



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL APPEAL NO.77 OF 2015

ILSAN ENTERPRISES LTD.....APPELLANT

-VERSUS-

CARMELLO MUTHAMIA M'INYINGI.....RESPONDENT

RULING

1. This matter was coming up for hearing of the application dated **18th December, 2020** taken out by the Respondent and filed on the **22nd December 2020**.
2. **M/S Nduku**, Counsel appearing for the Respondent/Applicant has submitted that the Respondent was served with the said application but filed no response. In her view, the application is thus unopposed and should be in its entirety.
3. I have read through the court record and confirmed that the Applicant's Counsel were served with the application, subject of today's hearing as well as the hearing notice from the **Affidavit of Service** sworn by **Mr. Julius Muthengi Mulyungi** and filed on **21st May, 2021**. It is therefore clear that the Appellant's Counsel were aware of the application and today's date but have failed to attend court. They have not even sent an explanation with regard to their absence.
4. I have also read through the application and the grounds which form its basis are inter alia; that the Appeal was launched more than five (5) years ago but the Appellant has taken no step to have the same prosecuted. I find the delay is inordinate with no justifiable excuse and it has only served to prejudice the Respondent.
5. **Under Article 50(1)** of the **Constitution of Kenya, 2010**, "every person has the right to have any dispute that can be resolved by application of the law decided in a fair manner". **Sub-Article 2(E)** further provides for the right to have a trial begin and concluded without unreasonable delay. Although, the Constitution does not provide for the period or the length of time between the commencement of a suit to the date of its conclusion. The prescriptive period has been left for the legislature.
6. Therefore, in such a case, the applicable law on the process of appeals is the Civil Procedure Act. And to bring the context closer home, the dismissal of appeals for want of prosecution is provided for under **Order 42 Rule 35(1)** of the **Civil Procedure Rules**. The same provides as follows:-

"Unless within three months after granting of directions under Rule 13, the appeal shall have been set down for hearing by the Appellant, the Respondent shall be at liberty to either set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.

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 he appeal before a Judge in Chambers for dismissal".
7. Finally, I wish to point out that this appeal has never been listed for directions as required under **Section 79B** of the **Civil Procedure Act**, since its inception. The Appellant has also never approached the court to have the appeal set down for hearing since the filing of the **Memorandum of Appeal** on **28th May, 2015**.
8. The bottom line test to be applied in the application for dismissal for want of prosecution, as the one at hand is whether the delay is prolonged, inordinate and inexcusable, and whether justice can still be achieved despite the delay. As pointed earlier, there has been a delay

of more than five (5) years since this appeal was filed and no reason, whatsoever has been adduced to explain that delay.

9. I am also alive to the fact that **Order 42 rule 35(1)(2) as read with Order 42 rule 11 and 13** of the **Civil Procedure Rules, 2010**, in that, before an appeal is dismissed, directions with regard to its disposal ought to have been issued. It will be noted that this threshold has been satisfied in this suit as the matter was set down for directions on **2nd August, 2019** but the Applicant failed to appear or attend court for the same. And since then, the Appellant has never bothered with the appeal so that its actions reflect those of a lethargic litigant who has lost interest in the matter.

10. It is worth noting that such prolonged nature of litigation between parties is a source of torment to either of them, and as pointed out by the Respondent/Applicant, such length of delay makes it impossible for the Respondent/Applicant to achieve a fair trial. It is on this ground that I proceed to find the application dated **28th December, 2020** merited and allow the same as presented.

11. For avoidance of doubt, an Order do and is hereby issued dismissing the instant Appeal with costs to the Respondent/Applicant.

It is so ordered

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 24TH DAY OF MAY, 2021.

D. O. CHEPKWONY

JUDGE

In the presence of:

M/S Nduku Counsel for Respondent

No appearance for and by Applicant

Court Assistant - Winnie