REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CIVIL APPEAL No. 40 OF 2018

CHINA ROAD & BRIDGE CORPORATION........................APPELLANT

-VERSUS-

JOHN KIMENYE MUTETI..RESPONDENT

RULING

1. By a Notice of Motion dated 4th July, 2019, the Applicant herein, **John Kimenye Muteti,** who is the Respondent in this appeal seeks an order that this appeal be dismissed for want of prosecution with costs.

2. According to the applicant, this appeal arose from the judgement delivered in Mavoko Magistrate's Court Suit No. 658 of 2016 which was delivered on 5th February, 2018 in which judgement was entered for the applicant in the sum of Kshs 703,000/-. The appeal was commenced by way of memorandum of appeal dated 26th April, 2018 filed on 24th May, 2018.

3. However, the Appellants have not prosecuted the appeal or taken any steps to do so for a period of over one year. It was the applicant's position that the appeal is frivolous and an abuse of the court process hence ought to be dismissed with costs in the interest of justice as the appellant has lost interest in the same. According to the applicant the appeal is not filed in good faith and is only aimed at delaying the payment to the applicant and to deny him the enjoyment of the fruits of his judgement.

4. In opposing the application, the Appellant averred that following the filing of the appeal, the appellant embarked on the process of compiling the record of appeal and in so doing applied for typed copies of the proceedings. However, the applicant raised a preliminary objection dated 24th July, 2018 contending that the appeal ought to have been filed in the Employment and Labour Relations Court. When the same was set down for hearing, the parties agreed to have the same withdrawn by consent.

5. According to the appellant it is not true that it has lost interest in the appeal as it has applied for typed proceedings and is keen and very interested in prosecuting the appeal.

6. It was the Appellant's case that the application is premature and violates the provisions of Order 42 Rule 35(2) of the ***Civil Procedure Rules***.

7. The Appellant denied that the applicant is being delayed from enjoying the fruits of the judgement since the applicant was already paid Kshs 300,000.00. It was contended that by dismissing the appeal, the appellant would be occasioned a lot of injustice.

8. In support of the application the applicant cited Order 42 Rules 35 and 42 of the ***Civil Procedure Rules.***

9. It was submitted that though the appellant claims that they have applied for typed proceeding, they have not disclosed on what date or time they did so and whether the same as been supplied or not and if not who is to blame. The applicant therefore insisted that the respondent has failed to offer any reasonable explanation for the delay in setting this appeal for hearing and in the absence of any reasonable and substantiated explanation it must be presumed that the delay is intentional and as such cannot be excused.

10. It was lamented that though the applicant obtained judgment against the Appellant almost 18 Months ago, to date, he has not received full benefit of the said judgment. Accordingly, the unexplained delay to prosecute the appeal by the Appellant is resulting to unnecessary injustice, hardship, and aggravated costs to the applicant.

11. The court was therefore called upon to exercise its discretion and allow the applicant's application as prayed, as the applicant continues to suffer unnecessarily due to unexplained delay in the prosecution of this Appeal case which has also delayed the execution of the award given

by the Magistrates court.

12. In support of the application the applicant relied on the decision of **Protein & Fruits Processors Limited & Another vs. Diamond Trust Bank Kenya Limited [2015] eKLR, Civil Appeal 9 of 2007.**

13. On behalf of the Appellant it was submitted that an appeal can only be dismissed if the same is set down for directions and ***unless 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.*** It was submitted that the appellant does not have any role in fixing the appeal for directions. It was therefore submitted that the bottom line is that directions must have been given before an appeal can be dismissed for want of prosecution. In this respect the appellant relied on **Jurgen Paul Flach vs. Jane Akoth Flach [2014] KLR** and submitted that the application is premature as it violates Order 42 Rule 35 of the ***Civil Procedure Rules.***

14. It was reiterated that the appellant is keen and very interested in prosecuting the appeal and that the applicant is enjoying part of the fruits of the judgement having already been paid Kshs 100,000.00 and has not demonstrated the prejudice that he will suffer if the appellant is given more time to prosecute the appeal.

Determination

15. I have considered the issues raised in this application. The principal behind the dismissal of suits was set out in the case of **Sheikh vs. Gupta and Others Nairobi HCCC No. 916 of 1960 [1969] EA 140** where **Trevelyan, J** expressed himself as follows:

> **"The purpose of rule 6 of Order 16 is to provide the court with administrative machinery whereby to disencumber itself of case records in which parties appear to have lost interest…In this matter the claim is now eight years, less four months, old and the plaintiff, so far as the court is concerned, has done nothing for more than three years to say the least. There is a** *prima facie* **negligence on the part of the lawyers or inexcusable delay on the part of the plaintiff or both, on his own say so. In deciding whether or not to dismiss a suit under rule 6 a court will be slow to make an order if it is satisfied that the hearing of the suit can proceed without further delay, that the defendant will suffer no hardship, and that there has been no flagrant and culpable inactivity on the part of the plaintiff…In the instant case there has been both culpable and flagrant inactivity on the part of the plaintiff in respect of his smallish claim and he cannot bring himself within the set of circumstances as stated...It is the duty of the plaintiff's adviser to get on with the case. Public policy demands that the business of the courts should be conducted with expedition. It is of the greatest importance in the interest of justice that these actions should be brought to trial with reasonable expedition".**

