



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BOMET**

**CIVIL APPEAL NO. 17 OF 2019**

**AIG INSURANCE COMPANY LIMITED.....APPELLANT/RESPONDENT**

**VERSUS**

**BENARD KIPROTICH KIRUI.....RESPONDENT/APPLICANT**

**RULING**

1. This ruling is in respect of the Respondent/Applicant's application dated 14<sup>th</sup> August 2020. The application is brought under Order 42 Rule 11 and Rule 13 of the Civil Procedure Rules 2010. It seeks orders reproduced verbatim as follows:-

(i) That the Honourable court be pleased to mark the Memorandum of Appeal dated 14<sup>th</sup> August, 2019 and filed on the 15<sup>th</sup> August, 2019 against the judgment of the principal magistrate at Sotik by Honourable B. Omwansa delivered on 25<sup>th</sup> July, 2019 as withdrawn.

(ii) That the Honourable court do order the decretal sum held in a joint account between the law firm of Kemboi Chambers Advocates and the firm of Omwenga & Co. Advocates totaling to Kenya shillings one million, nine hundred and twenty eight thousand, two hundred and thirty only (Kshs.1,928,230/=) plus interest earned from March 19<sup>th</sup>, 2020 to date under account number 101xxxxxxx domain at Faulu Bank Ltd as per Justice Dulu orders dated 5<sup>th</sup> March 2020 as awarded by Hon. P.M Hon. Barasa on 17<sup>th</sup> October, 2019 be released forthwith.

(iii) That costs of and incidental to this application and appeal be awarded to the Applicant.

2. The application is brought on 10 grounds which all point to an allegation of inordinate delay to prosecute the appeal on the part of the appellant. The supporting affidavit is sworn by Kemboi Gilbert advocate for the Applicant. He deposes *inter alia* that the Respondent since filing his appeal on 15<sup>th</sup> August 2019, has never caused the appeal to be listed for directions in contravention of Order 42 Rule 11 and, therefore the memorandum of appeal be deemed to have been withdrawn.

3. Both the prayers and the grounds upon which the application is brought seek to have the appeal marked withdrawn. The court takes it that the appropriate order was one for dismissal as the Respondent in the appeal cannot seek to withdraw the Appellant's appeal.

4. The application is opposed by the Respondent. Pauline Wairegi legal officer of the Appellant Company swore a Replying affidavit dated 8<sup>th</sup> September 2020. In numerous averments she disputes that the Appellant was guilty of inordinate delay. She avers that directions have not been given by the court and therefore the instant application was premature in view of the provisions of Order 42 Rule 35 of the Civil Procedure Rules and further that the application does not fall within the clear provisions of Order 42 Rule 11 of the Civil Procedure Rules.

5. The Applicant/Respondent Benard Kiprotich Kirui filed what is described as a further replying affidavit in opposition. In various averments, he disputes that the record of appeal was filed on 28<sup>th</sup> January 2020. He avers that the provisions of Order 42 Rule 13 of the Civil Procedure Rules are couched in mandatory terms; that the delay and lethargy shown by the Respondent has denied him the fruits of his judgment.

6. In their submissions dated 13<sup>th</sup> January 2021 the Respondent/Applicant contended that the Record of Appeal was filed out of time and that there have been inordinate delays likely to occasion him injustice. He challenged the Appellants to provide evidence of the fact that their record of Appeal had indeed been prepared on 28 January 2020 as dated to demonstrate that they tried on numerous accounts to obtain the file from the registry in vain as it was still pending the ruling. Lastly, the Applicant stated that there was likelihood of mischief on the part of the Appellants as they only filed the record of appeal days after the Notice of Motion was brought to dismiss the appeal for want of prosecution. He added that the Appellants had filed the Appeal out of time without seeking leave of the court.

7. In their submissions dated 28<sup>th</sup> September 2020, the Appellants/Respondents indicated that the main reasons for their delay in filing the Record of Appeal was that the file was not available in the Registry as they awaited the ruling in respect of their Application dated 5 November 2019 for stay of execution of the lower court's Order pending the determination of the instant appeal. That the said ruling was delivered on 5<sup>th</sup> March 2020. They also stated that the Application for dismissal was bad in law and premature because the appeal had not been listed by the court for directions in accordance with Order 42 Rule 35 of the Civil Procedure Rules. They argue that there was no way the Respondent could apply for dismissal at this stage. For this they relied on **Morris Njagi & Another vs. Mary Wanjiku Kiuru (2017) eKLR, Kirinyaga Machinery vs. Hezekiel Mureithi Ileri HCCC No. 98/2008 and Njai Stephen vs. Christine Khatiala Andika (2019) eKLR.**

8. The Appellants also submitted that a dismissal of the appeal would deny them access to justice which is contrary to their constitutional rights under Article 50 of the Constitution.

9. I have considered the application; the rival affidavits and submissions by the parties. The only issue in this application is whether there has been inordinate and inexcusable delay to warrant dismissal of the appeal for want of prosecution.

