sup>th</sup> November, 2003 and suit was concluded on 16/01/2018 and Respondent has delayed finalization of instant appeal filed in 2018 without any justifiable reason.

6. The parties filed submissions to canvass application.

**APPLICANT'S SUBMISSIONS:**

7. It is important to note that the emails and letters alluded to having been sent to the Applicant's advocate were never sent. Looking at the emails, the same do not reflect the email service provider through which the same were sent. A proper print out of an email should reflect whether it was sent through an email service provided like gmail.com or yahoo.com which is not the case here.

8. The letter that the Respondents herein claim to have sent to the Applicant's advocates do not have a receive stamp. This is a clear indication that the same were never sent or served upon the Applicant's advocate.

9. The Appellants/Respondents claim that it took inordinately long to get certified copies of the typed proceedings and other certified documents. The Appellants/Respondents have however not shown this Honorable Court the efforts they made to get the documents referred to within a reasonable time in order to avoid the inordinate delay.

10. The Appellants/Respondents only moved the court for the first time as they claim on 8<sup>th</sup> March, 2021. This is over 3 years since the appeal was filed. The Appellants/Respondents then moved the court last on 24<sup>th</sup> April, 2021. On the said date the Appellants/Respondents did not get an opportunity to have directions on the appeal taken but they did not do a follow up to get another date until when the Applicant took a date for the present application two months down the line. This is clear show that the Appellants/Respondents are guilty of lethargy and inertia in prosecuting the appeal.

11. Further the Applicants despite filing their record of appeal early, they did not have the same served upon the Applicant. They waited until the Applicant filed the present application to have the appeal dismissed for want of prosecution to serve the same upon the Applicant.

12. Thus it is submitted that the Appellants/Respondents have never taken prosecution of this appeal seriously and the Applicant's submission is that the Appellants have failed to prosecute the appeal as required by law by failing to cause the appeal to be listed before a judge for directions within 30 days of filing as required by *Section 79B of the Civil Procedure Act and Order 42 Rule 11 of the Civil Procedure Rules, 2010*.

13. *Order 42 Rule 11 of the Civil Procedure Rules, 2010* provides as follows:

*"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."*

14. Applicant cites the case of *Haron E Ogechi Nyaberi v British American Insurance Co. Ltd Nairobi HCCA No. 110 of 2001 [2012] eKLR* where the High Court held that:

*"It is however clear to this court that the Registrar cannot give notice of directions to the parties of an appeal and cannot himself fix an appeal for directions before a judge unless and until the Appellant has caused it by first complying with Rule 11 and 13 thereof. Appellant's compliance to those rules is the gate-opening for admission of appeal and for the taking of directions. It is to be observed, therefore, that it will be the Appellant who shall really cause the appeal to be listed for giving directions before a judge by:*

*a) Serving the Memorandum of Appeal; and*

*b) Filing and serving the Record of Appeal.*

15. In this case, the Appellants/Respondents have not denied that they did not serve the record of appeal within 30 days to enable the appeal to be listed before a judge to admit it to hearing under *Section 79B of the Civil Procedure Act* as directed by *Order 42 Rule II*. They have also not denied the fact that they failed to cause the appeal to be listed for the giving of directions by the Judge in Chambers under *Rule 13* of the above-mentioned Order. And finally, Appellants' only allege that they are not responsible for the delay without showing the efforts made to avoid the inordinate delay.

16. Applicant rely on the case of *Justus Gachoki Wachira v Emma Makena, Embu High Court Civil Appeal No. 142 of 2009 [2011] eKLR*, as cited in the case of *Bruce Mutie Mutuku T/A Diani Tour and Travel Centre v Equity Bank Limited [2014] eKLR* where the court stated that:

*"The Appellant deliberately refused to comply with Order 42 Rule 11 Civil Procedure Rules. The Appellant had to cause the matter to be listed to enable the Judge give directions under Section 79B of the Act. He cannot therefore turn around to blame*

*the court for his own mistakes/carelessness.”*

17. Thus applicant submits that the appeal be dismissed since the delay cause is inexcusable since no sufficient reasons have been given and the annexure annexed on the Appellants’ replying affidavit does not demonstrate enough efforts that they have made to have this appeal prosecuted expeditiously.

