



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 177 OF 2013**

**AFRICA MERCHANT ASSURANCE COMPANY LIMITED.....APPELLANT/RESPONDENT**

**VERSUS**

**TITUS KINYANJUI KIENJEKU ..... RESPONDENT**

**RULING**

1. The respondent has moved this court by a notice of motion dated 29<sup>th</sup> January, 2017 seeking the dismissal of this appeal for want of prosecution. The motion is brought under **Order 42 rule 35 1 & 2 of the Civil Procedure Rules** and **Section 3A of the Civil Procedure Act**. It is based on the grounds on the body of the motion and the supporting affidavit of Gachoka Mwangi who is the advocate in conduct of this matter on behalf of the respondent.

2. It is contended that this matter has stalled for three years from the date of filing of the memorandum of appeal which was filed on 2<sup>nd</sup> April, 2013. That the delay in prosecuting the appeal has caused the respondent great prejudice having to wait for the matter indefinitely. That the delay is denying the respondent his lawful right to enjoy fruits of the judgment. It was submitted that the respondent filed a similar application but the same was withdrawn on condition that the appellant would be paid throw away costs of KShs.7,000/= which the appellant has not paid to date. That the respondent was served with the grounds of opposition after the three days' period prescribed under **Order 51 rule 14 (2)** had lapsed. That the accident occurred on 8<sup>th</sup> July, 2010 which is 7 years ago yet the respondent has never realized the fruits of his judgement.

3. The appellant filed grounds of opposition on 27<sup>th</sup> February, 2017 in opposition to the motion listing only one ground, that with the record of appeal on record, it is only fair and just that the appellant be given a chance to be heard on the appeal on merit. In submissions, the appellant's counsel admitted that the appeal has indeed stalled but the reason he gave was that his office file was marked as closed and the same had been filed away in the archives. Counsel for the appellant admitted it was an error on his part and stated that the record of appeal has been filed and served. On the issue of delay in filing the grounds of opposition, he told the court that the same was occasioned by non availability of his office file.

4. Counsel for the respondent/applicant submitted that the application was served on 30<sup>th</sup> January, 2017 but the appellant's counsel never called to explain to him his predicament. It was further submitted that the filing of the record of appeal was prompted by the respondent's motion filed on 7<sup>th</sup> May, 2014 seeking dismissal.

5. The court has considered the application and the arguments by the respective parties. The principles that govern dismissal of a suit for want of prosecution are that; delay must be inordinate, the inordinate delay is inexcusable and the Defendant is likely to be prejudiced by the delay. Chesoni, J. [as he then was] applied these principles in the case of ***IVITA V KYUMBU, [1984] KLR, 441***. He stated as follows in the said case:

***“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that***

***he will be prejudiced by the delay or even that the Plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the Plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the Plaintiff's excuse for the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time."***

6. The latter decision was cited with approval in the Court of Appeal's decision in **MOSES MURIIRA MAINGI & 2 OTHERS V MAINGI KAMURU & ANOTHER, NYERI CA NO. 151 OF 2010** where the court said:

***"The power of the court to dismiss a suit for want of prosecution is discretionary power, but which should be exercised judicially."***

7. It follows that for this court not to dismiss this appeal, sufficient explanation for the delay has to be given. It is then that the court shall determine whether or not the delay is inordinate and inexcusable and whether justice can still be done even with such delay. The appellant filed grounds of opposition to this motion. While I appreciate that ***Order 51 rule 14 (1) of the Civil Procedure Rules*** gives a respondent an option to either file a replying affidavit or grounds of opposition in opposition to an application, I must say that in this case, a replying affidavit was ideal and essential as it gives real evidence of the material facts. I find that the grounds of opposition filed herein do not suffice in rebutting the facts raised in the supporting affidavit as the grounds do not constitute evidence of the allegations such as the closure of file and filing away of the same which were made in the appellant's counsel's oral submissions. See **KENNEDY OTIENO ODIYO & 12 OTHERS V KENYA ELECTRICITY GENERATING COMPANY LIMITED, [2010] ECLR** and **KIPYATOR NICHOLAS KIPRONO BIWOTT V GEORGE MBUGUSS AND KALAMKA LTD, CIVIL CASE NO. 2143 OF 1999** where it was stated as follows respectively:

***"...The grounds of opposition addresses only issues of law and no more. The grounds of opposition aforesaid are basically general averments and in no way respond to the issues raised by the application in its supporting affidavit. Thus what was deposed to was not entered nor rebutted by the respondents. It must be taken to be true. In the absence of the replying affidavit rebutting the averments in the applicant's supporting affidavit, means that the respondents have no claim against the applicant."***

***"...From the facts and the law, I have analyzed in this case, I do find the Defendants have no defence to this suit...having filed no replying affidavit to rebut the averments in the plaintiff's affidavit in support of the application. I, therefore have no alternative but to strike out paragraphs 3, 4, 5, 6 and 10 of the defence and enter judgment for the plaintiffs on liability..."***

8. The same position was held by the Court of Appeal in **MOHAMED & ANOTHER V HAIDARA, (1972) E.A. 166** where the court held that a replying affidavit was essential as it sets out the real evidence of the material facts that is contained in the appellant's affidavit. In view of the foregoing, I find that the delay has not been sufficiently explained but in the interest of justice, I will give the appellant a chance to prosecute the appeal and order that the same to be prosecuted within 120 days failing which, it shall stand dismissed. The application dated 29<sup>th</sup> January, 2017 is dismissed. The costs shall abide the outcome of the appeal.

**Dated, signed and delivered at Nairobi this 20<sup>th</sup> day of April, 2017.**

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**L. NJUGUNA**

**JUDGE**