



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIVASHA**

**CIVIL APPEAL NO. 34 OF 2015**

**OMARI SHARIF.....1<sup>ST</sup> APPELLANT**

**SALIM KONDE WASHE.....2<sup>ND</sup> APPELLANT**

**CROWN PETROLEUM KENYA LTD .....3<sup>RD</sup> APPELLANT**

**-VERSUS-**

**HENRY MUSULUMA ILIATI & VIOLET KHASIALA (Suing as the Administrator of the  
Estate of Phillip Lushirika Musuluma) - (Deceased).....RESPONDENTS**

**RULING**

1. The application filed on 25/5/17 by the Respondents primarily seeks the dismissal, for want of prosecution of the appeal filed 18/3/15 by the appellants against the decision of Kimilu, Principal Magistrate in PMCC 361 of 2008. It is expressed to be brought under Order 42 Rules 13(1), 35 (1) and (2) of the Civil Procedure Rules and section 3A of the Civil Procedure Act. The main grounds raised in support of the application is that two years have lapsed since the appeal was filed but no step has been taken to prosecute the appeal. That is the gist of the supporting affidavit sworn by **Donald Wekesa Muyundo**.

2. The appellants in opposition for the motion filed a Replying affidavit through **Evans Juma Matanda** explaining the Appellants' efforts, and that delay in prosecuting the appeal was occasioned by the difficulty encountered in obtaining proceedings of the lower court. That the record of appeal had eventually been filed on 4<sup>th</sup> September, 2017 and served. The Appellants consider the application for dismissal premature and misconceived.

3. On 21/9/17 counsel for the Appellants, Mr. Ombui, intimated that parties were considering a compromise of the application but since the counsel for the Respondents was absent, the court directed that a formal communication of the parties' consent be made before directions on the appeal could be given. It appears that no communication was received and on the date slated for giving of directions, on 23<sup>rd</sup> November, 2017 the court mistakenly ordered that the appeal, which had yet to be admitted be disposed of through written submissions. The subsequent filing of submissions in respect of the subject application however confirms that the intended compromise did not materialize.

4. The respondents filed their submissions on 14/3/18 in support of the motion. Relying on the provisions of Order 42 Rules 11 and 13 (1) of the Civil Procedure Rules, the applicants assert that the duty lies with the appellant to comply with the said rules upon filing an appeal. Further that the Respondents cannot be barred from moving the court to dismiss a dormant appeal.

To reinforce these arguments, the Respondents cite the decision in **Haron E. Ongechi Nyaberi v British American Insurance C. Ltd (2012) eKLR**.

5. Moreover, the Respondents point to the period of 2 years delay and describe it as inordinate. They urge the court to invoke its inherent discretion under Section 3A of the Civil Procedure Act to dismiss the appeal. The decisions in **Protein Fruits Processors Ltd & Another v Diamond Trust Bank Kenya Ltd (2015) eKLR** and **Allan Otieno Otsula v Gurdev Engineering Construction Ltd (2015) eKLR** are cited to bolster the submission. Also cited is the case of **Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium v MD Popat & Others (2016) eKLR**. The Respondents cite discrepancies in the annexure to the Replying Affidavit and describe the documents as a sham and false.

6. On their part, the Appellants have emphasized the documents attached to their Reply as evidence of efforts made to secure proceedings of the lower court in furtherance of the appeal, and assert that the delay in filing the Record of Appeal was not deliberate. They therefore urge that the application be disallowed, citing a similar decision in **National Bank of Kenya v Alfred Omino Bala (2017) eKLR**.

7. Further, relying on the decision in **Elem Investment Ltd v John Mokora Otwoma (2015) eKLR**, they contend that the application

cannot lie as no directions have been taken. Moreover, urging the court to consider that the appellant will be disproportionately prejudiced, they rely on **Bruce Mutie Mutuku t/a Diani Tour & Travel Center v Equity Bank Ltd (2014) eKLR**.

8. I have considered the material canvassed in the present application. There can be no dispute, as regards the import of the provisions of Order 42. Rule 35(1) of the Civil Procedure Rules or Section 79B of the Civil Procedure Act. I therefore associate myself with the collective wisdom of the learned judges as contained in the decisions cited by the parties. Rule 35(1) of Order 42 Civil Procedure Rules is the only express provision which permits a Respondent to seek the dismissal of an appeal for want of prosecution. That means that directions must have been given under Rule 13 before a Respondent can move the court. In this case, Rule 13 has not yet applied; the appellant not having moved the court as required, at the time of the filing of the instant application.