18. This Honorable Court is mandated to consider length of the delay, the cost and the prejudice likely to be occasioned to a party in dismissing an appeal. The overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantive justice.

19. The Applicant herein has suffered prejudice since its now three years down the line since judgment was delivered in her favour and she is yet to enjoy the fruits of her judgment and this is a suitable circumstance where the court ought to exercise its discretion and dismiss the instant appeal for want of prosecution even though directions had not been taken.

20. Even if the Respondents/Appellants were to claim that the appeal should not be dismissed since directions have not been taken which they have not, the same cannot suffice as this court is well vest with the discretion to dismiss an appeal even if directions have not been taken.

21. The case of *Hesbon Amata & Another v David Maina Waitihaka and Kariby Industries v Nemchard Anand & Co.* it was stated that in proper and suitable circumstances the court has jurisdiction to dismiss appeal which has not been admitted. See *Shamchulin A. Gothey v Joseph Ng’ang’a Kuria [2013] eKLR*

#### **RESPONDENT’S SUBMISSIONS:**

22. It is submitted that, in the process of compiling the record of appeal, getting certified copies of the typed proceedings and other certified documents took an inordinately long period of time.

23. As a result, the process of compiling of the Record of Appeal took longer time which was by no means by any fault of the Appellants/Respondents or in any way a deliberate or intentional delay on their part or the part of the counsel on record herein.

24. As soon as certified copies of documents were ready, the record of appeal was compiled by Counsel for the Appellants/ Respondents and thereafter promptly filed on the 10<sup>th</sup> December, 2020 by Counsel for Appellants/Respondents.

25. Immediately thereafter, the Counsel for the Respondents/Appellants requested the court through a letter dated 21<sup>st</sup> January, 2021, annexed to the replying affidavit, to issue the Respondents with a mention date for taking directions on their appeal.

26. Thereafter, the Counsel issued the Respondents/Appellants with a mention date for 8<sup>th</sup> March, 2021 and the court requested that the said date be served upon the Respondent/Applicant.

27. The Respondent/Applicant’s counsel duly served a mention notice on the 3<sup>rd</sup> February, 2021 via email for the mention date of 8<sup>th</sup> March, 2021 and afterward filed an affidavit of service.

28. On the 8<sup>th</sup> March, 2021 when the matter was supposed to be mentioned, it did not proceed for reason that the court was not sitting and the court registry issued another mention date for the 21<sup>st</sup> April, 2021.

29. Subsequently, counsel for the Appellants/ Respondents prepared and served another mention notice for the 21<sup>st</sup> April, 2021 via letter dated 9<sup>th</sup> March, 2021 upon the Respondent/Applicant.

30. On the said date 21<sup>st</sup> April, 2021 when the matter was to come up for mention for directions on the Appellants/Respondents’ appeal the same did not proceed for the reason that the Judge was away.

31. It is in the process of following up to be issued with another date for directions, the Respondent/Applicant served the instant application dated 26<sup>th</sup> April, 2021.

32. In light of the foregoing, it is submitted that the delay in prosecuting the appeal herein cannot be squarely blamed on the Applicants/Respondents or their counsel. As demonstrated, there was no intentional delay on their part to prosecute the present appeal from its inception.

33. The Respondent/Applicant has also not demonstrated how the Appellants have deliberately refused to prosecute the appeal. Respondent submit that the delay in prosecuting the appeal was by circumstances beyond the Appellants/Respondents or their counsel and that the unintentional delay has been sufficiently explained.

34. The Counsel for the Appellants/Respondents have as demonstrated and proved, continuously followed up the matter from the time the record of appeal was prepared and promptly following up on setting the matter down for directions.

