



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 236A OF 2013

THE METHODIST CHURCH OF KENYA REGISTERED UNDER TRUSTEES

BISHOP J MUKU

JOYCE J KINOTI

JAMES KIBITI.....APPELLANT/RESPONDENT

VERSUS

DAVID MWEBIA MUTHAMIA

M'INOTI M'MWARI

HELLEN MWARI.....RESPONDENT/APPLICANT

RULING

1. This Notice of Motion dated 25th September 2015 has been filed pursuant to *Section 1a, 1b, 3, 3a of the Civil Procedure Rules, Order 17 Rule 2(3) of the Civil Procedure Rules CAP 21 Laws of Kenya* and *all enabling laws*. The applicant seeks the following orders:

a) Spent.

b) THAT the honorable court be pleased to dismiss the instant appeal for failure to prosecute the appeal for a period of one year.

c) That the temporary orders of stay issued in lower court in the case NO. 349 of 1999 (lower court) be vacated.

d) THAT the cost of this application be provided for.

2. The grounds upon which the Motion is grounded are set out in its body, supporting and further supporting affidavit of Mutunga Murithi sworn on 25th September 2015 and 1st October 2018 respectively. It is contended that the lower court gave its judgment in Civil Suit No. 349 of 1999 and a decree was issued on 23rd July 2008. On that particular day the appellant sought a stay pending the intended appeal of which a temporary stay of execution was issued. Since then the appellants have not moved this court on their appeal as it has taken two years. Thus the appellants are not desirous to prosecute their appeal. The appellants are enjoying the stay as they are still on the Suit Land, while the respondent is unable to enjoy the fruits of the judgment.

3. This application was opposed vide the replying affidavit of Mutegi Mugambi sworn on 27th July 2018 and submissions thereof. He deponed that the reason why the appellant has been unable to prosecute this appeal is because the lower court file has been missing and their efforts to have the file has been fruitless. They have attended court severally and parties have agreed to exchange documents to enable the reconstruction of the file.

4. The issue for determination before this court is *whether or not to dismiss the instant appeal for failure to prosecute the same*.

5. Order 42 Rule 35 of the Civil Procedure Rules stipulates that:

i. "(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.

ii. (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.”

6. F. Gikonyo J in the case Utalii Transport Company Limited & 3 others v Nic Bank Limited & another [2014]eKLR stated as follows;

iii. “Accordingly, I will discern the principles which the law has developed to guide the exercise of discretion by court in an application for dismissal of suit for want of prosecution. These principles are:

- 1) *Whether there has been inordinate delay on the part of the Plaintiffs in prosecuting the case;*
- 2) *Whether the delay is intentional, contumelious and, therefore, inexcusable;*
- 3) *Whether the delay is an abuse of the court process;*
- 4) *Whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the Defendant;*
- 5) *What prejudice will the dismissal occasion to the plaintiff?*
- 6) *Whether the plaintiff has offered a reasonable explanation for the delay;*
- 7) *Even if there has been delay, what does the interest of justice dictate: lenient exercise of discretion by the court?*

The principles above are somewhat inextricable and may not be dealt with distinctively from one another without making prominent reference to or connecting one with the other. But what matters is the overall impression the court makes out of the analysis of the above principles within the circumstances of the case in question, and the general demands of justice. That is why; it is worth repeating, it is all a matter of discretion of the court.”

7. Being guided by the foregoing, I will weigh these principles against the facts. The appellant initiated the appeal in 2013. From the record, the memorandum of appeal was filed on 12.4.2013. For the next two plus years until the time of filing the present application in September 2015, nothing happened, save one feeble attempt to fix a mention date. For about 5 years the matter has not been prosecuted. The law provided that if one year after service of the memorandum of appeal the appeal, has not been set down for hearing it ought to be dismissed. Consequently, five years is indeed inordinate delay on the part of the appellant in prosecuting their appeal.

8. The appellants’ through their advocate explained that the delay was not intentional as it was due to misplacement of the lower court file which could not be traced. They supported their claim with a letter written to the applicant’s advocate which is dated 10th October 2016. This came a year after the application for dismissal had been filed. It is not this court’s file which went missing, it is the lower court file. There is nothing to indicate that the appellant made any efforts before the trial court to have the file reconstructed. By the time I was giving directions on the hearing of the application in May 2018, there was no tangible evidence on how the appellant intended to prosecute this application. I therefore find that the delay is inexcusable, more so because the appellants waited until the said application was filed to raise their excuse.

9. The appellants had been granted a stay pending the hearing of the appeal *inter-parties*. Given that the appellants have not sought the furtherance of their appeal since 2013, they have been sitting on the stay which has resulted in them remaining in occupation of the Suit Land. The appellants are indolent litigants who have in essence abused the court process.

10. **Article 159 of the Constitution** stipulates that the courts in exercising their judicial authority ought to be guided by several principles which include “**justice shall not be delayed and justice shall be done to all**”. In light of the delay in this matter, and keeping in mind that a stay was granted before the lower court, then certainly there is prejudice occasioned to the Applicants who have not been able to enjoy the fruits of their judgment.

11. **From the foregoing, I am of the view that the application dated 25th September 2015 is merited. The same is allowed with costs to Applicant.**

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 28TH NOVEMBER, 2018

IN THE PRESENCE OF:-

C/A: Kananu

Gikonyo holding brief for Mutegi for appellant/respondent

Rimita C. holding brief for Mutunga for applicant/respondent

HON. LUCY. N. MBUGUA

ELC JUDGE