9. As stated in **Haron E. Ongechi Nyaberi v British American Insurance**, the duty of moving the court in terms of Order 42 Rule 11 & 13, lies with the appellant. What then is the option left to a Respondent when the appellant, as in this case files an appeal and fails to take any further step? Is such Respondent without recourse? In my own view such a Respondent may prod the Deputy Registrar to move under 42 rule 35(2) of the Civil Procedure Rules; and secondly, he is not barred from seeking the court's intervention under Section 3A of the Civil Procedure Act.

10. Because, as I observed in **Osho Chemicals Ltd v Tabitha Wanjiru Mwaniki (2018) eKLR** the court bears the duty imposed by Section 1B of the Civil Procedure Act, to further the overriding objective in Section 1 of the Civil Procedure Act which states:

**“1A(1)the overriding objective of this Act and the rules made hereunder is to facilitate, the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act;**

**(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 specified in sub-section (1);**

**(3) A party to civil proceedings or an Advocate for such a party is under a duty to assist the court to further the overriding objective of the Act, and to that effect, to participate in the process of the court and to comply with the directions and orders of the court.”**

11. The court confronted with an application such as the present one is not hamstrung, and where circumstances demand, may invoke its inherent discretion in order to give meaning to the overriding objective principle, notwithstanding the absence of an express provision to authorize the Respondent, desirous of applying for the dismissal of an appeal which has not been set down for directions, to do so. See also **Aburili J in Allan Otieno Otsula's** case. An indolent appellant cannot be allowed to use the provisions of Order 42 Rule 35 (1) as both a sword and a shield.

Thus in my view the legal demurrer raised by the Appellants in this case offers them little refuge.

12. The appellants have, in attempting to explain their delay of 2 years placed before the court several annexures. The Respondents have in their submissions poked holes in the authenticity of the correspondence contained in the said annexures. For my part, I have to agree with the Respondents' observations that annexure **EMJ 1(a)** dated 30/3/16 is unsigned and not stamped as received in the respective registry. Ditto for annexure **EMJ 1b** dated 9<sup>th</sup> November 2016. Thus the first and only authentic evidence for the request of proceedings must be the letter marked annexure **EMJ 1c**, dated 25<sup>th</sup> January 2017, and filed in the Chief Magistrates registry on 2<sup>nd</sup> February 2017. The subsequent letter marked as **EMJ 1d** is equally unsigned and bears no stamp to confirm receipt at the relevant registry. The contents of the letter from the Chief Magistrate's court annexure **EMJ 1e** dated 23<sup>rd</sup> February 2017 is to my mind confirmation that the first communication by the appellants to the court is their letter of February 2017, two years after filing the appeal.

13. Besides, the letter by the Chief Magistrate's registry indicates ready availability of the lower court file. Thus the appellants' allegation that the lower court file was missing is not supported by any evidence. The appellants, rather than admit their own tardiness have chosen the easier road of laying blame on the registry of the lower court. The delay in this case is inordinate. Seemingly, the appellants only revisited their appeal when served with the present motion, by filing their record of appeal four months later. Despite the late filing of the said record, I believe that justice can still be done between the parties and the Respondents can be compensated by way of costs. See **Ivita v Kyumba (1984) KLR 441**.

14. In the circumstances, while I decline the instant application, and in order to expedite the matter, will order the appeal admitted under section 79B of the Civil Procedure Act. The appellants are to have the matter listed for directions under Order 42 Rule 13 of the Civil Procedure Rules within 30 days of today's date, failing which the appeal will automatically stand dismissed for want of prosecution.

The costs of the application are awarded to the Respondent in any event.

**Dated and Signed at Kiambu this 1<sup>st</sup> day of August, 2018.**

**C. MEOLI**

**JUDGE**

**Delivered and signed at Naivasha this 14<sup>th</sup> day of August, 2018.**

**R. MWONGO**

**JUDGE**

In the presence of:-

For the Appellants Ms Kipchoge holding brief for Juma

For the Respondents No representation

Court Assistant Quinter