



**Bottlers v Kamau t/a Pety Investments Hotel (Civil Suit 204 of 2017)  
[2023] KEHC 27553 (KLR) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 27553 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL SUIT 204 OF 2017  
F WANGARI, J  
SEPTEMBER 29, 2023**

**BETWEEN**

**COASTAL BOTTLERS ..... APPELLANT**

**AND**

**PETER KAMAU T/A PETCY INVESTMENTS HOTEL ..... RESPONDENT**

**RULING**

1. This court issued a Notice to Show Cause why the case should not be dismissed for want of prosecution (NTSC), under Order 42, Rule 35 of the *Civil Procedure Rules*, Chapter 21 Laws of Kenya. The Notice dated 7/3/2023 was issued to both the Appellant and the Respondent.
2. Upon service of the application, the Respondents filed an Affidavit dated 2/5/2023 opposing the NTSC on grounds that the appeal had been filed on 6/10/2017 but there were frustrations in getting copies of the court proceedings. A series of letters seeking to know the status of the typed proceedings, were attached as proof of follow-up with the court registry.
3. The Respondent filed an Affidavit dated 25/4/2023 in support of the NTSC stating that the Appellant had no good explanation as to why no action had been taken for over 6 years. The Respondent stated that he was greatly disadvantaged by the pendency of the appeal for the 6 years' period. He prayed that the appeal be dismissed.
4. The court directed that the matter be disposed of by way of written submissions. Both parties complied.

**Analysis and determination**

5. I have considered the application, and filed submissions together with the authorities relied upon by the parties, as well as the law and in my respectful view, there is only one issue for determination which



is whether the appellant has made out a case for not dismissing the appeal for want of prosecution. Corollary to this finding is the issue of costs.

6. 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”.

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”

7. Order 42 Rule 13 (1) 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.

8. From the court records, there were no directions that had been given in this appeal. Since the filing of the Memorandum of Appeal on 10/10/2017, no action has been taken by the Appellant. I note that the Appellant had written to the Executive Officer, Mombasa Court enquiring about the lower court proceedings subject of this appeal.

9. The letter dated 13/7/2017 and 24/2/2020 have been received by the court registry and the counsel for the Respondent. The letters dated 3/10/2022 and 25/10/2020 though addressed to the court, they have no receipt stamps from the court, nor from the Respondent’s advocates who were copied. Even though the letters were indeed sent, the Appellants took no action thereafter until the NTSC was issued 5 months after the last letter was allegedly sent.

10. The essence of dismissal of suits for want of prosecution is the need for expeditious dispensation of suits. In Mobile Kitale Service Station v Mobil Oil Kenya Limited & another [2004] eKLR, it was held as follows;

“I must say that the Courts are under a lot of pressure from backlogs and increased litigation, therefore it is in the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice caused by delay would be a thing of the past. Justice would be better served if we dispose matters expeditiously. Therefore, I have no doubt the delay in the expeditious prosecution of this suit is due to the laxity, indifference and/ or negligence of the plaintiff. That negligence, indifference and/or laxity should not and cannot be placed at the doorsteps of the defendant. The consequences must be placed on their shoulders.”

11. This court has a duty to determine the application on merits. In Mwangi S. Kimenyi v Attorney General and Another, Civil Suit Misc. No. 720 of 2009, the court on considering whether or not the suit should be dismissed for want of prosecution stated as follows: -

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 action straight away. However, it should be understood that prolonged delay alone should not prevent the



court from doing justice to all the 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.

13. It is a fact that the Plaintiff took steps in following up the proceedings, though there was delay on the part of the Applicant in the follow-ups, the fact that the matter had not been fixed for directions under Order 42 Rule 13 of the *Civil Procedure Rules*, and in the interest of justice, I hereby grant the Applicant the benefit of doubt and grant him an opportunity to put its house in order.
14. On the issue of costs, Section 27 of the *Civil Procedure Act* decrees that the same follows the event. However, the court retains its discretion to either award or not to award costs. In this case, each party is to bear its own costs.
16. Following the foregone discourse, the upshot is that the following orders do hereby issue;
  - a. The Appellant has shown cause as to why the appeal should not be dismissed.
  - b. That the Record of Appeal be filed and served within the next 30 days after the delivery of this ruling.
  - c. In default of (b) above, the appeal stands dismissed.
  - d. Each party to bear its own costs.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 29<sup>TH</sup> DAY OF SEPTEMBER, 2023.**

.....

**F. WANGARI**

**JUDGE**

In the presence of;

Nzisa Advocate for Applicant/ Appellant

M/S Monari Advocate h/b for Omwenga Advocate for Respondent

Barile, Court Assistant

