Cheruiyot v Lima Limited & 3 others (Civil Appeal 67 of 2016) [2023] KEHC 365 (KLR) (30 January 2023) (Ruling)

Neutral citation: [2023] KEHC 365 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL 67 OF 2016

TM MATHEKA, J

JANUARY 30, 2023

BETWEEN

ALLAN KIPRONO CHERUIYOT .... APPLICANT

AND

LIMA LIMITED .... 1ST RESPONDENT

WILLIAM OGOLA .... 2ND RESPONDENT

AFRIC PAK INTERNATIONAL LTD .... 3RD RESPONDENT

JAMESAN INVESTMENT .... 4TH RESPONDENT

RULING

1. The Applicant vide a Notice of Motion dated 11th June, 2019 brought pursuant to Section 3,3A of the *Civil Procedure Act* Cap 21 Laws of Kenya, Order 51 Rule 1, Order 42 Rules 35(1) and (2) of the *Civil Procedure Rules* seeks for Orders: -
    1. That this Appeal be dismissed for want of prosecution.
    2. That order of stay of execution be vacated.
    3. That the costs of this Application and entire Appeal be provided.
2. The Application is premised on the grounds on its face and supported by an Affidavit of Allan Kiprono Cheruiyot sworn on June 10, 2019. He deposed that the Appellants filed a Memorandum of Appeal on June 21, 2016 which was used to seek stay of execution pending appeal in Molo Chief Magistrate's Civil Case Number 30 of 2013.
3. That since the appeal was filed the appellants have never taken any steps to prosecute it and it is now 2 years 5 months since the appeal was filed.

4. He deposed that any further delay of this appeal delays the enjoyment of fruits of his judgement in Molo Chief Magistrate's Civil Case Number 30 of 2013.

5. He stated that he requested the Appellants to serve him with the Record of Appeal but they have failed to avail the same and that a letter following up on the prosecution of the appeal that he sent to the Appellants has never been responded to.

6. He averred that justice delayed is justice denied and that further pendency of this appeal erodes the tenets of expeditious dispensation.

7. The Respondents opposed the application. Their Advocate one Victor Ng'ang'a swore a Replying Affidavit on April 4, 2022. He deposed that the Application herein is misconceived, premised on misapprehension of law and facts and prayed that the same be dismissed with costs to the respondents.

8. He averred that they have deposited the entire decretal sum herein in court as was directed by the lower court on June 30, 2016 and that the slight delay in compiling and filing the Record of Appeal has been occasioned by the delay in obtaining proceedings from the lower court.

9. It was his deposition that the respondents have constantly followed up with the lower court for the relevant proceedings via their several correspondences but the same have never been responded to.

10. He stated that the aforesaid delay is not unreasonable or inordinate as to prejudice the applicant as he can always be compensated by an award of costs.

11. He deponed that the appellants have an arguable appeal and should be given an opportunity to prosecute the same on merit and that they are willing to abide by the orders of this court.

12. The Application was canvassed through written submissions.

The Applicant's Submissions

13. The Applicant submitted that under Order 35 rule 1 and 2 this court is vested with power to dismiss an appeal which has stayed for more than one year without action or any step being taken.

14. He argued that the only letter seeking certified copies of the proceedings was done on August 8, 2016 and nothing happened until June 8, 2021. That this doesn't demonstrate appellants' interest in prosecuting the appeal.

15. He submitted that six-year delay is inordinately long and cannot be blamed on court.

16. He prayed that the orders sought be granted.

Appellants'/respondents' Submissions

17. The appellant submitted there is no likelihood that the Applicant will suffer prejudice as they have already deposited the entire decretal sum of Kshs 235,350/- in court in fulfillment of condition for grant of stay of execution and as such the Applicant's interest are secured.

18. It was the Appellants submission that on their part they stand to lose their right of Appeal if their Appeal is not heard and determined on merit.

19. They submitted that the court has to strike a balance between the competing rights of the rival parties as the scenario herein. They referred this court to the case of *Njai Stephen v Christine Khatiala Andika* [2019] eKLR where the court held that every person ought not to be shut from accessing court or

having his day in court and that the right of a party to enjoy the fruits of his judgement must be weighed against the right of a party to access court to have his dispute determined by a competent court.

