REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL APPEAL NO. 12 OF 2017

STEPHEN NDOLO WAMBUA.....APPELLANT/RESPONDENT

VERSUS

BEATRICE MBULA MUTILU.....1ST RESPONDENT/RESPONDENT

JUSTUS NZAU MUNYWOKI.....2ND RESPONDENT/APPLICANT

RAPHAEL MUTINDA MULWA.....3RD RESPONDENT/RESPONDENT

RULING

Introduction

1. By a Notice of Motion dated 7th November 2017 and filed on 9th October 2018, the applicant seeks that the appeal herein be dismissed for want of prosecution. The application is brought under Order 17 Rule 2(1) and 2(3) of the Civil Procedure Rules, Sections 3 and 3A of the Civil Procedure Act. It is supported by the Affidavit of Justus Nzau Munywoki sworn on 9th October 2018.

2. The applicant states that since the Memorandum of Appeal was filed, the appellant has not taken any steps to prosecute it by setting it down for hearing. He stated that the decree in the suit in the lower court had been issued on 23rd May, 2017 when the appeal was filed.

3. The application was opposed through the grounds of opposition dated 29th October, 2018 and filed on 1st November, 2011. The appellant states that the appeal has been settled by consent order dated 4.4.2017 and ruling delivered on 31.7.18 therefore the matter is closed and the court is functus officio. There is no other response on record to the application

4. The application was canvassed by way of written oral submissions. The applicant stated that he served the appellant's advocate and there is an affidavit of service on record.

Analysis

5. The application is based on Order 17 Rule 2 sub rules 1, 2, 3, and 4 and Order 51 Rule 1 of the Civil Procedure Rules. Order 17 Rule 2 sub rules 1, 2, 3 and 4 provide as follows;

> ***2. (1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.***
>
> ***(2) If cause is shown to the satisfaction of the Court it may make such Orders as it thinks fit to obtain expeditious hearing of the suit.***
>
> ***(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.***
>
> ***(4) The Court may dismiss the suit for non-compliance with the direction given under this Order.***

6. I have considered the Application herein, the grounds and affidavit in support thereof and the grounds of opposition thereto. I have also

considered the submissions tendered by the applicant in the absence of the respondent/appellant. The subject appeal was filed vide a Memorandum of Appeal dated 30th January, 2017, seeking to set aside orders of the trial court issued on 26.1.17. It sought to challenge the Ruling of the trial court which allowed the execution process in Tawa Civil Case no 87 of 2013 to proceed. It is at that stage when the execution commenced that that the respondent herein, filed an appeal and an application for stay of execution of the orders of the trial court in Tawa SRMCC 87 of 2013. A consent order was entered on 4.4.17 wherein the judgement against the appellant was set aside and the applicant herein was given liberty to execute against the 1st respondent.

7. I find the following issues need determination:

a. ***Whether the appellant has been indolent,***

b. ***Whether the court can determine an appeal that has been compromised by a consent.***

8. I have perused the Court record; the last time the appeal was in Court was on the date of filing the memorandum of appeal. According to the Respondents ground of opposition, there is no explanation for the delay but they rely on the consent order that was issued on 4.4.17. I have seen a letter dated 21.11.18. It is addressed to the Deputy Registrar seeking to place on record grounds of opposition that were filed on 1.11.18, the said letter is received on 3.12.18 after I had reserved the matter for ruling and in essence as at 7.11.18 the grounds of opposition were not brought to my attention.

9. From this entire letter it is clear that counsel did not attend court and thus in sneaking in the grounds of opposition yet as at that date, I had addressed my mind to the fact that there is no response on record. Counsel is well aware how to move court in order to admit a document, and in the absence of such an application, I am unable to accept the grounds of opposition.

