REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

MACHAKOS

(Coram: Odunga, J)

CIVIL APPEAL NO. 108 OF 2019

ROBERT MUTYANGO MUSAU.....APPELLANT/RESPONDENT

VERSUS

MULANDI KISABITI & ASSOCIATES.....1ST RESPONDENT/APPLICANT

UPSTATE KENYA AUCTIONEERS.....2ND RESPONDENT/APPLICANT

(Being an appeal from the Ruling and Order of Hon. C.A Ocharo

Senior Principal Magistrate at Machakos dated 6th August, 2019

in Civil Suit No.133 of 2019)

BETWEEN

ROBERT MUTYANGO MUSAU.....PLAINTIFF

VERSUS

MULANDI KISABITI & ASSOCIATES.....1ST DEFENDANT

UPSTATE KENYA AUCTIONEERS.....2ND DEFENDANT

RULING

1. The Appellant/Respondent instituted this appeal vide the Memorandum of Appeal dated 13th August, 2019 and filed on 15th August, 2019 together with an application for stay seeking to restrain the Respondents/Applicants from distressing rent pending the hearing and determination of the appeal. The appeal arose from the decision of the Senior Principal Magistrate at Machakos dated 6th August, 2019 in Civil Suit No.133 of 2019 in which the trial court upheld the Respondents/Applicants preliminary objection for lack of jurisdiction.

2. The subject of this ruling is a Motion taken out by the 1st and 2nd Respondents/Applicants dated 11th May, 2021 seeking the appeal be dismissed for want of prosecution. The application is supported by the supporting affidavit of the Applicants advocate, **Ambrose Muthama Mulandi** sworn on 11th May, 2021.

3. According to the deponent, the Appellant has not taken any steps to file the Record of Appeal since the Memorandum of Appeal was filed. It was averred that the matter was last in court on 13th March, 2020 and that since then the Respondent has failed to take any steps to prosecute the appeal. According to the Applicants, they continue to suffer unnecessary anxiety due to the delay in prosecution of this suit. He averred that two and half years have lapsed and the delay prejudices them yet they were wrongly sued by the Appellant since they were acting on instructions from their client. They sought that the application be allowed.

4. In opposition to the Applicant's application, the Appellant swore a replying affidavit on 9th November, 2021 wherein he disputed the averment that he has not taken any steps to file the Record of Appeal and asserted, based on legal advice, that his Record of Appeal was filed

and served upon the Applicants on 27th August, 2021. It was therefore his position that the application dated 11th May, 2021 as the appeal came up for directions on 30th November, 2020 and the application for dismissal for want of prosecution was filed on 12th May, 2021 before the expiration of one year as provided under Order 17 of the ***Civil Procedure Rules***. As the Record of Appeal has been filed, his position was that the application is overtaken by events since.

5. The Appellant expressed his desire to prosecute the appeal since the Record of Appeal was filed on 23rd August, 2021 and served on 27th August, 2021. He averred that the delay to file the Record of Appeal was beyond their control as it was due to the fact that his advocate's office file went missing.

6. The Appellant/Respondent therefore urged the Court to dismiss the application dated 11th, May, 2021 with costs so that the parties may take directions on the appeal.

7. While reiterating the averments in the supporting affidavit, it was submitted on behalf of the Applicants that Order 17 Rule 2(1) of the ***Civil Procedure Rules, 2010*** provides that in any suit in which no application has been made or steps taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit. Reliance was placed on **Rajesh Rughani vs. Fifty Investment Ltd & Another [2016] eKLR** where the Court of Appeal cited the case of **Ivita vs. Kyumbu (1984) KLR 441** where the test for dismissal of suit for want of prosecution was held to be whether the delay is prolonged and inexcusable and if it is, can justice be done despite the delay. According to the Applicants, delay defeats justice and equity helps the vigilant but not the indolent. According to the Applicants, the Appellants slept on his rights when he was given time to prosecute his appeal. It was submitted that the delay of two years is inordinate. While submitting that litigation must come to an end, the Applicants relied on Article 159(2) (b) of the Constitution, 2010 which provides that Justice shall not be delayed.

