ffREPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 85 OF 2018

BARCLAYS BANK OF KENYA LIMITED.......................................APPELLANT/APPLICANT

VERSUS

JOSEPHINE NYOKABI WANJIKU..1ST RESPONDENT

GUNNAR HALLSON..2ND RESPONDENT

RULING

1. The Notice of Motion by the applicant dated **12th July 2021** prays for the following orders;

> ***a) THAT this Honourable court be pleased to grant an order for stay of execution pending the hearing and determination of this Application inter-partes.***
>
> ***b) THAT this Honourable Court be pleased to issue an Order for the reinstatement of the dismissed Appeal.***
>
> ***c) THAT this Honourable court be pleased to issue an order compelling the Executive Officer of the Nakuru Magistrate Court to furnish the Applicant/Appellant with the typed proceedings in Nakuru CMCC No. 226 of 2014.***

2. The application is supported by the grounds on the face thereof and the sworn affidavit of the applicant's advocate dated 12 th July, 2021. He averred that they received Notice to Show Cause why this appeal should not be dismissed dated 11th February, 2021 and that they filed a replying affidavit giving reasons why they had not filed the Record of Appeal as directed by the court. He averred further that appellant's advocates filed an application for stay of execution pending appeal under Certificate of Urgency concurrently with a Memorandum of Appeal on 4th July, 2018. They had requested severally and paid for typed proceedings from the court but to date they are yet to receive the same.

3. The advocate for the applicants averred that the matter was slated for mention on 13 th April, 2021 but the same did not materialize due to court closure as a result of one of its staff members succumbing to Covid-19 related complications. That thereafter despite the numerous correspondences the court did not respond on the status of the file. He went on to state that on 6th July, 2021 upon perusal of the court file the records showed that on 13th April, 2021 the court issued a mention date of 3rd May, 2021 and a further mention on 16th June, 2021 but both dates were never communicated to them hence their failure to attend court. He averred that the appellant was condemned unheard resulting to unfair and unjust dismissal of the appeal. He added that failure of the appellant to prosecute its appeal to date is not as a result of any indolence on the part of the appellant. That the appellant was still desirous of pursuing its appeal and in the interests of justice the appeal should therefore be reinstated and the appellant allowed to prosecute the same.

4. The respondents opposed the application through the replying affidavit sworn by their advocate and filed on 26 th July, 2021. The advocate for the respondents deposed that the appeal herein was filed in 2018 alongside an application for stay of execution of the judgement of the lower court delivered on 6th July, 2018 in CMCC 226/14. He deposed further that the said application by the appellants was set aside for hearing on 31st July 2018 and on the said date parties agreed by consent that a decretal sum of $10,600 be deposited in an interest earning account to be opened in the name of the parties' advocates within 30 days. That the said sum has never been deposited in the subject account as directed by the court.

5. He went to state that the appellant/applicant has never filed the record of appeal and before the appeal was dismissed several notices to show cause had been issued by the court. That however on 2nd March 2021 the appellants showed cause and they were directed to show cause within 21 days and the said notice was deferred to 14th April 2021 failure to which the appeal was to stand dismissed.

6. He further stated that up to 16th June 2021 when the appeal was dismissed, no record of appeal had been filed. That therefore the appellant/applicant was indolent in prosecuting the appeal and cannot blame the court for its mistakes. He added that no reason for inordinate delay had been given by the defendants and therefore the present application was res- judicata to the application dated 2nd July 2018 and the orders of 31st July 2018. That further, prayer 4 of the present application was misconceived, misleading and an abuse of the court process since the orders for typed proceedings can only be made by the lower court and that was already done.

7. When the matter came up for hearing the court directed that the same be determined by way of written submissions which the parties have complied.

APPLICANT'S SUBMISSIONS.

8. The applicant identified two issues for determination namely; whether the applicant has given sufficient explanation for failing to attend court on 16thJune 2021 and whether the applicant will suffer hardship and injustice if the orders sought are not granted.

7. On the first issue of whether the applicant has given sufficient explanation for failing to attend court on 16th June 2021 ,the applicant while placing reliance in the cases of **Wilson Cheboi Yego v Samuel Kipsang Cheboi [2019] eKLR, The Hon. Attorney General vs the Law Society of Kenya & Another, Civil Appeal (Application) No. 133 of 2011(ur), the Registered Trustees of the Archdiocese of Dare Salaam vs The Chairman Bunju Village Government & Others Civil Appeal No. 147 of 2006** and **Pirimal v Veena [2011] 3 SCC 545**, submitted that the explanation they had given for their failure to attend court constituted sufficient cause. That the failure by its advocate to attend court was not because she was negligent or indolent but it was because she was not served with the mention notice to appear on 16th June 2021 and that could been see from the court's record. The court's attention is drawn to **Order 51 rule 1** and **Order 42 rule 21** of the **Civil Procedure Rules** which empowers the court to reinstate the appeal and meet the ends of justice.