20. The appellants further submitted that the appeal is not ripe for dismissal for want of prosecution since directions is yet to be taken. In support of this position they relied on the cases of *Jurgen Paul Flach v Jane Akoth Flach* [2014] eKLR, *Kirinyaga General Machinery v Hezekiel Muriithi Ireri* [2007] eKLR and *Elem Investment Ltd v John Mokora Otwoma* [2015] eKLR where courts stated that an appeal cannot be dismissed for want of prosecution before directions have been issued.

21. The appellants in further urging this court not to strike out appeal placed reliance on the case of *Allan Otieno Osula v Gurder Engineering & Construction Ltd* [2015] eKLR where the court declined to strike out an appeal where delay had not been satisfactorily explained on grounds that right of appeal is a constitutional right and the court should weigh the costs and prejudice that is likely to be occasioned to the appellant as well as the respondent if the appeal is struck out without affording the appellant an opportunity to be heard on merit. The court invoked the overriding objective principle and found that albeit there was delay, it is in the interest of justice that the appeal should not be struck out as the respondent can adequately be compensated by an award of costs.

22. The appellants submitted that if the appeal is dismissed they will be denied the benefit of substantive justice as envisaged under Article 159 of the *Constitution 2010*.

Analysis & Determination

23. The only issue for determination is whether this court should dismiss the Appeal for want of prosecution.

24. Dismissal of appeal is provided for under Order 42 Rule 35 of the *Civil Procedure Rules* and which is the provision under which the instant application is brought.

25. 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.”

26. 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”.

27. The respondents in their submissions submitted that the application is premature as directions had not been given in this appeal as required by the law. As a general rule, appeals cannot be dismissed under Order 42 Rule 35 (1) unless directions have been given under Order 42 Rule 11 of the *Civil Procedure Rules*. The legal position in this respect was well articulated by Hon. Justice J. Kamau in *Pinpoint Solutions Limited and Another v Lucy Waithegeni Wanderi (as the Legal Administrator of the Estate of James Nyanga Muchangi)* [2020] eKLR The Learned Judge held that: -

    20. 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 Order 42 Rule 13 of the Civil Procedure Rules, 2010.

21. 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…"

28. In the instant case, the lower court file has not been forwarded to this court and there is no indication that such directions have been issued. Under Order 42 Rule 35(1), the respondent in an appeal cannot apply for dismissal of the appeal for want of prosecution unless within three months after the giving of directions under rule 13 the appeal has not been set down for hearing by the appellant.

29. However, where there are sufficient reasons advanced, the court can invoke its inherent powers as bestowed on it by the *Civil Procedure Act* and the Rules and dismiss an appeal for want of prosecution even where directions have not been given.

30. Is this is a proper case for the court to invoke its inherent powers and dismiss the appeal herein notwithstanding that directions have not been given?

31. I take the position taken by Odunga J (as he then was) and Onyancha J as cited by Odunga J in *China Road & Bridge Corporation v John Kimenye Muteti* [2019] eKLR; He states

    19. It is therefore clear that it is upon the appellant to trigger the process of the giving of directions and an appellant who sits on his/her laurels and when confronted with an application to dismiss the suit contends that no directions have been given when he has not moved the court to give the said directions cannot but face censure from the court. To contend that an application for dismissal of an appeal is premature for failure to give directions when the appellant himself has not moved the court to give directions to my mind cannot be taken seriously where the delay is contumelious. Nothing bars the court from dismissing an appeal even where no directions have been given. Accordingly, I agree with the opinion of Onyancha, J in the case of Protein & Fruits Processors Limited & Another v Diamond Trust Bank Kenya Limited [2015] eKLR, Civil Appeal 9 of 2007 that;

    > "Three years later the applicant is seeking dismissal of the appeal. It is not disputed that directions have not been given in this appeal, in my view the appeal cannot therefore be dismissed under Rule 35 (1) since the appeal has not be placed before the judge for direction. As it is, the appeal is incomplete and the Appellants have not furnished the court with the record of appeal. The only alternative the applicant is left with is under Rule 35(2) which requires the Deputy Registrar to list the appeal for dismissal by a Judge. In the current application the applicant is seeking an order that the Deputy Registrar be directed to list the appeal for dismissal before a judge in chamber. I have no reasons not to grant the prayer, the appeal hearing has been pending in court for six years and it is only fair if the matter can be finalised. In the circumstances of this matter I will not order the Deputy Registrar to place the file before a judge for dismissal; instead I will dismiss the appeal. This court has the inherent discretion to do so under Section 3A, to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process. The court is also enjoined under Article 159(2) b of the Constitution to do justice without any delay."

