



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 18 OF 2015**

*(Being an appeal from Judgment of the Chief Magistrate's Court at Naivasha Civil Case No. 370 of 2013, E. Kimilu - SRM)*

**NDATHI MWANGI.....1<sup>ST</sup> APPELLANT/RESPONDENT**

**DAVID KILO.....2<sup>ND</sup> APPELLANT/RESPONDENT**

**JOSHUA MWAURA.....3<sup>RD</sup> APPELLANT/RESPONDENT**

**-VERSUS-**

**BENSON LUMUMBA NDIVO.....APPLICANT/RESPONDENT**

**R U L I N G**

1. The memorandum of appeal herein was filed on 17<sup>th</sup> February 2015. On 26<sup>th</sup> January 2017 the Respondent filed the Notice of Motion the subject of this ruling, seeking the dismissal of the appeal. The Respondent states that no step has been taken by the Appellants in prosecuting the appeal since filing.
2. In response, the Appellants swore an affidavit stating that their request for typed proceedings has not been acted upon and that, at any rate, the delay is not inordinate; that the decretal sum having been deposited, the Appellants will suffer hardship if the appeal is 'struck' out.
3. In written submissions, the Respondent/Applicant makes the point that there is no evidence that the Appellants ever applied for or paid for the lower court proceedings and the only recourse left to him is to seek the dismissal of the dormant appeal.
4. For their part, the Appellants made lengthy submissions, the bulk of which is anchored on legal technicalities. The gist thereof is based on the provisions of Section 79B of the Civil Procedure Act and Order 42 Rule 35 of the Civil Procedure Rules. It is the Appellants' contention that based on the provisions, the application is premature as no directions have been given on the appeal.
5. They further contend, obviously in error, that the Motion is brought under Order 50 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act which have no relevance to the matter. Several decisions of the High Court are cited by the Appellants.
6. I have considered all the material canvassed in this instance. There can be no dispute, as regards the import of the provisions of Order 42 Rule 35 (1) of the Civil Procedure Rules or Section 79B of the Civil Procedure Act. I therefore fully associate myself with the collective wisdom of the learned Judges as contained in the decisions cited by the Appellants.

7. In this case the Appellants have tendered no evidence whatsoever that that the delay to prosecute the appeal has been occasioned by the lower court's failure to supply proceedings. Not a single communication to the registry concerned has been attached to the affidavit of the Appellants.

8. In my own view, there is a lacuna in the law that needs to be addressed so as to enable a Respondent to move the court to strike out or apply for the dismissal of an appeal where the Appellant has filed a memorandum of appeal and gone to sleep. Indeed, I consider it mischievous that a party guilty of unexplained delay such as the Appellants herein could hide behind the gap in the law to continue holding the court and adverse party at ransom.

9. This court agrees entirely with the approach taken by **Aburili J.** in similar circumstances in the case of **Allan Otieno Otsula -Vs- Gurdev Engineering & Construction Ltd [2015] eKLR**. The overriding objective, as the learned judge demonstrated in her ruling, exists for exigencies of this nature. The principle as captured in Section 1A of the Civil Procedure Act is that:-

**“(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.**

**(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).**

**(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.”**

Section 1B of the Civil Procedure Act imposes a duty on the court to further the overriding objective in its handling of disputes.

10. It is obvious in this case that the Appellants have not acted in compliance with the overriding objective and are using the provisions of Order 42 Rule 35 of the Civil Procedure Rules and Section 79B of the Civil Procedure Act as a sword. That is unacceptable.

11. In the case of **Nicholas Kiptoo Arap Korir Salat -Vs- Independent Electoral and Boundaries Commission & Others [2013] eKLR** the Court of Appeal in discussing the application of the overriding objective principle had this to say

**“Abok James Odera t/a A.J. Odera & Associates V. John Patrick Machira t/a Machira & Co. Advocates, Civil Appeal No. 161 of 1999 was an appeal raising, inter alia, the question whether a record of appeal not containing Memorandum of Appeal, as required by Rule 82 (1) (a) of the Court of Appeal Rules, was competent. In answer to this, the Court (Githinji, Nambuye & Koome, JJ.A) in one of the most comprehensive review of case law on the application of the overriding objective principle stated the law in this area as it is today. Because of its importance and relevance to the application before us, I will reproduce it in extenso as follows:-**

