REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL NO. 71 OF 2004

NEW KENYA COOPERATIVE

CREAMARIES LTD.....APPLICANT/ OBJECTOR

VERSUS

OMARI MZEE SEGA.....RESPONDENT/PLAINTIFF

RULING.

1. There are two applications to be considered in the ruling:

(a) The first application which is by way of Notice of Motion dated 4th December, 2017 is for setting aside of order issued on 29th December, 2017;

(b) The application of 20th December, 2017 is for stay of proceedings.

2. At the hearing it was directed by the court that the applications dated 4th December, 2017 and 20th December, 2017 to be heard together by way of written submissions.

3. The application dated 4th December, 2017 is the first in time and it is about setting aside of the order issued on 21st July, 2015 and reinstatement of Appeal.

4. The application dated 4th December, 2017 is brought under Sections 1A, 1B, 3, 3A of the Civil Procedure Rule of the Civil Procedure Rules for orders;

(a) Spent

(b) the decision and/or orders of the Honourable Judge issued during the **"Justice at last"** exercise in Mombasa Law Courts be and is hereby set aside.

(c) the appeal be reinstated and heard before the Honourable Court.

(d) costs.

5. The reason for this application is that the Appellant/Objector is upset by an order made on 21st July, 2015 during an initiative of the Judiciary styled **"Justice at last"** whereby the appeal herein was dismissed under Order 42 Rule 35(2) of the Civil Procedure Rules, 2010.

6. The appellant's/objector's submissions are based on the grounds itemized in the supporting affidavit of DAVID M. MEREKA sworn on 4th December, 2017 which are:

(a) the appellant contends that they filed a supplementary Record of Appeal on 6th November, 2012 and attempted to fix the case for case management on the 29th March, 2017.

(b) the appellant contends that no formal notice to show cause or any other notice for dismissal was issued and that they discovered that the appeal had been dismissed on 21st July, 2015 during the "Justice at last" exercise.

(c) the Appellant further submits that the Honourable Court denied the Appellant/Objector an opportunity to prosecute its case and as a result, the appellant will suffer great prejudice as this is a fairly complex case.

(d) lastly, the appellant contends that the respondent will not suffer such prejudice should the case be referred for hearing and in any event there is already a deposit in court for the amount of Kshs423,736.60/=.

7. The respondent contested the application vide a Replying Affidavit dated 11th December, 2017. He submitted that the application dated 4th December, 2017 having been filed under Order 42 Rule 6(1) of the Civil Procedure Rules which provides for stay of proceedings as well as stay of execution is not properly before the court as the appellant/objector is guilty of laches hence undeserving of the orders sought. He submits that the application is misconceived contrary to the established laws and doctrine of equity to wit that equity aids the vigilant and not the indolent. He also submits that the application for reinstatement of the appeal is only aimed at delaying the respondents/plaintiffs access to the fruits of their judgment issued by Honourable S. A. Ngugi in CMCC No. 3562 of 1998.

8. I have considered the Notice of Motion application dated 4th December, 2017, the replying affidavit dated 11th December, 2017, the depositions and the oral submissions. Order 42 Rule 35(2) provides for the dismissal of dormant appeals. It states:

"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."

9. While Order 42 Rule 35(2) does not specifically provide for personal service of the Notice to show cause, some form of notice to the parties is required. And by employing the word "shall", it is clear that this requirement of notice is mandatory. The appeal herein was lodged on 21st June, 2004, which is more than thirteen (13) years ago. The record of appeal was filed on 25th June, 2010. The record also shows a supplementary record of appeal dated 5th November, 2012, but there is no evidence the leave was ever sought by the appellant to have the same admitted and for the aforesaid leave for the supplementary Record of Appeal to be considered as a step towards prosecuting the appeal. The Appellant's last attempt to have the appeal admitted was on 5th July, 2007, which was nearly five (5) years without any action from either the appellant or Respondent to have the Deputy Registrar moved to have the appeal admitted or directions taken. The appeal then became dormant.

10. The applications herein are as a result of a countrywide initiative by the Judiciary dubbed **"JUSTICE AT LAST"** where, targeting matters that had been dormant for five(5) years and above, decided to notify the parties if its intention to dismiss such cases for want of prosecution.

11. Court stations countrywide, on their own motion notified the parties in all the dormant cases of their intention to dismiss the same for want of prosecution, by posting all matters that were to come up during the exercise on the Judiciary's website and cause listed the same in their respective court stations.

12. The court then, having taken judicial notice of the **"JUSTICE AT LAST"** initiative by the judiciary where matters that had been dormant in the court for five (5) or more years were posted on the judiciary website and cause listed for dismissal for want of prosecution, proceeded to dismiss the appeal herein on 21st June, 2016.

13. The appellant is hence seeking a discretionary relief to set aside the order dismissing the appeal for want of prosecution vide the Notice of Motion application dated 4th December, 2017.

14. **Delay defeats equity**, and therefore what this court is to consider is whether or not to dismiss the appeal for want of prosecution. The leading case on this issue is IVITA VERSUS- KYOMBO (1984) KLR 441, where Chesoni J. (as he then was) held as follows:

"The test is whether the delay is prolonged and inexcusable, and if it is, can justice be done despite such delay. Justice to both the plaintiff and 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 missing 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 its favour and dismiss the action for want of prosecution. Thus, even if 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."

15. It is trite law that equity and discretionary powers come to the aid of the vigilant. The five(5) year delay exhibited in this case is not only inordinate, but has sufficient reason been given to explain it considering that the Respondent is obviously prejudiced by the lassitude of the appellant?

16. It is worth noting that our justice system being adversarial, the duties of a court are outlined, and prosecuting of an application on behalf of a party is not one of them. The duty of the court is to act as a reference and only in favour of the party that is persuasive and deserving of the prayers sought.

17. I have perused the records and find that indeed the appellant has been indolent and has not explained the delay in this case. Infact, this motion is a further delay, so much so that the court is entitled to dismiss the appeal for want of prosecution.

18. However, I find that the Applicant/Appellant had deposited a sum of Kshs423,736.60 in court, which I take to have been a sign of there having been an intention appeal, and may still be there. It could be the reason the Respondent herein not having moved this court for the

dismissal of the appeal.

19. In view of the said findings, I allow the applicant's application dated 4th December, 2017 as follows:-

> **(a) the decision and or orders of the Honourable Judge issued during the "Justice at last" exercise in Mombasa on 21st July, 2015 be and is hereby set aside.**
>
> **(b) the appeal filed herein on 21st June, 2004 be and is hereby reinstated and to be fixed for hearing within 60 days from today. Failure to comply, the appeal will stand dismissed.**

20. As for the application for stay of proceedings is the Notice of Motion dated 20th December, 2017 which is supported by the grounds on the face of the application and submissions filed herein. This application is premised on the success of the application dated 4th December, 2017. And now that the said application has been allowed, this application be and is hereby allowed in terms of prayer (2), (3) and (4) of the application.

Ruling DELIVERED, DATED & SIGNED this 29th day of January, 2019.

D. CHEPKWONY

JUDGE.

In the presence of:

Mr. Oliya, Counsel holding brief for Mr. Waweru, Counsel for the Respondent.

Court assistant; Beja