REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 77 OF 2006

EASTERN PRODUCE (K) LTD……..……..……..…APPELLANT

VERSUS

DISHON ALMASA…….……..…….…….……...RESPONDENT

RULING

1. The respondent prays that this appeal be *dismissed*. In a chamber summons dated 11th August 2016 the respondent pleads that the appellant has lost interest in the appeal. He states that the appeal was filed over *ten years* ago; and, admitted for hearing on 31st July 2014. He contends that the appeal is *dormant*; and, that *no* steps have been taken by the appellant to set it down for hearing.

2. Those matters are buttressed by a deposition of his counsel sworn on even date. The pith of the summons is that the delay is inexcusable; and, prejudicial to the interests of the respondent.

3. The appellant opposes the application. There is a replying affidavit sworn by the appellant's counsel, *Alfred Nyairo* on 4th March 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 29th September 2016, 16th July 2016 and 21st November 2016 and marked AKN1 (a) to (c). He also avers that the court file went missing. A letter dated 20th August 2015 is displayed to that effect.

4. The deponent implores the court to take *judicial notice* that the court diary is congested; and, that the *respondent* took no steps to fix the appeal for hearing. In essence, 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 appellant 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 *16th June 2006*. That is well over *ten years* ago. The record of appeal was filed on 31st May 2011, over *five years* ago. I have seen the standard form affixed on page 1 of the court record. The appeal was admitted by Ngenye-Macharia J on *31st July 2014*. 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. But it

must never be forgotten that 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. The bitter truth is that the appellant went into deep slumber.

8. The appellant claims the court file went missing. That is strange. The letter dated 20th August 2015 to the Registrar has no acknowledgement stamp. The original file is *not* lost. The record shows that on 12th July 2013, a clerk from the appellant's law firm took a date for an application dated 9th July 2013. It was an application for directions. It came up for hearing on 14th November 2013. It was adjourned because the appeal had at that point not been admitted. As I stated, the appeal was subsequently admitted on 31st July 2014. The letters dated 29th September 2016, 16th July 2016 and 21st November 2016 and marked AKN1 (a) to (c) to the Deputy Registrar for *admission* are obviously redundant. The claim that the court file was missing is equally a red herring.

9. The original transcript of the lower court file is attached to the appeal file. In summary, there was nothing preventing the appellant from taking a hearing date. True, the court diary at Eldoret is congested. But *ten years* delay from the presentation of the appeal; or, at any rate *five years* from the date of the record of appeal is too long; and, *inexcusable*. Not even one invitation letter is annexed to take a hearing date. The appellant persisted in its mistaken belief that the appeal has never been admitted.

10. 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 the filing of the appeal on *16th June 2006*. The application for dismissal is thus properly before the Court.

11. 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.

12. The blame for failure to progress the appeal from the date of admission on 31st July 2014 rests entirely at the appellant's doorstep; or, that of its learned counsel. The appeal has lain dormant for over *ten years*. Inordinate delay has thus been established. 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.

13. I have also perused the decree that was appealed against. Judgment was entered against the appellant for the tort of negligence for Kshs 102,000 less 20% liability. Granted the decree, I would have expected the appellant to be a little more diligent in the matter.

14. 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.

15. The upshot is that the appeal is hereby *dismissed*. I grant the respondent *costs*.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 21st day of March 2017.

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:

No appearance by counsel for the respondents.

No appearance by counsel for the appellant.

Mr. J. Kemboi, Court clerk.