**The complaint on lack of inclusion of the memorandum of appeal as a primary document in the record of appeal is genuine. We also wish to confirm that the defects noted in the notice of appeal on which this appeal is premised, were not cured as advised by this court in its rulings of 20<sup>th</sup> April, 2000 and 24<sup>th</sup> May, 2002.**

**The question we have to ask ourselves is whether we can take refuge under the oxygen rule enshrined in section 3A and 3B of the Appellate Jurisdiction Act (Supra) which underpins the overriding objective principle introduced in the appellate jurisdiction in 2009, long after the appeal subject of this Judgment had been filed in order to breathe life into an otherwise incurably defective appeal as per the contention of the respondent.**

**On the applicability of the overriding objective principle in the appellate jurisdiction, we wish to draw guidance from case law. The principle confers on the courts considerable latitude in the exercise of its discretion in the interpretation of the law and rules made thereunder. (See the case of City Chemist (NB1) Mohamed Kasabuli suing for and on behalf of the Estate of Halima Wamukoya Kasabuli versus Orient Commercial Bank Limited Civil Application No. Nai 302 of 2008 (UR.199/2008); The aim of the overriding objective principle is to enable the Court achieve fair, just, speedy, proportionate, time and cost saving disposal of cases before it. (See the case of Kariuki Network Limited & Another versus Daly & Figgis Advocates Civil Application No. Nai 293 of 2009); that the application of the overriding objective principle does not operate to uproot established principles and procedures but to embolden the court to be guided by a broad sense of justice and fairness (See the case of Kariuki (Supra); that in applying or interpreting the law or rules made thereunder, the Court is under a duty to ensure that the application or interpretation being given to any rule will facilitate the just, expeditious, proportionate and affordable resolution of appeals (See the case of Deepak Manlal Kamani and another versus Kenya Anti-Corruption and 3 others Civil Application No. 152 of 2009); that there is a mandatory requirement that the Court of Appeal rules of procedure should also be construed in a manner which facilitates the just, expeditious, proportionate or affordable resolution of appeals. (See the case of Dorcas Indombi Wasike versus Benson Wamalwa Eldoret Civil Application No. 87 of 2004); that the overriding objective principle is intended to re-energize the process of the court, encourage good management of cases and appeals, and ensure that interpretation of any of the provisions of the Act and the rules made there under are 2” compliant (see the case of Hunter Trading Company Limited versus ELF Oil Kenya Limited, Civil Application No. Nai 6 of 2010 (UR3 (2010); that the principal aim of the overriding objective principle is to give the court greater latitude to overcome any past technicalities which might hinder the attainment of the overriding objective (See the case of Caltex Oil Limited versus Evanson Wanjihia Civil Application No. Nai 190 of 2009 (UR). And, lastly, that the “O2” principle does not cover situations aimed at subverting the expeditious disposal of cases or appeals, mistakes or lapses of counsel, or negligent acts, or dilatory tactics or acts constituting abuse of the court process (See the case of Kenya Commercial Bank vs. Kenya Planters Co-operative Union Nai Civil Application No.85 of 2010 (UR) 62 of 2010. (emphasis added)**

12. It is true that the issue before the Court of Appeal related to a pure technicality regarding the compliance with form of the appeal before it. The court’s discussion on the overriding objective principle however is no less applicable in this case. Its relevance becomes pronounced when it is considered that the Appellants have confined their response to the Respondent’s Motion by faulting the provisions of law invoked by the Respondents while giving scant attention to explaining why they have left their appeal to lie dormant for two years.

13. In the circumstances of this case, my view is that the Appellants’ overreliance on the evident inadequacy of legal provisions to curb their delay is cynical and in total disregard of the intended purpose of the overriding objective principle. Equally the Appellants seem to pay scant attention to the court’s inherent jurisdiction under Section 3A of the Civil Procedure Act which provides that:-

**“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”**

14. In order to give meaning to the overriding principle this court is not hamstrung and where circumstances so demand, can invoke its jurisdiction under Section 3A of the Civil Procedure Act. I am satisfied that this matter calls for such invocation. Therefore, while declining the application herein, this court directs that the Appellants take the steps necessary to have their appeal set down for hearing within 45 days of today’s date, failing which it will stand dismissed. The costs of the application are in any event awarded to the Respondent.

Delivered and signed at Naivasha on this 17<sup>th</sup> day of October, 2017.

In the presence of:-

No appearance for the Appellants

Mr. Waigwa Ngunjiri for the Respondent

C/C – Barasa

**C. MEOLI**

**JUDGE**