



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 244 OF 2010

JOHN KIMUNYEE CHERUIYOT.....1ST APPELLANT

NSSF BOARD OF TRUSTEES.....2ND APPELLANT

VERSUS

TALLA CHEBOCHA.....RESPONDENT

RULING

1. The respondent prays that this appeal be *dismissed* for want of prosecution. The notice of motion is dated 12th May 2016. The respondent avers that the appeal has been pending for two years; and, that *no* steps have been taken by the appellant to set it down for hearing. The respondent contends that the appellant has lost interest in the appeal.

2. Those matters are reinforced by a deposition of his counsel, *George Mbiyu*, sworn on even date. The essence of the motion is that the lethargy by the appellant is inexcusable; and, prejudicial to the interests of the respondent.

3. The appellants oppose the application. There is a replying affidavit sworn by the appellants' counsel, *Alfred Nyairo* on 28th February 2017. He deposes at paragraph 8 that the appeal has *not* been admitted. At paragraph 3, he annexes three letters to the Deputy Registrar requesting for the file to be placed before the judge in chambers for *admission*. The letters are dated 10th June 2011, 6th September 2013 and 8th March 2016 and marked *AKN1 (a) to (c)*. He also avers at paragraph 5 that the court file went *missing*. A letter dated 3rd June 2015 to the Deputy Registrar is displayed.

4. The deponent avers that the *record of appeal* has been filed; and, that it would be unjust to dismiss the appeal on a technicality. In a synopsis, the appellant asserts that it is keen on prosecuting the appeal; and, that no prejudice will be suffered by the respondent if the appeal is heard on merits.

5. On 7th March 2017, learned counsel for the appellants and respondent made brief oral submissions. I have considered the rival arguments. I have also paid heed to the records before me, the pleadings, and depositions.

6. The memorandum of appeal was lodged on 15th December 2010. That is well over *six years* ago. The record of appeal was filed on 27th April 2012; and, a supplementary record on 6th June 2012. That is well over *four years* ago. I have seen the standard form affixed on page 1 of the court record. The appeal was admitted by Azangalala J (as he then was) on 25th July 2012. It is thus *not* true as urged by the appellant or his counsel that the appeal has *never* been *admitted*. The judge also *directed* that the record of appeal

be served.

7. Order 42 rule 12 required the Registrar to notify the appellant that the appeal had been admitted. I have seen a letter dated 16th March 2016 by the Deputy Registrar to the lawyers for the appellant *clarifying* that the appeal was *admitted*. In our *adversarial* system of justice, it remained the primary obligation of the appellant to follow up on his appeal. See Anne Chege & another v Peter Musasya, Nairobi, High Court Civil Appeal 840 of 2003 [2006] eKLR, Daniel Okoko v Dan Owiti, Nairobi, High Court Civil Appeal 452 of 2003 [2006] eKLR.

8. The appellant claims the court file went missing. That is not borne out by the record. The letter dated 3rd June 2015 to the Registrar has no acknowledgement stamp. The original file is *not* lost. The original transcript of the lower court file is attached to the appeal file.

9. The record shows that on 7th December 2012, the parties took a date for *directions* by consent for 29th January 2013. On the latter date, the judge fixed the appeal for hearing on 30th April 2013. On that date, the court was informed that the respondent had passed on; and, there was need for substitution. On 8th July 2014, the application for substitution was allowed. On 10th July 2015, a date for directions was fixed for 8th December 2015. That was the last step taken in prosecuting the appeal.

10. A period of *two years* has passed from the date of substitution on 8th July 2014 without *any* further step. In summary, there was nothing preventing the appellant from taking a hearing date. Not even one invitation letter to take a hearing date is annexed. The appellants persisted in their *mistaken belief* that the appeal has never been *admitted*.

11. Order 42 rule 35 (1) expressly authorizes an aggrieved respondent to move the court for dismissal if the appeal is not set down for hearing *three months* after taking directions. In the instant case, the appellant has *not* taken any steps to list the appeal for directions or for hearing since 10th July 2015. The application for dismissal is thus properly before the Court.

12. The test in a matter of this nature was well laid out in Ivita v Kyumbu [1984] KLR 441. It is whether the delay is *prolonged* and *inexcusable*, and if it is, whether justice can still be done. In that event, instead of dismissal, the court may exercise its discretion to set the suit down for hearing.

13. The blame for failure to progress the appeal from the date of substitution on 8th July 2014 rests entirely at the appellant's doorstep; or, that of its learned counsel. The appeal has lain dormant. The delay has *not* been well explained. It is thus *inexcusable*. See Ivita Vs Kyumbu [1984] KLR 441, Allen v McAlpine [1968] 1 All ER 543, Ramuka Agencies Ltd v Esther Wanjira Maina and another Nairobi, High Court ELC 1187 of 2007 [2012] eKLR.

14. I have also perused the decree that was appealed against. Judgment was entered against the appellant for the tort of negligence for Kshs 702,500. Granted the decree, I would have expected the appellant to be a little more diligent in the matter.

15. I am alive of the overriding objective to do justice to the parties. It is in the interests of a fair trial that disputes be resolved expeditiously. Sections 1A and 1B of the Civil Procedure Act speak strongly to the duty of parties and counsel to assist the court to expedite justice. The respondent is obviously *prejudiced* by a stagnant appeal. The dictates of justice and the inherent power of the court require, in circumstances such as these ones, to free the respondent from the hold of the appellant's inert grip.

16. The upshot is that the appeal is hereby *dismissed* with *costs* to the respondent.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 23rd day of March 2017.

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:

Mr. Okara for Mr. Mutonyi for the respondents instructed by Mutonyi, Mbiyu & Company Advocates.

No appearance by counsel for the appellant.

Mr. J. Kemboi, Court Clerk.