8. According to the Applicants the ends of justice will not be served in keeping the Appellant's appeal alive when the Appellant has not been in interested in taking any action since the filing of the appeal on 15th August, 2019 without any cogent explanation for the delay in prosecuting the appeal being offered hence the Applicants' application dated 18th May, 2021 ought to be allowed and the appeal be dismissed.

9. On behalf of the Respondent, the averment in the replying affidavit were reiterated and it was submitted under Order 42 Rule 35(1) of the ***Civil Procedure Rules, 2010*** an appeal cannot be dismissed before direction have been given by court. It was submitted that the Respondent can only apply, if after directions have been given, the appellant has not taken action to set down the appeal for hearing. It was submitted that the second option is where the Registrar with notice to the parties shall place the appeal before the judge for dismissal is one year after service of memorandum of appeal the appeal has not been set down for hearing.

10. According to the Respondent, in the first scenario the Respondent is given the option to either list the appeal for hearing or apply for its dismissal but the appeal can only be dismissed if it has been admitted and directions have been given. It is submitted that there is no evidence that the appeal had been admitted and placed before the judge for directions. Reliance was placed on the case of **Brenda Nawekulo Uluma vs. Robert Otieno Matete [2020] eKLR** in which the case of **Morris Njagi & Another vs. Mary Kiura [2017] eKLR** was cited with approval and in which the court held that a party can only apply for dismissal where directions have been given under Order 42 Rule 35(1) of the ***Civil Procedure Rules, 2010***.

11. According to the Respondent, the application herein is premature in that it was filed before the expiration of one year which contravenes Order 42 Rule 35(2) of the ***Civil Procedure Rules, 2010***. It was submitted that the record of appeal has been duly filed and served before the expiry of one year form the date of directions were given hence a clear demonstration that the Respondent is desirous to prosecute the appeal.

12. It was submitted that the application seeking dismissal of the appeal is fatally and incurably defective in form and substance, incompetent, bad in law, misconceived and an abuse of the court process and the same ought to be dismissed with costs.

Determination

13. I have considered the issues raised in this application. Since the matter before me is an application for dismissal of the appeal for want of prosecution one needs to consider the general principles guiding the dismissal of suits for want of prosecution since an appeal is pursuant to Rule 2 of the ***Civil Procedure Rules*** a "suit" since it is commenced in a manner prescribed by the Rules Committee by way of Memorandum of Appeal.

14. The principal behind the dismissal of suits was set out in the case of **Sheikh vs. Gupta and Others Nairobi HCCC No. 916 of 1960 [1969] EA 140** where **Trevelyan, J** expressed himself as follows:

> **"The purpose of rule 6 of Order 16 is to provide the court with administrative machinery whereby to disencumber itself of case records in which parties appear to have lost interest…In this matter the claim is now eight years, less four months, old and the plaintiff, so far as the court is concerned, has done nothing for more than three years to say the least. There is a *prima facie* negligence on the part of the lawyers or inexcusable delay on the part of the plaintiff or both, on his own say so. In deciding whether or not to dismiss a suit under rule 6 a court will be slow to make an order if it is satisfied that the hearing of the suit can proceed without further delay, that the defendant will suffer no hardship, and that there has been no flagrant and culpable inactivity on the part of the plaintiff…In the instant case there has been both culpable and flagrant inactivity on the part of the plaintiff in respect of his smallish claim and he cannot bring himself within the set of circumstances as stated...It is the duty of the plaintiff's adviser to get on with the case. Public policy demands that the business of the courts should be conducted with expedition. It is of the greatest importance in the interest of justice that these actions should be brought to trial with reasonable expedition."**

