REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE NO. 6 OF 2012

B.O.G. MISYANI GIRLS SEC. SCHOOL .....APPELLANT/RESPONDENT

VERSUS

JOSEPH MUTISO KIOKO .....RESPONDENT/APPLICANT

RULING OF THE COURT

1. The Notice of Motion Application before court is dated 27th July 2016. It prays for orders that the Appeal filed herein be dismissed with costs for want of prosecution. The Application is premised on the grounds that:-

(a) That the Appeal herein was filed in court on 11/01/2011 and the record of Appeal was filed on 20/1/2014 and served on the 3/2/2014.

(b) That it is more than two (2) years since the appeal was filed and was last in court when a ruling on the issue of stay of the judgment was delivered.

(c) That no steps have been taken to prosecute it.

(d) That the continued pendency of the appeal is not only against the principles of justice but also prejudicial to the Respondent/Applicant.

(e) That even if the Respondent was to have the appeal set down for hearing, it will be of no use as the Appellant has had the opportunity to prosecute the Appeal but spurned.

(f) That further even if the appeal were filed for hearing it is not known whether the Appellant would have seized the opportunity.

2. The Application is supported by the Affidavit of **Anthony Mulekyo** sworn on even date. The deponent is the Applicants Advocates. The Applicants case is that this Appeal was field way back in January, 2011 and it is now more than five (5) years since the appeal was filed yet no steps have been taken by the Appellant to prosecute it. It is the Applicant's contention that is unfair and unjust for the Appellant to endlessly subject the Respondent to anxiety of defending an appeal that is not being prosecuted. It is further the Applicant's contention that the failure by the Appellant of taking steps towards an expedited resolution of the appeal is a gross abuse of the court process and hence this court should dismiss the Appeal.

3. The Application is opposed vide a replying affidavit sworn by Joyce Kulola Mshila Advocate for the Respondent on 27/2/2017. The Respondent's case is that it duly filed its record of Appeal in time and were advised by the Civil Appeal Registry that they would be notified once the lower court file would be

availed so that directions could be taken. It is the Appellant/Respondent's case that so far directions have not been taken and hence the Application is premature. It is further the Respondent's case that there was no indolence on their part to prosecute the Appeal as the registry has not yet communicated with them over the matter and therefore the Application should be dismissed with costs. The Respondent also filed grounds of opposition dated 27/2/2017 in which he contended that the Appellants Application's is fatally defective as it has been brought under the wrong provisions of the law since the correct and applicable provisions is under order 42 Rule 35 if the Civil Procedure Rules.

4. Parties filed Written Submissions

Applicant's Submissions:-

It was submitted for the Applicant that this court should use its inherent powers and allow the Application since the Appellant cannot be allowed to sleep on the Appeal and thereby prejudice the Respondent/Applicant. It was further submitted that the Appellant's excuse in shifting the blame upon the Civil registry is not excusable as it could not expect the registry to do all the work for them yet they themselves have never bothered even to list the matter for directions at any given time. It was also submitted for the Applicant that it can no longer rely on the argument that an appeal cannot be dismissed unless directions have been issued in line with Section 79B, 79C of the Civil Procedure Act and Order 42 Rule 11 of the Civil Procedure Rules 2010. Two cases were relied upon namely **ELEN INVESTMENT LIMITED =VS= JOHN MOKORA OTWOMA [2015] eKLR** and **JUSTUS GACHOKI WACHIRA =VS= EMMA MAKENA [2011] eKLR** where the courts held that inherent powers under Section 3A, 1A and 1B of the Civil Procedure as well as Article 159 (2) (b) of the Constitution could be invoked and have an Appeal dismissed for want of prosecution as a result of Appellant's filing Appeals and then going to sleep. It was finally submitted for the Applicant that there has been inordinate delay on the part of the Appellant as a result of which the Respondent's/Applicant's rights to expeditious justice under Article 159 (2) has been violated and that the Application should be allowed.