35. Case of *Ivita v Kyumbu [1975] eKLR Civil Case No. 340 of 1971*, Applicant cited, *Mwangi S. Kimeny v Attorney General & Another [2014] eKLR Civil Suit Misc. No. 720 of 2009*, *Richard Ncharpi Leiyagu v IEBC & 2 Others CA 18/2013*

#### **RESPONDENT/APPELLANT'S SUPPLEMENTARY**

#### **SUBMISSIONS:**

36. It is submitted that, the court should consider that the appeal before it has not been determined on its merits and there will be considerable detriment to the Appellant's/Respondent's if the court dismissed the appeal on mere technicalities.

37. It is of importance that the main consideration of this Honorable Court should be the judicious and expeditious determination of the appeal herein.

38. By striking out the Appellants'/Respondents' appeal, the trial court will be effectively condemning the Appellants/ Respondents unheard contrary to the well cherished canons of natural justice.

39. The Rules of Natural justice require that parties ought to be afforded opportunity to be heard and such right to be heard should never be deprived of a party that has approached the court for justice.

40. In the Court of Appeal decision in *Johnson Matiti Kithendu v Mercy Wanjiru Mbochu & Milango Finance Service, Mombasa Civil Appeal No. 15 of 2015 (UNREPORTED)*, at paragraph 2 of page 13 therein, the superior court stated thus:

*"The courts of this land have been consistent on the importance of observing the Rules of Natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made."*

41. See also *Onyango v Attorney General [1986 – 1989] EA 453*, *Johnson Matiti Kithendu v Mercy Wanjiru Mbochu & Milango Financial Service (supra)*, *Mbaki & Others v Macharia & Another [2005] 2 EA 206*.

42. It is trite in law that an appeal cannot be dismissed before directions have been given by Court. See *Brenda Nwekulo Uluma v Robert Otieno Matete [2020] eKLR Environment and Land Appeal 15 of 2018*, *Morris Njagi & Another v Mary Wanjiku Kiura [2017] eKLR*.

43. The Respondent was at liberty to have the Registrar list the matter in terms of Order 42 Rule 35 and failed to do so. That was the option available to him at this point. See *Morris Njagi & Another v Mary Wanjiku Kiura (supra)*

#### **LEGAL ANALYSIS**

**The core issue is whether the appeal can be dismissed for want of prosecution before directions are given''**

44. The court notes that the provisions cited in application namely Order 17 Rule 2(3) & Order 51 Rule 1 Civil Procedure Rules 2010 apply to suits but not appeals. However, since the respondent /applicant never raised, I will go to the merit of application.

45. The Respondent submitted that Order 42 Rule 11 and 13 of the Civil Procedure Rules requires that an appellant, within thirty (30) days of filing the appeal, cause the matter to be listed for directions under Section 79B of Civil Procedure Act. Also added that it was the duty of an appellant to cause the appeal to be placed before the judge for directions.

46. In then the case of Haron E Ongechi Nyaberi vs British American Insurance Co Ltd HCCA No 110 of 2001 eKLR (sic) where it was held that:

***“It will be the Appellant who shall really cause the appeal to be listed for directions before a judge by serving the Memorandum of Appeal and serving the Record of Appeal.”***

47. Applicant also The Appellants/Respondents only moved the court for the first time as they claim on 8th March, 2021. This is over 3 years since the appeal was filed. The Appellants/Respondents then moved the court last on 24th April, 2021.

48. On the said date the Appellants/Respondents did not get an opportunity to have directions on the appeal taken but they did not do a follow up to get another date until when the Applicant took a date for the present application two months down the line. This is clear show that the Appellants/Respondents are guilty of lethargy and inertia in prosecuting the appeal.

49. Further the Applicants despite filing their record of appeal early, they did not have the same served upon the Applicant. They waited until the Applicant filed the present application to have the appeal dismissed for want of prosecution to serve the same upon the Applicant.

50. Thus it is submitted that the Appellants/Respondents have never taken prosecution of this appeal seriously and the Applicant’s submission is that the Appellants have failed to prosecute the appeal as required by law by failing to cause the appeal to be listed before a judge for directions within 30 days of filing as required by Section 79B of the Civil Procedure Act and Order 42 Rule 11 of the Civil Procedure Rules, 2010.