8. Lastly, on whether the applicant will suffer hardship and injustice if the orders sought are not granted, the applicant submitted that unless the orders it has sought are not granted it will be condemned unheard. That further, the oxygen principle enjoins this court to dispense substantive justice over procedure as encapsulated under **Article 50** of the **Constitution of Kenya 2010**. The court's attention is drawn to the following case in regard to primacy of fair hearing in all cases; **Wachira Karani vs Bildad Wachira [2016] eKLR**, **Efil Enterprises Limited & 2 others vs Air Travel & Related Studies Ltd [2018] eKLR**.

9. In conclusion, the applicant submitted that it was desirous of appealing the judgment of the lower court delivered by **Hon. G.H Oduor** on 6th June 2018 in **Nakuru CMCC No. 226 of 2014** where it was condemned to the colossal sum of USD 10,600.00. That great hardship will be suffered by it unless the present application is allowed and the appeal is heard on merit. That further, the respondents shall suffer no prejudice if their application is allowed.

1ST RESPONDENTS SUBMISSIONS.

10. On her part the 1st respondent identified two issues for determination namely; whether an order for stay of execution should be issued to the applicant and whether the court should reinstate the appeal.

11. On the issue whether an order for stay of execution should be issued to the applicant ,the 1st respondent while relying on **Order 42 rule 6(2)** of the **Civil Procedure Rules** and the cases of **Antonie Ndiaye vs African Virtual University [2015] eKLR**, **Prilscot Company Limited Monica Heho [2015] eKLR** and **Kenya Shell Limited vs Kibiru [1986] eKLR**, submitted that the applicant had filed an application for stay without any cogent reasons or a clear demonstration of fulfilment of the conditions as required by the law for grant of the same by the court.

12. On the issue of whether the court should reinstate the appeal, the 1st submitted that this matter came up for hearing of the appeal several times but the appellants failed to enter appearance and defend the appeal. That the applicant had been indolent to prosecute its case as it was given 21 days to file its record of appeal but it has not done the same to date. The 1st respondent submitted that in line with **order 17 rule 2(1)** of the **Civil Procedure Rules** it was served with several notice to show cause prior to the dismissal of its appeal.

13. It is submitted further for the 1st respondent that on 2nd March 2021 the appellant showed cause and was directed to file its record of appeal failure to which the appeal would stand dismissed. That on 16th June 2021 the same was dismissed by this court as the appellant/applicant had not complied with the court's directions to file the record of appeal.

14. While placing reliance on the case of **Tirth Construction Limited v Orion Hotels Limited [2020] eKLR**, the 1st respondent submitted that litigation must come to end and the respondent deserves a peace of mind and enjoy the fruits of his judgement. She urged the court to uphold the orders for dismissal of the appeal.

ANALYSIS AND DETERMINATION

15. The court has perused carefully the appellant's/applicant's application, the supporting affidavit, the replying affidavit by the 1st respondent and both parties' submissions and I find that there is only one issue for determination namely **whether this court should reinstate the dismissed appeal.**

16. Before addressing the aforementioned issue, it is important for this court to clarify the following; first, that regarding prayer 2 in the instant application the court notes that the appellant/applicant had sought the same prayer in another application dated 2nd July 2018. At the hearing of the application on 31st July 2018 the parties entered consent that the decretal sum of US dollars 10,600 be deposited in a joint

interest earning account in the names of the parties' advocates and in default execution to issue. It is the 1st respondent contention that the said order was not complied with and the appellant/applicant have not adduced any evidence to the contrary. The court in the premises shall not venture into it as it shall be considered *resjudicata.*

17. Secondly, regarding prayer 4, the same may not be necessarily the duty of this court as there are laid down procedures in obtaining proceedings and any party seeking the same should follow the said procedure and further this issue is more of an administrative issue which this court cannot address.