Respondent's Submissions

It was submitted for the Respondent/Appellant that the Application has been brought under the wrong Provisions of the law and which merits the dismissal of the Application. It was submitted that the Application. It was submitted that the Application should have been brought under Order 42 Rule 35 of the Civil Procedure Rules, 2010. It was submitted for the Appellant/Respondent that the appeal should not be dismissed since the same has not been admitted and directions taken pursuant to Section 79B of the Civil Procedure Act. It was further submitted that the Appellant did not go to sleep as claimed by the Applicant but rather the delay is attributed to the Civil Appeal s Registry which had promised to notify them on the date for directions upon receipt of the lower court file. It was finally submitted that the Appellant is still desirous in the prosecution of the Appeal and that this court should invoke its inherent powers under Section 34 and Article 159 (2) (b) of the Constitution to do justice and to give directions as to the hearing of the Appeal herein.

5. I have considered the Application and the opposition thereto. I have also considered the submissions of the learned Counsels for the parties as well as the cited authorities. The issue for determination is whether the Appeal should be dismissed for want of prosecution. There is no doubt that there is indeed inordinate delay in the finalization of the Appeal herein. The Appellant/Respondent claims that it is still waiting for the Civil Appeal Registry to have the matter listed for directions and they be invited to take directions. It seems the Appellant is laying the entire blame for the delay to the Civil Appeal Registry yet they have not initiated any correspondences in the said registry or the Deputy Registrar as to the need to have the Appeal fast-tracked and concluded. Already the Appellant has prepared and filed the record of Appeal and what has been remaining is for the same to be admitted and listed for directions pursuant to Section 79B of the Civil Procedures Act and Order 42 Rule 11 of the civil Procedure Rules. The Appellant upon securing an order of stay of execution of the judgment of the lower court and preparing the record of appeal should not have left the responsibility of fasttracking the matter to the civil Appeal Registry but to be proactive towards the finalization of the matter. Under the Provisions of Sections 1A and1B of the Civil Procedure Act parties and their advocates are enjoined to assist the court in achieving

the overriding objectives of the Act namely to expedite the delivery of justice for the parties justly, fairly, proportionately and at a cost that is affordable to all. As noted, there is indeed a delay in the finalization of the Appeal and the Appellant should have been in the forefront towards that goal since delay defeats equity and further by dint of Article 159 (2) (b) of the Constitution Justice should not be delayed. Each of the parties to the suit expect Justice to done in the sense that the Appellant should be accorded an opportunity to ventilate its case and on the other hand the Respondent/Applicant should not be unduly kept away from enjoying the fruits of the judgment. A perusal of the court record reveals that this matter was lastly dealt with on the 29/04/2013 when a ruling on an Application for stay of execution by the Appellant was delivered. Since then no action has been taken by the Appellant towards having the Appeal set down for hearing until the present Application by the Respondent seeking for dismissal of Appeal for want of Prosecution. There is no evidence at all such as correspondences by the Appellant to the Deputy Registrar or civil Appeal Registry on the way forward as far as the Appeal is concerned. Hence I am inclined to believe the Applicants contention that the Appellant actually went to sleep and has now been woken up by the present Application. Indeed the Applicant has shown that he is vigilant and wants the litigation to come to an end since justice delayed is justice denied. However, the Appellant has not indicated that he is desirous in prosecuting the Appeal and should be given a chance to ventilate its grievances. It is noted that the entire decretal sums herein had been ordered to be deposited into court vide this court's ruling dated 29/04/2013 and if the same was complied with, I find the Appellant stands to suffer great prejudice if the Appeal herein is dismissed. As for the Respondent/Applicant, the decretal sums are already safely secured and could be accessed without so much of a hustle once the Appeal gets out of the way. The Court's role is now to order the Appellant to fast-track the appeal by setting it down for directions and hearing expeditiously.

6. In the result I decline to grant the Application but give the Appellant forty five (45) days within which to ensure that the Appeal is listed for directions and hearing. The costs hereof shall be to the Applicant/Respondent.

It is so ordered.

Dated, signed and delivered at **MACHAKOS** this **27TH** day of **JULY** 2017.

D. K. KEMEI

JUDGE

In the presence of:

Nthiwa for Mulekyo for Respondent

Kalua for Chege for Appellant

C/A: Kituva