15. In the case of **Et Monks & Company Ltd vs. Evans [1985] KLR 584 Kneller, J** (as he then was) stated as follows:

> **"The court when pondering over an application to dismiss a suit for want of prosecution should among other things ask whether the delay was lengthy, has it made a fair trial impossible and was it inexcusable? Whether or not the application should be allowed is a matter for the discretion of the judge who must exercise it, of course, judicially. Each turns on its own facts and circumstances…If an action is dismissed for want of prosecution the plaintiff has certain options if it is not his fault. It may sue its advocate for negligence unless it has caused or consented to the delay which has resulted in the action being dismissed for want of prosecution. Advocates for the most part insure against the risk of liability for professional negligence. The plaintiff then has a remedy not against the defendants but against its own advocates. Should the trial proceed despite a prolonged delay the plaintiffs may not succeed because it cannot after such a long time establish liability and then it has no remedy against anyone else. If the plaintiff has caused or consented to the delay which led to its suit being dismissed for want of prosecution then it must blame itself…The court may consider the matter of limitation and whether or not the plaintiff might probably succeed in the action for negligence against its lawyers and might prefer to be slow in deciding to dismiss for want of prosecution, but looking at the matter as a whole may order the application be dismissed and award the defendants the costs of the suit and of the application…It is the duty of a plaintiff to bring his suit to early trial, and he cannot absolve himself of this duty by saying that the defendant consented to the position. A plaintiff who, for whatever reason, delays for over six years before bringing his suit for trial can expect little sympathy…If the court is satisfied that there will be prejudice to the defendant as a result of a delay of ten years if the case proceeds and it would be impossible to have a fair trial the suit dismissed for want of prosecution since the principle witness for the defence was dead and 3 others had left Kenya and their whereabouts were unknown."**

16. In my view the principles guiding the dismissal of suits for want of prosecution apply *mutatis mutandi* to dismissal of appeals for want of prosecution. The provision that deals with dismissal of appeals for want of prosecution is however Order 42 Rule 35 of the ***Civil Procedure Rules*** and not Order 17 Rule 2(3) of the Rules which is what the Applicants cited. The former provides as follows:

> ***(1) 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.***
>
> ***(2) 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."***

17. **When are directions to be given? 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.***

18. What can be gleaned from the foregoing is that the appellant is required, within thirty days of filing the appeal which is instituted by the filing of the memorandum of appeal, to list the matter before the Judge for directions. Unlike the deleted provisions, where the onus was on the Court to list the appeal for directions, the burden is now on the appellant to do so. The rule is expressed in mandatory terms and therefore a party who fails to do so runs the risk of having the appeal dismissed for failure to take a necessary step in the proceeding. This is a different thing from saying that the appeal is being dismissed for want of prosecution.

19. Where however directions are issued, then Order 42 Rule 35(1) of the ***Civil Procedure Rules*** kicks in and the appellant is then required to, **within three months thereafter set the appeal down for hearing. If he fails to do so the Respondent, at his discretion, may do so or apply to have the appeal dismissed. However, if no step is taken by either party along those lines within one year after the service of the memorandum of appeal, the Court is obliged upon notice to the parties, list the appeal before a judge in chambers for dismissal.** Order 42 Rule 12 provides that:

> ***After the refusal of a judge to reject the appeal under section 79B of the Act, the registrar shall notify the appellant who shall serve the memorandum of appeal on every respondent within seven days of receipt of the notice from the registrar.***

20. Though this provision is expressed in a negative terms, in line with the language expressed in section 79B of the ***Civil Procedure Act***, I take it to mean that after the Court admits the appeal under section 79B of the ***Civil Procedure Act***, the registrar is required to notify the appellant to serve the memorandum of appeal on every respondent within seven days of receipt of the said notification. Therefore, at the time of the admission of the appeal, which may well be at the time of the giving of directions, the Court is expected to direct that the Registrar notifies the appellant to serve the memorandum of appeal on all the respondents which service ought to be effected within 7 days of such notification.