10. The law that governs dismissals of suits for want of prosecution is found in Order 17 Rule 2, Order 42 rule 13 and 35. Order 42, Rule 13 (1) under which the application has been brought provides:-

Directions before hearing

***(1) Upon notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of appeal the registrar shall cause the appeal to be listed for the giving of directions by a judge in chambers.***

Order 42 Rule 35 (1) and (2) of the Civil Procedure Rules 2010 provides:-

***35 (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.***

11. From the foregoing, it is clear that there are two scenarios when an appeal may be dismissed for want of prosecution. The first scenario is where the appeal has not been listed for hearing within three months after directions have been made under Order 42 Rule 13 and; secondly, if after one year since the service of Memorandum of Appeal, the appeal has not been listed for hearing.

12. In deciding the prayer for dismissal, I am guided by the principles aptly summarized in the case of **Ivita Vs. Kyumbu (1984) KLR 441** thus:-

***“The test by the court 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. Thus 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. It is a matter in the discretion of the court.”***

13. In this case the Applicant has argued strongly that after the filing of the memorandum of appeal, the Appellant/Respondent has never bothered to have the appeal listed before a judge for directions and that the delay has consequently denied the Respondent the fruits of his judgment. On the other hand, the Respondent, Appellant has argued that the appeal had not been admitted and therefore they could not set it down for hearing. They have also argued that they could not have proceeded with the appeal as the matter had not been listed for directions before the Honourable Judge.

14. It is clear from the reading of Order 42, Rule 35 that an Application for dismissal for want of prosecution should only be made by the Respondents where the court has admitted an Appeal, provided directions and if after three months, no action has been undertaken by the Appellants. It is clear from the record that there are no directions in respect of the current Appeal and that the file went 'cold' after the delivery of the ruling for stay of execution pending Appeal. The Appellants in their defense relied on **Order 42, Rule 35 (2)** which gives the Registrar the power to issue notice to the parties and list the matter before the Judge for directions noting that such an Application cannot be brought by the Respondent/Applicant. They also stated that the duty to list a matter for directions in accordance with **Order 42 Rule 13** lies only with the Registrar therefore the same was not within their control.

15. It is true as stated by the Respondents that the duty to issue notice to the parties and of placing the file before the Judge for admission lies with the Registrar. However, it must be remembered that the suit belongs to the Appellant and that the Appellant cannot just file an appeal and let it lie in the court system. The Appellant must demonstrate what action it took to move the appeal forward. They cannot hide behind the duties of the Registrar.

16. I have considered the chronology of the events in this appeal. The judgment that is being appealed was delivered on 25 July 2019 after which the Appellants filed their Memorandum of Appeal on 14 August 2019. In the same year on 5<sup>th</sup> November 2019, they brought an Application for stay of execution pending Appeal, which ruling was made in their favour on 5<sup>th</sup> March 2020. The Appellants have exhibited their Record of Appeal dated 28 January 2020 and stated that the same was ready way back in January 2020 save for the fact that they had to wait for the file which was unavailable in the registry until after the delivery of the ruling on the above-mentioned Application. The Respondent/Applicants on the other hand filed the instant Application for dismissal for want of prosecution on 14 August 2020, a little over a

year since the delivery of the judgement and award of the decretal amount, claiming that the Appeal had grown cold and the Appellants had not taken any steps towards advancing the same and had only applied for Stay of Execution. The Record of Appeal was filed on 28 August 2020, apparently after the notice for the current application had been served on the Appellants.

17. This chronology of events demonstrated a clear laxity on the part of the Appellants. They moved the court to ensure that the decretal amount was not paid to the Respondent as they felt that they Appeal had overwhelming chances of success. After that, they went quiet and made no follow up on having the Record of Appeal filed in court, the Appeal admitted and the same listed for directions only until after the current application was filed and served upon them. Indeed, if they were desirous of moving the Appeal forward, they would have actively followed up on the file immediately and filed the record expeditiously. It is evident that the Appellants forgot about expedition once they obtained stay orders.

18. I have said enough to show that the Appellant/Respondents have not been diligent in prosecuting the appeal. The question that remains is whether justice in this case can still be served despite delay. In issue in the appeal is a decretal sum amounting to Kshs.1,928,230/= which is not a mean sum. I observe also that the conditional stay granted by the court secured the decretal sum. I therefore find that justice can still be served despite the delay.

19. Consequently, I direct that the appellants take all necessary steps to set the appeal for admission and directions before the Judge within 21 days of this ruling. Failure to do so, the appeal shall stand dismissed.

20. Orders accordingly.

**Ruling delivered, dated and signed this 30<sup>th</sup> day of April, 2021.**

.....

**R. LAGAT-KORIR**

**JUDGE**

**By consent of the parties this Ruling has been delivered electronically to the parties in the addresses provided as [omwengacompany@gmail.com](mailto:omwengacompany@gmail.com) for Respondent/Applicant and [gkemboi@gmail.com](mailto:gkemboi@gmail.com) for Appellant/Respondents.**