



Quickhard Steam & Equipment Limited v Ecobank Kenya Limited (Civil Appeal 147 of 2014) [2022] KEHC 18114 (KLR) (Civ) (24 November 2022) (Ruling)

Neutral citation: [2022] KEHC 18114 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 147 OF 2014

DO CHEPKWONY, J

NOVEMBER 24, 2022

BETWEEN

QUICKHARD STEAM & EQUIPMENT LIMITED PLAINTIFF

AND

ECOBANK KENYA LIMITED DEFENDANT

RULING

1. This ruling relates to a notice to show cause (NTSC) dated May 16, 2022, why the appeal herein should not be dismissed for want of prosecution. The notice to show cause was taken out and served upon the parties by the learned counsel, who were directed to canvass the same by way of oral submissions on June 3, 2022, with Mr Amimo appearing for the appellant and M/S Ikonge appearing for the respondent.
2. According to Mr Amimo, the suit ought not be dismissed since the appellant is still interested in prosecuting the appeal which in his view has a high chance of success. He submitted that the appellant's counsel had lost his file and was yet to reconstruct another file. He attributed the delay exhibited to the said allegations and asked the court not to punish the innocent appellant for mistakes of counsel. In his view, the respondents would not suffer loss beyond monetary compensation and urged the court to consider dismissal of the appeal as the last resort. He urged the court to grant them thirty (30) days to enable the appellant set the appeal for hearing.
3. On the other hand, M/S Ikonge counsel for the respondent sought the court to consider the delay as inordinate since they were last in court sometimes in November, 2015. In his view, the explanation tendered is not sufficient to explain the delay and in that vain, she asked the court to dismiss the appeal.



Analysis

4. I have accordingly considered the rival submissions by counsel for the parties. The record shows that the appeal was last in court on December 3, 2015 where a ruling on stay of the judgment subject of the appeal was delivered in favour of the appellant. In this court's view, the existence of those stay orders are an explanation of the appellant's inertia for all that long.
5. Nonetheless, considering the length of delay which is about six (6) years, it implies that the appeal is ripe for canvassing this notice to show cause pursuant to order 42 rule 35(2) of the Civil Procedure Rules, cap 21 Laws of Kenya, which provides that:-

“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.”
6. It is a common ground that the appeal herein was lodged on April 16, 2014 and there has been about six (6) years with no action being undertaken to prosecute the same. Then, the question which this court has to grapple with, is whether the reasons advanced by the appellant's counsel for not taking any steps to have the appeal prosecuted are plausible.
7. In as much as appellant's counsel attempts to shift the blame onto the counsel for losing and or misplacing the file, this court reiterates that the appeal belongs to the appellant and they ought to have demonstrated or shown interest in following up to establish the position of the appeal. It would not be sufficient to say that a party is ready to be heard or to prosecute the case/appeal as the case may be, as such readiness must be demonstrated by action, which action is lacking on the part of the appellant herein.
8. However, having in mind that dismissal of suits is a draconian act, which should be invoked as a last resort, this court has established from the record that it is also undeniable that the respondent also went into slumber. Were it not for the notice to show cause issued upon the parties by this court, it is more likely than not that the respondent would not have moved the court for dismissal of the appeal for want of prosecution. It is for that reason that the court is inclined to grant the appellant a last opportunity to prosecute the appeal. However, this court wishes to remind the parties that they are enjoined to be catalysts in facilitating the courts mandate of ensuring expeditious and just disposal of matters and not filing suits, then abandon them at the court registry.
9. In the resultant, this court sets aside the notice to show cause with orders that the appellant set down the appeal for hearing within sixty(60) days from the date of this order. Should the appellant fail to comply, the appeal shall automatically, and without reference to the parties stand dismissed.
10. Each party shall bear its own costs for attendance of hearing the notice to show cause.
11. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF NOVEMBER, 2022.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Amino counsel for Appellant



M/s Ikonge counsel for Respondent

Court Assistant – Simon

