REPUBLIC FOF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 177 OF 2011

KIPLABAI FARM LIMITED.....PLAINTIFF

-VS-

AMBROSE KIPLIMO CHEBOI.....RESPONDENT

RULING

1. The Notice of Motion before me dated 26th February, 2016 seeks that the memorandum of appeal be dismissed for want of prosecution and that the costs of the application be granted to the applicant. According to the grounds set out by the applicant and the supporting affidavit sworn by **Kipkoech Ngetich**, the applicants advocate, the memorandum of appeal was filed on 14th October, 2011 and that the appellant had not served a record of appeal since then which was a total of 1500 days of delay.

2. The application is opposed through the replying affidavit of **Rayond Kiprop Kikenei** advocate for the appellant/respondent. In various averments, he admits that the appeal was filed on 14th October, 2011 and attributes the delay to the inability to obtain typed proceedings from the court to facilitate the preparation of the record of appeal. He avers further that the respondent had paid Kshs. 500,000/= to the applicant's lawyers on 9th April, 2014 to facilitate stay of execution pending procurement of proceedings. That the proceedings were ready by July 2016, and the record was filed on 24th August, 2016.

3. The parties filed submissions along with authorities to support their respective positions. I have considered them. The only issue in this application is whether the appeal dated 12th October, 2011 should be dismissed for want of prosecution.

4. The principles to be applied in an application of this nature were succinctly stated in the case of **Ivita –vs Kyumbu (1984) KLR 441** in the following terms;-

> "The test applied by the courts in an application for 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. Thus, 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 time. It is a matter in the discretion of the court".

5. That applicant has premised his application on **Article 159 (2) (b) of the Constitution, Section 1A and B and Section 3A of the Civil Procedure Act** and **Order 42 Rule 35 (i) of the Civil Procedure Rules**, all which underscore the imperative for expeditious dispensation of justice. They submit that the delay in this appeal has been inordinate and inexcusable and the appellant has offered no valid reason for the delay. They cite **Michael Muriuki Ngubuini –VS- EABS Ltd** for the proposition that the court ought not to countenance unacceptable levels of delay and must use the overriding objective to bring cases to finality. They also site **Onyango VS National Naftali Opondo Bank of Kenya (2005) eKLR** to underscore that the burden of proof was on the defendant to demonstrate that the delay was inordinate, inexcusable and prejudicial.

6. The respondent's argument is that the delay was occasioned by the failure of the court administration to provide typed proceedings and judgment for them to compile and serve the record. They stated that they wrote several letters to the court and it was only in June, 2016 that the proceedings were available. That under **Order 42 Rule (13) (4) of the Civil Procedure Act** typed proceedings and judgment or Order must form part of the record. Further, the respondent submits that the appeal cannot be dismissed for want of prosecution where directions have not been issued. They rely on **Kenya Power & Lighting Ltd vs Quentive Wambua Mutisya t/a Bondeni Wholesalers, Machakos HCC No. 16 of 2013 (2015) ekLR and Kirinyaga General Machinery Vs. Hezekiel Muriithi Ireri (2007) eKLR.**

7. It is not disputed that it took the applicant some 5 years to file the record of appeal. He has hang on to the reason that the proceedings were not typed and supplied to her by the court despite several requests in correspondence dated 7th March, 2016, 17th July, 2014 ,03rd February, 2014 and 14th June, 2016 and 17th April, 2014. These letters which are indicated on the submissions have not however been

annexed to the replying affidavit to prove their existence. It is in fact the applicant who has annexed letters addressed by themselves to the court expressing frustration at the failure of the court to provide typed proceedings. This in itself is an indictment of the court processes which provide such a vital service to litigants. It makes the respondent's explanation for the delay reasonable and believable. Under those circumstances it would not be just to hold the respondent wholly responsible for the delay.

8. I would agree with the legal position stated by the respondent that the appeal cannot be dismissed under **Order 42 Rule 35 (i) of the Civil procedure Rules** as it has not been admitted and directions issued thereupon. It is still however possible for the appeal to be dismissed pursuant to **Section 3A and 1B and 3A of the Civil Procedure Act** to enforce the expeditious disposal of disputes and rid the court registry of inactive files. In this case however, as I have found, the respondent is not wholly to blame for the delay.

9. In the circumstance of this case I find that justice can still be done despite the delay. I will therefore not dismiss the appeal for what of prosecution but rather direct that the record of appeal be served upon the respondent within 7 days of the delivery of this ruling. The appeal shall stand dismissed if it shall not have been admitted and a date taken for its hearing within 30 days of this ruling.

Orders accordingly.

Ruling signed at Garsen on.....day of June 2018.

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R. LAGAT KORIR

JUDGE

Ruling delivered dated and Counter signed at Nakuru this 2nd day of August, 2018.

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JANET MULWA

JUDGE

In the presence of

.....CA

.....for applicant

.....for respondent