21. In my view, where directions are given by the Court as to the time for service of the memorandum of appeal, that suffices for the purposes of invocation of this provision and it would be no excuse by the Appellant that through his own default, the memorandum of appeal has not been served.

22. A cursory reading of Rule 35(1) of the said Rule reveals that the Respondent can only apply for dismissal of appeal, if, after directions have been given, the appellant has not taken action to set down the appeal for hearing, while under sub-rule (2), it is the Registrar on notice to the parties, who places the appeal before the Judge for dismissal.

23. Dealing with the said provision, **Odeny J.** in **Brenda Nawekulo Ulum vs. Robert Otieno Matete [2020] eKLR** held that:-

> **"Order 42 Rule 35(1) is to the effect that an appeal cannot be dismissed before the directions have been given by the court.**

The Respondent can only if, after directions have been given, the appellant has not taken action to set down the appeal for hearing. In the case of Morris Njagi & Another vs.Mary Wanjiku Kiura[2017]eKLR the court held:-

'A party can only apply for dismissal where directions have been given. This is under Order 42 Rule 35(1) Civil Procedure Rules. I have already pointed out that no directions have been given. The appeal has to be admitted first before it can be listed for hearing. The provision under which this appeal could be dismissed for want of prosecution is Order 42 Rule 35(2). This provision could not be invoked by the applicant. The applicant did not write to request the registrar to list the appeal for dismissal…I am of the view that since no directions have been issued in the appeal the applicant(respondent) cannot move the court to dismiss the appeal for want of prosecution.'"

24. In the same vein in the case of **Rosarie (EPZ) Limited vs. Stanley Mbithi James (2015) eKLR** the court stated that:-

"since under Order 42 Rule 35(1) the appeal cannot be dismissed before directions have been given the applicant should have taken advantage of Order 42 rule 35(2) and cause the registrar to list the appeal for dismissal. If there had been such correspondences which the registrar ignored, I would have been inclined to the application since however, there is no evidence that the applicant had requested the registrar to list the matter in terms of Order 42 rule 35(2) and the latter failed, I find it difficult to accede to the application."

25. **Aburili J.** in **Elem Investment Ltd vs. John Mokora Otwoma [2015] eKLR** pitched in as hereunder:

"A reading of the above provision (Order 42 Rule 35) shows that it is clear that an appeal can be dismissed for want of prosecution in two instances. Firstly, where there has been failure to list the appeal for hearing three months after directions have been given under Order 42 Rule 13 of the CPR or, secondly, if after one year of service of the Memorandum of Appeal the appeal has not been listed for hearing.

In these two scenarios, the procedure is different. In the first scenario, the Respondent is given the option to either list the appeal for hearing or to apply for its dismissal. Under that scenario however, the appeal can only be dismissed if it has been admitted and directions have been given."

26. The reasoning in the above cases is therefore that directions must have been given in the appeal for the Respondent to seek its dismissal for want of prosecution and if directions have not been given, then the application seeking the dismissal of the appeal is premature.

27. The question that arises is whet is the Court to do with an appellant who fails to serve the memorandum of appeal or fix the appeal for directions. In my considered view, since it is upon the appellant to trigger the process of the giving of directions 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 when no directions have been given in the exercise of its inherent powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. I therefore associate myself with **Musyoka J**. in **Abraham Mukhola Asitsa vs. Silver Style Investment Company Ltd [2020] eKLR** where the Learned Judge at paragraph 12 stated:-

"From the authorities above, it would appear that an appeal cannot be dismissed for want of prosecution before directions have been taken. However, I am not persuaded that there is any justification, for the party to file appeal, and thereafter go to sleep. An appeal is not filed for the sake. 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 appeal and goes to sleep and takes no action on it for a long time, cannot hide under the above 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 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 untenable position. I believe there is inherent power to dismiss such appeals."

