REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL APPEAL NO.39 OF 2015

SDV TRANSAMI LIMITED.....APPELLANT

VERSUS

GIBSON MURIUKI NJERU.....RESPONDENT

(Appeal from the judgment of the court in CMCC No.141 of 2010 dated 27.10.2015 (Hon. G. M. A. Ongond'o, CM)

RULING

1. The appellant in this matter filed the present appeal against the decision of the trial court in Kericho CMCC No. 141 of 2010 delivered on 27th October 2015. The record of appeal with respect to the appeal was filed on 18th April 2017.

2. By an application dated 3rd April 2017, however, the respondent had sought orders for the dismissal of the appeal for want of prosecution. The application, premised on Order 42 Rule 35 (2) section 1, 1A and 2A of the Civil Procedure Act and all other enabling provisions of the law, was based on the grounds that the appellant was not interested in pursuing the appeal after keeping the applicant out of the fruits of his judgment. The lower court judgment had been pronounced on 27th October 2015, and the Memorandum of Appeal filed on 25th November 2015.

3. The appellant had not, however, bothered to request for the typed proceedings. More than a year had passed since the Memorandum of Appeal was lodged but no record of appeal had been filed. The applicant observed that as the court can proceed *suo moto* under Order 42 Rule 35 (2), it should be swift to act when a party files an application for dismissal of the appeal.

4. The application was supported by an affidavit sworn by the applicant's advocate, Dennis Gweno, on 3rd April 2017. The affidavit reiterates the grounds set out in the application, with the Advocate averring that he has perused the lower court file and found, to his astonishment, that the appellant had not bothered to apply for the typed proceedings. He avers that the appellant is not serious about the appeal but is only keeping the respondent out of the fruits of his judgment.

5. In an affidavit in response to the application sworn by Mitchell J. O. Menezes, the appellant's Advocate on 13th April 2017, the respondent denies having lost interest in prosecuting the appeal. He avers that they applied for certified copies of the proceedings and the judgment on 13th March 2017. They had not received the typed proceedings at the time the respondent's application was filed, and they could therefore not compile the record of appeal.

6. He annexes to his affidavit a letter dated 13th March 2017, which bears the court's receipt stamp showing it was received on 11th April 2017, to his affidavit. He alleges that his representative went to the registry on 11th April 2017 and found that the proceedings were not ready but that he received other documents with which he prepared a record of appeal with the intention of preparing a supplementary record of appeal once the proceedings are ready.

7. It was Mr. Menezes's averment that the appellant would be prejudiced if the appeal is dismissed as dismissal is a drastic remedy which sends the appellant from the seat of judgment, and justice demands that the appellant be given an opportunity to prosecute the appeal. The appellant further avers that the present application offends the provisions of Order 42 rule 35 (1) in view of the fact that directions had not been given.

8. The parties filed written submissions dated 2nd October 2017 and 6th October 2017 respectively.

9. In his submissions, the applicant observes that the respondent was woken from his slumber by service of the present application on 10th April 2017. He went to the High Court the following day, 11th April 2017, to file the request for certified copies of the proceedings. The applicant cites Order 42 rule 35 (2) to reiterate that the respondent has denied the appellant the fruits of his judgment without proceeding with the appeal. He further cites sections 1A and 2A of the Civil Procedure Act on the need for disputes to be resolved expeditiously, and

Article 50 (c) and 159 on the need for justice not to be delayed.

10. The applicant further relies on the decision in **Protein and Fruits Processors Ltd vs Patrick Kirai Mwaura, Nairobi CA No.9 of 2007** and **John Wachanga Kiama vs Daniel Kiboro Muchai** whose facts he submits fit approximately to the present situation and urges the court to grant the orders that he seeks. He also cites **Hezron Alois Nyachae vs James Oburi Oenga Eldoret Civil Appeal No. 114 of 2012** in support of his submissions.

11. In response, the respondent submits that it has demonstrated its desire to have the matter litigated and the frustrations it has encountered in an effort to obtain the certified copies of the proceedings. That in order to speed up the matter, it had decided not to write more letters but to send someone personally to the registry to obtain the necessary documentation. The respondent also alleges that it resorted to obtaining other documents in order to *'quench its thirst for justice'* and it was finally able to file the record of appeal currently before the court, preparatory to filing a supplementary record of appeal.