16. In the case of **Et Monks & Company Ltd vs. Evans [1985] KLR 584 Kneller, J** (as he then was) stated as follows:

> **"The court when pondering over an application to dismiss a suit for want of prosecution should among other things ask whether the delay was lengthy, has it made a fair trial impossible and was it inexcusable? Whether or not the application should be allowed is a matter for the discretion of the judge who must exercise it, of course, judicially. Each turns on its own facts and circumstances…If an action is dismissed for want of prosecution the plaintiff has certain options if it is not his fault. It may sue its advocate for negligence unless it has caused or consented to the delay which has resulted in the action being dismissed for want of prosecution. Advocates for the most part insure against the risk of liability for professional negligence. The plaintiff then has a remedy not against the defendants but against its own advocates. Should the trial proceed despite a prolonged delay the plaintiffs may not succeed because it cannot after such a long time establish liability and then it has no remedy against anyone else. If the plaintiff has caused or consented to the delay which led to its suit being dismissed for want of prosecution then it must blame itself…The court may consider the matter of limitation and whether or not the plaintiff might probably succeed in the action for negligence against its lawyers and might prefer to be slow in deciding to dismiss for want of prosecution, but looking at the matter as a whole may order the application be dismissed and award the defendants the costs of the suit and of the application…It is the duty of a plaintiff to bring his suit to early trial, and he cannot absolve himself of this duty by saying that the defendant consented to the position. A plaintiff who, for whatever reason, delays for over six years before bringing his suit for trial can expect little sympathy…If the court is satisfied that there will be prejudice to the defendant as a result of a delay of ten years if the case proceeds and it would be impossible to have a fair trial the suit dismissed for want of prosecution since the principle witness for the defence was dead and 3 others had left Kenya and their whereabouts were unknown".**

17. In my view the principles guiding the dismissal of suits for want of prosecution apply *mutatis mutandi* to dismissal of appeals for want of prosecution. The provision that deals with dismissal of appeals for want of prosecution is however Order 42 Rule 35 of the ***Civil Procedure Rules*** which states as follows:

> ***35. (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."***

18. **When are directions to be given? Order 42 Rule 11** of the ***Civil Procedure Rules, 2010*** provides as follows:

> ***Upon filing of the appeal the appellant shall within thirty days, cause the matter to be listed before a judge for directions under section 79B of the Act.***

19. It is therefore clear that it is upon the appellant to trigger the process of the giving of directions and an appellant who sits on his/her laurels and when confronted with an application to dismiss the suit contends that no directions have been given when he has not moved the court to give the said directions cannot but face censure from the court. To contend that an application for dismissal of an appeal is premature for failure to give directions when the appellant himself has not moved the court to give directions to my mind cannot be taken seriously where the delay is contumelious. Nothing bars the court from dismissing an appeal even where no directions have been given. Accordingly, I agree with the opinion of **Onyancha, J** in the case of **Protein & Fruits Processors Limited & Another vs. Diamond Trust Bank Kenya Limited [2015] eKLR, Civil Appeal 9 of 2007** that;

> **"Three years later the applicant is seeking dismissal of the appeal. It is not disputed that directions have not been given in this appeal, in my view the appeal cannot therefore be dismissed under Rule 35 (1) since the appeal has not be placed before the judge for direction. As it is, the appeal is incomplete and the Appellants have not furnished the court with the record of appeal. The only alternative the applicant is left with is under Rule 35(2) which requires the Deputy Registrar to list the appeal for dismissal by a Judge. In the current application the applicant is seeking an order that the Deputy Registrar be directed to list the appeal for dismissal before a judge in chamber. I have no reasons not to grant the prayer, the appeal hearing has been pending in court for six years and it is only fair if the matter can be finalised. In the circumstances of this matter I will not order the Deputy Registrar to place the file before a judge for dismissal; instead I will dismiss the appeal. This court has the inherent discretion to do so under Section 3A, to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process. The court is also enjoined under Article 159(2) b of the Constitution to do justice without any delay."**

20. The applicant herein is therefore perfectly entitled to move the Court for the dismissal of this suit. However as indicated above the decision whether or not to dismiss a suit for want of prosecution is an exercise of discretion and both parties to the suit are under a duty to disclose material upon which the Court is to exercise its discretion. Whereas the Respondent in an appeal has no obligation to state the reasons for seeking the dismissal of the suit as long as the application falls within the parameters of dismissal, it must be remembered that in deciding whether or not to dismiss the suit or appeal the Court will take into account the nature of the claim, the period of the delay and the prejudice to be suffered. In other words, the Court will take into account all the circumstances of the case. In exercising the discretion it is my view that prejudice is the most important consideration in the exercise of discretion in such matters.