10. I shall now address the issue of delay. Is this delay of about one year inordinate, prolonged and or inexcusable? I do think so. In the case of **Ivita vs Kyumbu (1984) KLR 441**, the court held that, the test in any Application's for dismissal of the suit for want of prosecution is a balance between a prolonged and inexcusable delay and the need to give justice to both parties. Hence, the Court needs to weigh and establish whether justice can still be done despite the delay if any. I fully agree with the finding therein that **"Justice is Justice to both the Plaintiff and Defendant"**

11. The spirit of Article 48 the Constitution of Kenya guarantees the right of **"access to Justice". T**hat must be upheld at all time. The main core business of the Judiciary is administration of justice through settlement of disputes referred to it. Each Case must be treated on it's own merit. I hold the opinion that the Courts should shift blame where it belongs. If for example, an instructed party fails in his or her professional duties to comply with the instructions of the instructing client by attending court, despite being aware of the date either due to an inadvertent mistake and or negligence, such party must be held to blame. On the other limb, an order of court is valid unless set aside, therefore the appellant will not be prejudiced by the dismissal of the appeal. The applicant is anxious to realize the fruits of his judgement that was delivered on 23.11.2016 that has stalled by the filing of the instant appeal.

12. It is not in dispute that it has been over one year since the memorandum of appeal was filed on 30th January, 2017. A perusal of the file, no action has been taken by the appellant. From a reading of the provisions of Order 17 cited above, it is the appellant's duty to set the appeal in motion by having it listed for directions. This ought to have been done within 30 days of filing the appeal. The appellant did not take any such step and has not provided any reasons for such failure. I am therefore inclined to find that this application bears merit, however the court will go on to address the next issue.

13. The next issue for determination is whether the court can determine an appeal that has been compromised by a consent. From the court record, and before the appeal was heard on merits, the parties compromised it and entered into a consent on 4th April, 2017 that was adopted as an order of the court and issued on 25th May, 2017. The effect of the consent was to set aside the judgement entered against the appellant on 23.11.2016 and give the 2nd Respondent liberty to execute the said judgement against the 1st respondent. It is trite law that a consent judgment or order has the effect of a contract and can only be set aside on grounds which would justify setting aside of a contract. **(**See **Brooke Bond Liebig Ltd vs Mallya [1975] EA 266, Flora Wasike vs Destimo Wamboka (1988) 1 KAR 625** and **Samson Munikah t/a Munikah & Company Advocates vs Wedube Estates Limited [2007] eKLR 13)**

14. It is apparent that the consent in effect dislodges the appeal and in the absence of a discharge of the consent the same remains binding on the parties. **Order 25 Rule 5** of the Civil Procedure Rules provides for the compromise of a suit, and states that where the court is satisfied that a suit has been adjusted wholly or in part by any lawful agreement or compromise, it shall, on the application of any party, order that such agreement, compromise or satisfaction be recorded and enter judgment in accordance therewith..... the effect of this action was that the consent order becomes an order of the court upon being endorsed by the Court, and it consequently became subject to the law governing the discharge of court orders and decrees.

15. Under the Civil Procedure Act such discharge can only be by way of appeal from the order, or review and setting aside of the order. It is in this respect to be noted that under section 67(2) of the Civil Procedure Act that no appeal shall lie from a decree passed by the court with the consent of parties. The only allowed legal procedure therefore through which a consent order and a decree issue thereof can be discharged is by way of review and setting aside.... the only remedy available to parties who want to get out of a consent order is to set aside the consent order by way of review or by bringing a fresh suit in court. A review can only be by way of judicial process. There was no such review sought by the applicant in the present case to set aside the consent order, and neither was there any consent by the parties herein that the applicant be discharged from the consent order. In the circumstances this court finds that the instant application by the applicant to be of no legal effect and that the said consent order and decree are consequently still subsisting and in force. The court finds that there is no appeal in existence and what is remaining is for the Deputy Registrar to mark the file as closed. The present application is akin to flogging a dead horse since the appeal has since the appeal has since been compromised by the parties vide the consent dated 04/04/2017 and further by the ruling of this court dated 31/07/2018.

16. The upshot is that the entire application is found to be an abuse of the court process, operating in a vacuum and I hereby order that it be and is hereby dismissed with no order as to costs. The Applicant is at liberty to proceed with execution in the lower court in terms of the consent. The Deputy Registrar may mark the file as closed

Orders accordingly.

Dated, signed and delivered at Machakos this 22nd day of January, 2019.

D. K. KEMEI

JUDGE