12. Like the applicant, the respondent calls to its aid section 1A and 1B of the Civil Procedure Act and Articles 50 (1) and 159 (2) of the Constitution as well as section 3 and 3A of the Civil Procedure Act with respect to the inherent power of the court to exercise its discretion to do justice.

13. It further cites Order 42 Rule 35 (1) to submit that the present application has been brought prematurely as it had been brought before directions had been given. It relies in this regard on the decision in **Kirinyaga General Machinery vs Hezekiel Mureithi Ireri HCCC No.48 of 2008**, **Abdul Rahman Abdi vs Safi Petroleum Products Ltd & 6 Others (2011) eKLR** and **Mwangi S. Kimenyi vs AG & Another (2014) eKLR** with respect to striking out of documents.

14. The respondent charges the applicant with contributing to the 'stalemate' as he also has a duty to assist the court in disposing of matters.

15. I have considered the application before me and the respective averments and submissions of the parties with respect thereto. I note that the memorandum of appeal in the matter was filed on 25th November 2015. However, no record of appeal was filed until 18th April, 2017, two years after the memorandum of appeal was filed.

16. From the series of events on the record, it would appear that this record of appeal was precipitated by the respondent's application to dismiss the appeal for want of prosecution. The appellant wants to lay the blame for not filing the record of appeal on time on the court. It alleges that it got tired of writing letters and sent someone to personally check on the proceedings. That as a result, it filed the record of appeal on 18th April 2017, as a preliminary step before filing a supplementary record of appeal once it obtained the proceedings.

17. It is noteworthy, however, that the only letter that the appellant attaches to the affidavit in opposition to the application to dismiss the appeal is the one dated 13th March 2017. The court stamp indicates that it was received in the registry on 11th April 2017. One is hesitant to charge an officer of the court with alleging and submitting on a falsehood, but one gets the distinct impression that this is what was at play here. Having failed to take any steps whatsoever to pursue its appeal, not even writing a single letter to pursue the proceedings in order to file its record of appeal, the appellant produces the letter dated 13th March 2017, received in court on 11th April 2017, as evidence of its thirst for justice. The court is not convinced that there was any desire on the part of the appellant, prior to the filing of the present application, to pursue its appeal.

18. The appellant has taken refuge in the fact that directions had not been taken in this matter and therefore the respondent cannot invoke Order 42 rule 35(1) to strike out the appeal. It relies on the decision in **Kirinyaga General Machinery vs Hezekiel Mureithi Ireri** (supra) in this regard. The court in this case declined to dismiss the appeal for want of prosecution on the basis that directions on the appeal had not been given. The decision is from a court of concurrent jurisdiction and is therefore of persuasive authority. It also does seem to correctly interpret the provisions of Order 42 rule 35(1).

19. On further and close consideration of the decision and of the provisions of this section, however, it seems to leave the respondent, in an appeal filed by an indolent appellant or one who has no interest in seeing an end to the appeal, in a Catch 22 situation. This is especially so where there is stay of execution in favour of the appellant: the respondent cannot move forward to dismiss the appeal because directions have not been taken; but directions have not been taken because the appellant has never filed the record of appeal, the appeal has never been admitted, and the matter can therefore not be placed before the court for directions, after which the respondent would be in a position to invoke Order 42 rule 35 (1).

20. It seems to me that in such a scenario, the cause of justice is best served by treating the application before the court in the manner in which the court dealt with it in **Protein and Fruits Processors Ltd vs Patrick Kirai Mwaura, Nairobi CA No.9 of 2007**. In that case, the applicant had sought an order for the dismissal of the appeal for want of prosecution, and in the alternative, an order that the court directs the Registrar to list the appeal before a judge in chambers for dismissal. In declining to order the Registrar to place the matter before a judge in chambers for dismissal, the court (Onyancha J) stated as follows:

> ***"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."***

21. This is the course that this court deems fair in the circumstances of this case. The appellant/respondent has had close to three years to file its record of appeal. It only moved after service of the application for dismissal was served on it. The ends of justice and the constitutional command in Article 159 require that justice should be dispensed with expedition. It will not serve the ends of justice to keep an appeal alive on the basis of technical considerations when the appellant had not even been interested enough in its prosecution to apply for the proceedings necessary for filing the record of appeal until it was prompted by the present application.

22. I therefore order that the appeal in this matter be and is hereby dismissed for want of prosecution. The respondent shall have the costs of this application.

Dated Delivered and Signed at Kericho this 18th day of May 2018.

MUMBI NGUGI

JUDGE