32. And for emphasis I add from the same case;

21. Apart from the foregoing considerations, on 23rd July 2009 the Statute Law (Miscellaneous Amendments) Act No 6 of 2009 came into force. The said Act introduced inter alia sections 1A and 1B in the *Civil Procedure Act*. According to section 1A(2) "the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective" while under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties. The said provisions have since their promulgation received judicial interpretation both by the High Court and the Court of Appeal. In China Road & Bridge Corporation v John Kimenye Muteti [2019] eKLR Stephen Boro Gitiha v Family Finance Building Society & 3 Others Civil Application No Nai 263 of 2009, the Court of Appeal held inter alia that:

> "on 23rd July 2009 both the *Civil Procedure Act* and the *Appellate Jurisdiction Act* were amended to incorporate sections 1A and 1B in the *Civil Procedure Act* and sections 3A and 3B in the case of the *Appellate Jurisdiction Act*. These provisions incorporate into the civil process an overriding objective which has also been defined. All courts are required when interpreting the two Acts and the rules made under both Acts or exercising the power under both Acts and the rules to ensure that in performing both functions the overriding objective is given the pride of place including the principal aims of the objective...The overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with and whatever is in conflict with it must give way. A new dawn has broken forth and we are challenged to reshape the legal landscape to satisfy the needs of our time. The court must warn the litigants and counsel that the courts are now on the driving seat of justice and the courts have a new call to use the overriding objective to remove all the cobwebs hitherto experienced in the civil process and to weed out as far as is practicable the scourge of the civil process starting with unacceptable levels of delay and cost in order to achieve resolution of disputes in a just, fair and expeditious manner. If the often talked of backlog of cases is littered with similar matters, the challenge to the courts is to use the new "broom" of overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory applications and instead to adjudicate on the principal issues in a full hearing if possible".

33. That said the court has discretion to dismiss a suit for want of prosecution. It is up to the parties to provide the court with the material to have the discretion exercised either in their favour or against the opposing side. The Court is however bound to take into consideration all the circumstances of the case which include the nature of the claim, the period of the delay and the prejudice to be suffered if any.

34. The respondents instituted their Memorandum of Appeal on June 21, 2016 and to date no record of appeal has been filed or robust actions taken in this matter.

35. The respondents have occasioned the delay in filing their record of appeal to delay in obtaining certified proceedings from the lower court. They have annexed letters dated August 8, 2016 and June 8, 2021 requesting to be furnished with typed proceedings and certified copies of judgement and decree. The Appellants Between June 8, 2016 to June 8, 2021 did nothing to comply with the statutory requirements of Section 79(B) of the *Civil Procedure Act* of kicking off the process for getting directions. Between these periods the appellant did nothing nor reminders to court requesting for typed and certified proceedings. There has been inordinate delay on their part and total inactivity

between the aforesaid periods demonstrates lack of seriousness on the part of the Appellants. Litigation must surely at some point come to an end.

36. The court cannot wring its hand in helplessness bound by the provisions of Order 42 of the *Civil Procedure Code* yet it is empowered by Sections 1A, 1B and 3A of the *Civil Procedure Act* to act in the exercise of discretion to fulfil the overriding objective of the *Civil Procedure Act*.

37. That said there is the other side of the coin where the court must consider the prejudice that might be suffered by the appellant if not granted his day in court. In this case the appellant complied with the order to deposit the decretal sum with the court. The other thing is that they are prepared to pay costs. This court is also alive to the typing backlog in some courts. Courts should also be accountable where a party has applied for typed and certified proceedings and judgment. The courts ought to have a system that enables it to be proactive so that it is not left to a party to keep sending reminders to the court or to do anything once their request has been acknowledged. The court ought to be able to give an applicant for such things an indication when the same will be ready and to inform the party that their proceedings and judgment are ready for collection. It can become very expensive for a party to keep going to the registry to check whether the proceedings ready for collection.

38. In the circumstances it is only fair that the appellant gets the opportunity to prosecute the appeal.

39. The appellant is directed to file and serve the Record of Appeal within 30 days hereof. In default the appeal will stand dismissed with costs to the respondent.

40. The applicant/respondent will have the costs of this application assessed at Kshs 20,000 to be paid before the hearing off the appeal.

41. Orders accordingly.

DATED, SIGNED AND DELIVERED VIA EMAIL THIS 30TH DAY OF JANUARY, 2023.

MUMBUA T. MATHEKA

JUDGE

C/A Jennifer

Mboga G. G & Company Advocates,

Kimondo Gachoka & Co. Advocates