28. Accordingly, I agree with the opinion of **Onyancha, J** in the case of **Protein & Fruits Processors Limited & Another vs. 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."

29. The Applicants herein are perfectly entitled to move the court for the dismissal of the appeal. However as indicated above the decision to whether or not to dismiss a suit for want of prosecution is an exercise of discretion and both parties to the suit are under a duty to disclose material upon which the Court is to exercise its discretion. Whereas the Respondent in an appeal has no obligation to state the reasons for seeking the dismissal of the suit as long as the application falls within the parameters of dismissal, it must be remembered that in deciding whether or not to dismiss the suit or appeal the Court will take into account the nature of the claim, the period of the delay and the prejudice to be suffered. In other words, the Court will take into account all the circumstances of the case. In exercising the discretion, it is my view that prejudice is the most important consideration in the exercise of discretion in such matters.

30. 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 **Stephen Boro Gitiha vs. 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."**

31. Again in **Kenya Commercial Bank Limited vs. Kenya Planters Co-Operative Union Civil Application No. Nai. 85 of 2010** the same Court held that:

> **"where there is a conflict between the statute (overriding objective principle) and a subsidiary legislation (rules of the court) the statute must prevail. Although the rules have their value and shall continue to apply subject to being O2 complaint, the O2 principle is not there to fulfil them but to supplant them where they prove to be a hindrance to the O2 principle or attainment of justice and fairness in the circumstances of each case."**

32. Similarly, in **Kenya Commercial Finance Company Limited vs. Richard Akwesera Onditi Civil Application No. Nai. 329 of 2009** the Court expressed itself as follows:

> ***"the applicant's submissions that the omission to include primary documents rendered the appeal incurably defective would have had no answer to them if they were made before the enactment of section 3A and 3B of the Appellate Jurisdiction Act...*** **The advantage of the CPR over the previous rules is that the court's powers are much broader than they were. In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out.** ***In applying the principle or concept of overriding objective, each case must be viewed on its own peculiar facts and circumstances and it would be a grave mistake for anyone to fail to comply with well settled procedures and when asked why, to simply wave before the court the provisions of sections 3A and 3B of the Appellate Jurisdiction Act. The Court still retains an unqualified discretion to strike out a record of appeal or a notice of appeal; the only difference now is that the Court has wider powers and will not automatically strike out proceedings. The Court, before striking out, will look at available alternatives."***

33. What the said provisions as well as the authorities relating thereto mean is that the Court in determining any matter under the ***Civil Procedure Act*** and the Rules made thereunder must strive to give effect to the said overriding objective and that where there are alternative options available to striking out or dismissal of a suit, the Court ought to defer to those alternatives as much as possible before resorting to the drastic step of terminating the suit.

34. *This is not to say that the Court should nolonger dismiss a suit for want of prosecution. Each case must turn on its own circumstances and where it is shown by credible evidence that as a result of the delay, no fair and meaningful trial can possibly take place, the Court will not hesitate in dismissing the suit. In this case no evidence has been presented to show that that is the position. Accordingly, the C*ourt must be guided by the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie. The law is now that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should always opt for the lower rather than the higher risk of injustice. See **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.**

35. In my view since no serious prejudice is alleged on behalf of the Respondents in the appeal whose record has now been filed I adopt the wise words of **Chesoni, J** (as he then was) in the case of **Ivita vs. Kyumbu [1984] KLR 441**, that the test to be applied by the courts in an application for the dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and, if it is, whether justice can be done despite the delay and that even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest

available time since it is a matter in the discretion of the Court.

36. Accordingly, I decline to dismiss the appeal at this stage. The costs of this application are however awarded to the Respondents in the appeal in any event.

Read, signed and delivered in open Court at Machakos this 26th day of April, 2022

G V ODUNGA

JUDGE

Delivered the absence of the parties.

CA Susan