



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

HCA 69 OF 2014

JAMES WANYOIKE..... 1ST APPELLANT

GREAT RIFT VALLEY SHUTTLE.....2ND APPELLANT

-VERSUS-

ROSEBELLA JEBET BOR.....DEFENDANT

RULING

1. The respondent in this appeal (hereinafter applicant) has asked the court to dismiss the appeal for want of prosecution. The application is brought under Order 17 Rule 2 (3) and Order 51 Rule 1 of the Civil Procedure Rules and is based on the grounds that a period of 1 year and nine months had elapsed since the appeal was filed and that the continued pendency of the appeal was prejudicial and vexatious to the respondent/applicant and that the wider interest of justice demand dismissal for want of prosecution.

2. The application is supported by the affidavit of Mongare Gekonga Advocate sworn on 24th May 2016. In summary, counsel has made averments to the effect that the appellant has not prosecuted the appeal since filing on 6/6/2014 and that the inordinate delay was denying the applicant/respondent the fruit of judgment and causing anxiety and uncertainty.

3. The application is opposed by the respondent/appellant. Replying affidavit sworn by Maurine Andeje who is the claims manager of the respondents insurers states *inter alia* that the respondent filed the appeal on 5/6/2014 and wrote to the E.O of the Court requesting typed proceedings and deposited part payment of the decretal amount. That the appeal has not been admitted and directions given and cannot therefore be dismissed under Order 42 Rule 35. That Section 79B of the Civil Procedure Act and Order 42 give mandatory steps to be followed in prosecuting an appeal and that is in the interest of justice that the application be dismissed as the delay in prosecuting the appeal was not occasioned by the appellants.

4. At the hearing of the application on 9/3/2017, Mr. Gekonga for the applicant reiterated the averments in the supporting affidavit. He submitted that since the filing of the instant application in 2014 the respondent had not filed any response and that he had just been served with a replying affidavit. He urged the court to strike out the replying affidavit as the respondent had not sought leave to file the same out of time. That even if the replying affidavit was admitted the said affidavit did not disclose any serious reasons for the delay.

5. I will begin with the issue of the Replying Affidavit being filed out of time. It was admitted by Mr. Murunga who was holding brief for Ms. Bii for the respondent that the replying affidavit was filed out of time and that he had no instructions in respect of the delay. Section 95 CPA allows a court the discretion

to enlarge time. It is however upon the party who requires enlargement of time to ask for it. In this case, as the applicant's counsel pointed out that was not done. In the circumstances of this case however, and seeing no possible prejudice to be suffered by the applicant, I would admit the Replying Affidavit and deal with the merits of the application.

6. The respondent has challenged the provisions under which the application has been brought. Order 17 Rule 2 (3) of the CPR states that:

Any party to the suit may apply for its dismissal as provided by sub-rule 1.

Sub rule 1 states:-

“In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.”

The respondent contends that the appeal can only be dismissed for want of prosecution under Order 42 Rule 35 (2) of the Civil Procedure Rules as it has not been admitted in accordance with the Section 79B of the Civil Procedure Act. That orders for dismissal sought by the respondent should not be entertained.

7. Both Order 17 Rule 2 (3) and Order 42 Rule 35 (2) in my view give effect to the overriding objective which is the just, expeditious, proportionate and affordable resolution of civil disputes. They provide avenues through which idle litigation is weeded out of the court system. Their import is to ensure that parties either keep their litigation alive or get them removed. While Order 17 places the responsibility of flagging out such cases on the parties, Order 42 Rule 35 (2) places the responsibility on the court through its duly appointed Registrars. While I agree with the respondent that the application has been brought under the wrong provision of the law, I hesitate to strike it out. I will instead consider it under the ambit of overriding principle in litigation under Section 1A of the Civil Procedure Act.

8. The issue in this application as I see it is whether the appeal has been filed and left lying idle in the court registry and whether the applicant, who is the respondent in the appeal has been and continues to be prejudiced by the pending appeal and therefore deserving of the dismissal orders sought.

9. The principles to be applied when considering dismissal for want of prosecution have been enunciated in several decisions. They are aptly described in ***Ivita Vs Kyumbu (1984) KLR 441***, and ***Utalii Transport Company Ltd & 3 others Vs NIC Bank Ltd & another 2014 eKLR***.

They are:

- i. Whether the delay is inordinate***
- ii. whether the delay is intentional, contumelious and therefore inexcusable.***
- iii. whether it is an abuse of the court process***
- iv. whether the delay gives rise to substantial risk to the defendant.***
- v. whether the dismissal will occasion prejudice to the plaintiff***
- vi. whether the plaintiff has reasonable explanation for the delay, and;***
- vii. whether the interests of justice can still be served despite the delay.***

10. In the present case, the record shows that the memorandum of appeal was filed on 6/6/2014. There is evidence that the appellants deposited the decretal sum as to stay execution as ordered by the court. There is also the evidence that the appellants have sought typed proceedings from the lower court to no avail.

While it cannot be said that the appellants have actively made a follow up on the availability of proceedings and taken active steps to file record of appeal, I do not find it fair to hold them responsible for the omission of the court in availing typed proceedings.

On the same breath, I am alive to the fact that the appellants should not be allowed to lodge an appeal and thereafter hide behind the administrative steps necessary for an admission of an appeal to delay the expeditious disposal of the appeal. They cannot be seen to deny the respondents the fruits of the judgment while pleading inability to move the appeal forward. They must be seen to pursue the appeal with zeal.

11. In the premises I too decline to dismiss the appeal. I am satisfied that the appellant has not been indolent and that the delay is excusable. I order that the appellants file the record of appeal within 30 days and that the Deputy Registrar of the Court takes the necessary administrative steps to facilitate the admission of the appeal. The appeal shall stand dismissed if the record shall not have been filed within 30 days. Costs in application shall abide in the appeal.

Orders accordingly.

Ruling delivered, dated and signed in open court this 30th day of March, 2017

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R. LAGAT KORIR

JUDGE