18. **Should the court reinstate the dismissed appeal?** It is the appellant's/applicant's argument that it failed to attend court on 16th June 2021 because it was not served with the mention notice. This led to the dismissal of the appeal by this court. The 1st respondent on the other hand argues that this matter came up severally for hearing of the appeal, however the appellant/applicant failed to enter appearance and defend the appeal. That as at 16th June 2021 the appellant/applicant had not filed the record of appeal and no reason has been given for the inordinate delay in prosecuting appeal since 2018.

19. Upon perusal of the court I note that the Deputy Registrar issued Notice to show cause dated 11th February 2021 to the appellant/applicant in line with **Order 42 rule 35 (2) of the Civil Procedure** 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."***

20. It is however not clear from the court records whether that the said notice was served upon the appellant before the suit was dismissed.

21. In the case of **Utalii Transport Company Limited & 3 Others Vs NIC Bank & Another, [2014] eKLR** the court stated and correctly so, that:

> ***"When the applicant states and correctly so, that:***
>
> ***"It is the primary duty of the plaintiffs to take steps to progress their case since they are the ones who dragged the defendant to court."***
>
> **Then exhorts that:**
>
> ***"Over one year has lapsed without the plaintiffs taking any step to progress their case."***
>
> **And makes a strong conclusion that:**
>
> ***"The plaintiff's inertia runs contra to the overriding objective of the court stipulated in section 1A, 1B, 3A of the CPA."***
>
> ***The first intuitive feeling one gets is that the offending proceeding should quickly be removed out of the way of the innocent party, but the law prohibits a court of law from such impulsive inclination, and requires it to make further enquiries into the matter under the guide of defined legal principles on the subject of dismissal of cases for want of prosecution a view which is undergirded by the fact that dismissal of a suit without hearing the merits is a draconian act which drives the plaintiff from the judgment seat. It is, therefore, a matter of discretion by the court."***

22. A leading case in relation to dismissal of suits is the often quoted case of **IvitaVs. Kyumbu (1984) KLR 441** where **Chesoni J** as he then was stated;

> "***The test is whether the delay is prolonged and inexcusable, and if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and the defendant, so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents and, or witnesses may be wanting and evidence is weak due to the disappearance of human memory resulting from lapse of time. The defendant must however, satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time".***

23. In view of the above, it is clear that where an appellant commits acts of inordinate delay, the same occasions injustice to the respondent. The 1st respondent contended that the appellant/applicant is guilty of inordinate delay in prosecuting the matter before the trial court and argued that since the matter was filed in the year 2018, the appellant had done little to prosecute the same. From the authority cited above **Utalii Transport Company Limited & 3 Others (Supra),** it is clear that dismissal of a case is a draconian judicial act and should be done sparingly and employed only in cases where dismissal is the feasible and just thing to do.

24. Further, courts should strive to sustain rather than dismiss suits especially where justice would still be done and a fair trial allowed to take place despite the delay. In the circumstances of this case, the appellant/applicant in its support affidavit attached several correspondences requesting for typed proceedings. In addition to that, it claims that it was not served with mention notices hence it failed to attend

court. This court is inclined to agree with the 1st respondent's argument that this does not amount to sufficient reasons for the delay by the appellant in prosecuting the appeal. Further, the delay by the appellant in my opinion is unreasonable as no sufficient evidence has been adduced by it to justify the same or the efforts it has put in the attempt to prosecute its case.

25. What amounts to inordinate delay was discussed by the court in the case of **Mwangi S. Kimenyi Vs. Attorney General & Another (2014) eKLR** where it was held thus;

> ***"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...."***

25. On the other hand, though, the 1st respondent herein has also not shown any prejudice that is likely to be suffered if the appeal is reinstated, the appellant/applicant is not wholly to blame for the delayed justice, which delay has been explained though not sufficiently. However, this court in such circumstances must not oust the appellant/applicant from the seat of justice for no absolute fault of its own, instead it must serve substantive justice for all parties to a dispute before it.

26. The right of a fair hearing is enshrined under **Article 50** of the **Constitution 2010**. Further, in **Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others [2013] eKLR** the Court of Appeal stated that:

> ***"The right to a hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality."***

26. Consequently, applying the discretion of this court the application herein is allowed, the orders dismissing this appeal are hereby set aside, and the **appellant granted 45 days** from the date herein to file the record of appeal and set the same for directions and in default the appeal shall stand dismissed.

27. The respondents shall have thrown away costs of Kshs. 10,000 payable within 30 days from the date herein.

DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAKURU THIS 16TH DAY OF DECEMBER 2021.

H K CHEMITEI

JUDGE.