



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 25 OF 2016

LETICIA AKINYI OGOLA....APPELLANT/RESPONDENT

-VERSUS-

NIC BANK LIMITED.....RESPONDENT/APPLICANT

RULING

1. NIC Bank Limited who is the respondent/applicant (“the applicant”) herein, brought the Notice of Motion dated 30th July, 2021 and amended on 6th August, 2021 and sought for an order to the effect that the appellant’s/respondent’s (“the respondent”) appeal be dismissed for want of prosecution with costs, and a further order for release of the decretal sum of Kshs.150,000/= deposited in court.
2. The Motion is supported by the grounds laid out on its body and the facts stated in the affidavit of advocate **E. M. Kariuki**.
3. The respondent swore a replying affidavit on 8th October, 2021 to resist the Motion.
4. When the Motion came up for interparties hearing, the parties were directed to file and exchange written submissions. At the time of writing this ruling, this court only had the submissions by the applicant. The submissions by the respondent had not been availed.
5. I have considered the grounds laid out on the face of the Motion, the facts deponed in the affidavits supporting and resisting the Motion, and the written submissions by the applicant and authorities relied upon.
6. The sole issue for determination before me is whether the appeal filed by the respondent is ripe for dismissal, which will then determine whether the decretal sum ought to be released.
7. On the one part, the applicant states and submits that since filing her memorandum of appeal on 27th January, 2016 and obtaining an order for a stay of execution pending the hearing and determination of the appeal, the respondent has not filed her record of appeal despite being given notice to do so.
8. The applicant further states and submits that it is clear that the respondent is no longer interested in the appeal.
9. Moreover, the applicant through its submissions contends that the delay in the matter is not only inordinate but inexcusable, citing among others, the case of **Mwangi S. Kimenyi v Attorney General & another [2014] eKLR** to describe inordinate delay in the following manner:

“There is no precise measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable...Therefore, inordinate delay for purposes of dismissal for want of prosecution should be one which is beyond acceptable limits in the prosecution of cases.”
10. The respondent also contends that owing to the delay, it stands to be continually prejudiced since it has been denied enjoyment of the fruits of its judgment.

11. On the other part, the respondent attributed the delay in prosecuting the appeal to the absence of the typed proceedings which her advocate has been following up and therefore urges this court to exercise its discretion by extending the time for her to comply.

12. The respondent further states that since the appeal has not been admitted for hearing yet, the instant Motion has been brought prematurely and the orders sought ought not to be granted.

13. **Order 42, Rule 35** of the **Civil Procedure Rules, 2010** cited by the applicant provides for the circumstances and manner of dismissal of an appeal 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.”

14. From the record, it is apparent that the respondent filed her memorandum of appeal on 27th January, 2016.

15. The respondent annexed to her replying affidavit the letter dated 2nd February, 2016 addressed by her advocate to the Executive Officer of the Chief Magistrate’s Court requesting for typed and certified copies of the proceedings and impugned judgment and decree.

16. The respondent similarly annexed to her reply various correspondences to support her averment that the parties herein had briefly been engaging in negotiations on arriving at a settlement.

17. The applicant on its part availed copies of letters addressed to the advocate for the respondent requesting him to file and serve the record of appeal; it is apparent that the respondent is yet to comply.

18. Suffice it to say that the record shows that the lower court file plus the relevant documents were received by the High Court on 19th January, 2021.

19. Furthermore, the record shows that the Deputy Registrar issued the notice dated 4th February, 2021 addressed to the advocate for the respondent informing him of the availability of the lower court file and further directing them to file the record of appeal. It remains unclear whether the notice was served upon the respondent since the copy in the court file does not bear the advocate stamp.

20. Nevertheless, it is apparent that directions are yet to be given in respect to the appeal and consequently, the appeal is yet to be set down for hearing. It therefore follows that the appeal cannot be deemed to be ripe for dismissal under the provisions of **Order 42, Rule 35(1)** (supra).

21. There is also no indication of listing of the appeal by the Deputy Registrar before a judge for dismissal pursuant to the provisions of **Order 42, Rule 35(2)** (supra).

22. In the premises, I am of the view that even though there has been a delay in prosecuting the appeal, it is apparent that such delay was partially occasioned by the delay in availing the court file and the relevant documents to assist in the appeal.

23. Consequently, I find the Motion dated 30th July, 2021 and amended on 6th August, 2021 to be premature at this stage and I hereby strike it out with costs abiding the outcome of this appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 17TH DAY OF DECEMBER, 2021

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant/Respondent

..... for the Respondent/Applicant