51. On his part, the Appellant argued that the Respondent had not demonstrated the prejudice to be suffered if court gives more time to prosecute instant Appeal. Thus asked the court to take note of the delay in the typing of proceedings in the lower court. It was argued that the application herein was premature as directions were not given.

52. In the cases of Jurgen Paul Flach vs Jane Akoth Flach [2014] eKLR wherein Kasango J held that before an appeal can be set down for dismissal for want of prosecution directions ought to have been given.

53. Also the case of Allan Otieno Ofula vs Gurdev Engineering & Construction Ltd [2015] eKLR, Aburili J observed that ***“the right of appeal is (sic) constitutional right and in as much as there has been delay which has not been satisfactorily explained by the appellant”, the court has to weigh the cost and prejudice a respondent is to suffer if the appeal was struck out before it was heard on merits.***

54. **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 fail 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 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.

55. **Section 79B of the Civil Procedure Act** 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”.*

56. *Order 42 Rule 13 of Civil Procedure Rules* provides as follows:

*“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 the 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 the 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).*

57. It is evident from the provisions of *Section 79B of 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* that states as follows:

*“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”.*

58. If the appeal is not summarily dismissed, then the registrar shall notify the appellant who shall then serve the Memorandum of Appeal upon all the respondents within seven (7) days of receipt of the notice from the Registrar in accordance with *Order 42 Rule 12 of the Civil Procedure Rules*.

59. After service of the Memorandum of Appeal, on notice to the parties delivered not less than twenty-one (21) days, the appellant

shall again cause the appeal to be listed before the judge for directions as seen in **Order 42 Rule 13 of the Civil Procedure Rules**.

60. Notably, the procedure for rejection and/or admission of appeal and giving of directions is very well set out in the **Civil Procedure Rules**. However, this procedure does not seem to be strictly followed and differs from one court to another.

61. Invariably, the Registrar issues the notice for admission and directions of appeal after the High Court receives the file and lower court proceedings. The appellant does not seem to have any role in fixing the appeal for directions as contemplated under **Order 42 Rule 11 of Civil Procedure Rules and Order 42 Rule 13 (1) of the Civil Procedure Rules**. It is important to point out that under **Order 42 Rule 13 (4) of the Civil Procedure Rules**, the judge shall not allow a matter to proceed for hearing unless the record of Appeal is duly filed.

62. Once directions are given under **Order 42 Rule 13 of Civil Procedure Rules** and the appellant fails to fix the appeal for hearing, the respondent may fix the same for hearing and/or seek dismissal of the same for want of prosecution under **Order 42 Rule 35 (1) of the Civil Procedure Rules** or the registrar lists the appeal before a judge for dismissal under **Order 42 Rule 35 (2) of Civil Procedure Rules**.

63. **Order 42 Rule 35 (1) of the Civil Procedure Rules** stipulates as follows:

*“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”.*

64. **Order 42 Rule 35 (2) of the Civil Procedure Rules** stipulates as follows: -

*“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”*

65. 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 fail to proceed as per **Order 42 Rule 11 and Order 42 Rule 13 of the Civil Procedure Rules, 2010**.

66. 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 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.

67. Notably, every person is entitled as envisaged under **Article 50 of the Constitution of Kenya** to have a fair trial. The said **Article 50 of Constitution of Kenya** provides as follows: -

*“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”*

68. It therefore follows that every person ought not to be shut out from accessing court or having his day in court. Indeed, the right of a party to enjoy the fruits of his judgment must be weighed against the right of a party to access court to have his dispute heard and determined by a court or tribunal of competent jurisdiction.

69. It was therefore the considered opinion of this court that allowing the present application would be shutting out the Appellant from accessing the court and would be contrary to Article 50 of the Constitution of Kenya.

*(i) Thus court dismisses the application with costs being in cause.*

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 20TH DAY OF DECEMBER, 2021.

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**CHARLES KARIUKI**

**JUDGE**



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