21. Apart from the foregoing considerations, on 23rd July 2009 the Statute Law (Miscellaneous Amendments) Act No. 6 of 2009 came into force. The said Act introduced *inter alia* sections 1A and 1B in the ***Civil Procedure Act***. According to section 1A(2) "the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective" while under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties. The said provisions have since their promulgation received judicial interpretation both by the High Court and the Court of Appeal. In **Stephen Boro Gitiha vs. Family Finance Building Society & 3 Others Civil Application No. Nai. 263 of 2009,** the Court of Appeal held *inter alia* that:

> **"on 23rd July 2009 both the Civil Procedure Act and the Appellate Jurisdiction Act were amended to incorporate sections 1A and 1B in the Civil Procedure Act and sections 3A and 3B in the case of the Appellate Jurisdiction Act. These provisions incorporate into the civil process an overriding objective which has also been defined. All courts are required when interpreting the two Acts and the rules made under both Acts or exercising the power under both Acts and the rules to ensure that in performing both functions the overriding objective is given the pride of place including the principal aims of the objective…The overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with and whatever is in conflict with it must give way. A new dawn has broken forth and we are challenged to reshape the legal landscape to satisfy the needs of our time. The court must warn the litigants and counsel that the courts are now on the driving seat of justice and the courts have a new call to use the overriding objective to remove all the cobwebs hitherto experienced in the civil process and to weed out as far as is practicable the scourge of the civil process starting with unacceptable levels of delay and cost in order to achieve resolution of disputes in a just, fair and expeditious manner. If the often talked of backlog of cases is littered with similar matters, the challenge to the courts is to use the new "broom" of overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory applications and instead to adjudicate on the principal issues in a full hearing if possible".**

22. Again in **Kenya Commercial Bank Limited vs. Kenya Planters Co-Operative Union Civil Application No. Nai. 85 of 2010** the same Court held that:

> **"where there is a conflict between the statute (overriding objective principle) and a subsidiary legislation (rules of the court) the statute must prevail. Although the rules have their value and shall continue to apply subject to being O2 complaint, the O2 principle is not there to fulfil them but to supplant them where they prove to be a hindrance to the O2 principle or attainment of justice and fairness in the circumstances of each case."**

23. Similarly, in **Kenya Commercial Finance Company Limited vs. Richard Akwesera Onditi Civil Application No. Nai. 329 of 2009** the Court expressed itself as follows:

> ***"the applicant's submissions that the omission to include primary documents rendered the appeal incurably defective would have had no answer to them if they were made before the enactment of section 3A and 3B of the Appellate Jurisdiction Act...*** **The advantage of the CPR over the previous rules is that the court's powers are much broader than they were. In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out.** ***In applying the principle or concept of overriding objective, each case must be viewed on its own peculiar facts and circumstances and it would be a grave mistake for anyone to fail to comply with well settled procedures and when asked why, to simply wave before the court the provisions of sections 3A and 3B of the Appellate Jurisdiction Act. The Court still retains an unqualified discretion to strike out a record of appeal or a notice of appeal; the only difference now is that the Court has wider powers and***

will not automatically strike out proceedings. The Court, before striking out, will look at available alternatives".

24. What the said provisions as well as the authorities relating thereto mean is that the Court in determining any matter under the Civil Procedure Act and the Rules made thereunder must strive to give effect to the said overriding objective and that where there are alternative options available to striking out or dismissal of a suit, the Court ought to defer to those alternatives as much as possible before resorting to the drastic step of terminating the suit.

25. *This is not to say that the Court should nolonger dismiss a suit for want of prosecution. Each case must turn on its own circumstances and where it is shown by credible evidence that as a result of the delay, no fair and meaningful trial can possibly take place, the Court will not hesitate in dismissing the suit. In this case no evidence has been presented to show that that is the position. Accordingly, the C*ourt must be guided by the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie. The law is now that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should always opt for the lower rather than the higher risk of injustice. See **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.**

26. In my view since no serious prejudice is alleged on behalf of the Respondents in the appeal to whom part of the decretal amount has been paid. In the circumstances of this case I adopt the wise words of **Chesoni, J** (as he then was) in the case of **Ivita vs. Kyumbu [1984] KLR 441**, that the test to be applied by the courts in an application for the dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and, if it is, whether justice can be done despite the delay and that even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time since it is a matter in the discretion of the Court.

27. Accordingly, I decline to dismiss the appeal at this stage but since the proceedings are ready, I direct the appellant to, within the next 30 days, prepare and filed the record of appeal and serve the same on the Respondent in default of which this appeal shall stand dismissed with costs to the Respondent in the appeal. The costs of this application are however awarded to the Respondent in the appeal in any event.

Read, signed and delivered in open Court at Machakos this 17th day of December, 2019

G V ODUNGA

JUDGE

Delivered the absence of the parties

CA Geoffrey