



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 589 OF 2012**

**TRICLOVER NDURTIES (K) LTD ..... APPELLANT/RESPONDENT**

**VERSUS**

**PATRICK KITHEKA ..... RESPONDENT/APPLICANT**

**RULING**

1. The Respondent moved this court by a notice of motion dated 4<sup>th</sup> April, 2016 seeking the dismissal of this appeal and that the costs of the motion, the decretal amount awarded by the lower court and the costs arising therefrom be awarded to it with interest at court rates.
2. The motion was supported by the affidavit of Edna Bosibori who is the advocate in conduct of this matter on behalf of the Respondent. The appellant's operations manager Muzahir Bhajee swore a replying and supplementary affidavit in response to the motion on 17<sup>th</sup> October, 2016 and 17<sup>th</sup> January, 2016 respectively. The motion was heard by way of oral submissions.
3. It was the respondent's contention that judgment of KShs.351,500/= was awarded to the respondent on 19<sup>th</sup> October, 2010. The appellant filed a memorandum of appeal against the said judgment on 2<sup>nd</sup> November, 2012. That as at 22<sup>nd</sup> May, 2013, the appellant had not taken steps to ensure that the lower court filed was transferred and cause the appeal to be listed before a judge. That that prompted the respondent to file an application seeking that the decretal sum be released to him since he needed the same for medical attention. That application was dismissed.
4. The respondent contends that the dismissal of that application gave the appellant more time to file a record of appeal. That the parties engaged in communication with the respondent urging the appellant to cause the matter to be listed to no avail. That despite having been directed by the court to file a record of appeal, the appellant had since 2014 not filed one. On 5<sup>th</sup> December, 2014 the respondent moved the court to dismiss this appeal and it was so dismissed by orders of 9<sup>th</sup> December, 2014 but the appellant reinstated the appeal. It was stated that the reinstatement was a conditional one thus; the appellant was to pay costs to the respondent and it was to file a record of appeal within 30 days from 30<sup>th</sup> June, 2015. The respondent stated that since June, 2015 the appellant has not made any effort to list the matter before a judge or at least indicate an interest in prosecuting this appeal. He lamented that he has suffered for a long time since he has huge hospital bills and need medical attention.
5. The respondent contended that there are authorities that limit the oxygen principle that the appellants have sought to rely on. The respondent cited **CALTEX OIL LIMITED V EVANSON WANJIKO, CIVIL APPLN NO. 190 OF 2009** and **KCB LIMITED V KENYA PLANTERS UNION, CIVIL APPLN NO. 85 OF 2010**. The respondent further cited **JOHN ONGERI MARIARA & 2 OTHERS V PAUL MATINDURA, CIVIL APPLN NO. 301 OF 2003** where it was held that legal business cannot be

handled in a sloppy and careless manner. It was submitted that justice must look both ways as the rules of procedure are meant to regulate the administration of justice and are not meant to assist the indolent.

6. The appellant on the other hand contended that it moved with speed to file a memorandum of appeal after the entry of the judgment. That the appellant's advocates requested for proceedings from the lower court by a letter dated 2<sup>nd</sup> November, 2012. That the record of appeal could not be compiled as various attempts to obtain the typed proceedings were futile. That the court file was always missing at the registry and all attempts to obtain typed proceedings were in vain. The appellant contended that it should not be condemned for the delay occasioned by the court registry.

7. It was contended that the appeal was dismissed since the advocate who had been requested to hold brief on behalf of the appellant's advocate was in another court. That the respondent was given 15 days leave to file a cross appeal which it has not to date filed. The appellant urged that this court should hear this appeal since it raises triable issues. It was further contended that the parties had initiated negotiations for an out of court settlement which negotiations would have provided a faster way to settle the dispute in light of the lower court delay in issuance of the proceedings.

8. In his submissions the respondent cited **UNIVERSITY ACADEMIC STAFF UNION V KENYATTA UNIVERSITY & ANOTHER, [2015] eKLR** where the court dismissed an application for dismissal for want of prosecution of an appeal on the basis that although the appeal had not been prosecuted on time, the appellant had taken necessary steps to regularize the appeal. The appellant also cited Article 159 (2) (d) and submitted that substantive justice should be the driving force in deciding this matter.

9. In rebuttal, the respondent's counsel submitted that this motion was filed on 4<sup>th</sup> April, 2016 and the reply filed on 27<sup>th</sup> October, 2016, 6 months after. It was further stated that the letters were written one year apart. On the issue of prejudice, it was submitted that the appellant's action has unfairly withheld the respondent lawfully acquired judgment.

10. I have taken the liberty to read the record. The ruling reinstating this appeal was delivered on 30<sup>th</sup> June, 2015. The letters exhibited to prove that the appellant attempted to get the proceedings were written before the date of the delivery. The appellant has not annexed any correspondences to show that he followed up the proceedings after the delivery of the ruling. It is also noted though the appellant alleges that the lower court file was missing, there is no evidence by way of a letter to prove that allegation. My perusal of the record reveals that the proceedings were certified as a true copy of the proceedings way back on 22<sup>nd</sup> May, 2013 and from that date, they were available to the appellant for purposes of filing a record of appeal. It is also clear from the record that the appeal had earlier been dismissed but Hon Justice Aburili gave the appellant another opportunity by reinstating the same on condition that the appellant was to file the record of appeal within 30 days from the date of the ruling which was delivered on 30<sup>th</sup> June, 2015. The appellant filed the record on 1<sup>st</sup> October, 2015 outside the period that the court had given. Extension of time was not sought and therefore the record of appeal was filed out of time and in total disregard of the court order. As submitted by the counsel for the respondent, justice must look both ways. The conduct by the appellant is not one of a party who is serious in prosecuting the appeal.

11. In the result, I find and hold that the application dated 4<sup>th</sup> April, 2016 has merits and it is hereby allowed as prayed.

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

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**L. NJUGUNA**

**JUDGE**

**In the presence of:**

..... for the Applicant

..... for the Respondent