

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 447 OF 2012

NYAGA STOCK BROKERS LIMITED.....APPELLANT

- V E R S U S -

SOLOMON EMBENZI BWONYA AND EVERLINE LODENYI

(BOTH TRADING AS DAVIAN CLEANING SERVICES).....RESPONDENT

RULING

1. Solomon Embeni Bwonya and Everlyne Lodenyi T/a Davian Cleaning Services, the respondent herein took out the motion dated 24th August 2016 whereof they sought for the appeal to be dismissed for want of prosecution. The motion is supported by the affidavit of Solomon Embenzi Bwonya. When served with the motion, Nyaga Stockbrokers Ltd, the appellant herein filed a replying affidavit sworn by Zehrabanu JanMohammed to oppose the motion. When the motion came up for interpartes hearing, learned counsels recorded a consent order to have the motion disposed of by written submissions.

2. I have considered the grounds set out on the face of the motion and the facts deponed in the supporting and opposing affidavits. I have further considered the rival written submissions. It is the submission of the respondent/applicant that since the appeal was filed on 27.8.2012, the appeal has never been set down for directions under Order 42 rule 13 of the Civil Procedure Rules, 2010. It is also argued that the appeal has never been set down for hearing. This court was beseeched to find that the appellant has lost interest to pursue this appeal therefore the same should be dismissed.

3. The appellant on the other hand has conceded that indeed there was a delay in prosecuting the appeal. The appellant has pointed out that the delay cannot be attributed to it but it was as a result of factors beyond its control. The appellant exhibited in the affidavit of Zehrabanu JanMohamed various correspondences written by the appellant to the Deputy Registrar seeking to have the appeal listed for directions pursuant to the provisions of Section 79(B) of the Civil Procedure Act which correspondences never bore fruit. The appellant further stated that on 16.2.2015 it received a copy of a letter from the Deputy Registrar requesting the Chief Magistrate to forward the trial court's file to this court for purposes of having the appeal listed for directions to have the appeal ready for hearing. The appellant further stated that it has not lost interest in pursuing this appeal. It is also argued that the delay to prosecute the appeal is not inordinate nor inexcusable.

4. Having considered the material placed before this court, it is clear to me that the appellant has given plausible reasons to explain the cause for the delay. It is apparent that the file of the trial court took time to be availed to this court, therefore it was difficult to list the appeal for directions. The appellant has been able to demonstrate that it had not lost interest to prosecute the appeal in view of the correspondences it exchanged with the Deputy Registrar of this court. For the above reasons, I am convinced the appeal should not be dismissed for want of prosecution.

5. In the end, the motion dated 24th August 2014 is ordered dismissed with each party bearing its own costs.

Dated, Signed and Delivered in open court this 25th day of May, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent