



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 106 OF 2015

JOSEPH M. NGANGA.....1ST RESPONDENT

JOSEPHINE MUCHINA.....2ND RESPONDENT

SIMON CHEGE.....3RD RESPONDENT

VERSUS

LAWRENCE MURIUNGI GICHUNGE.....APPLICANT

RULING

1. The application dated 2nd February, 2017 seeks orders that the appeal herein be dismissed for want of prosecution
2. The application is based on the grounds stated therein. It is averred in the supporting affidavit that the Memorandum of Appeal was filed on 16th March, 2015 yet Section 79 Civil Procedure Act is yet to be complied with. It is further stated that no steps have been taken to prosecute the appeal.
3. In the replying affidavit filed in opposition to the application, it is stated that the application is premature as no directions have been given in accordance with Order 42 rule 13 Civil Procedure Rules. It is further deposed that the Respondents had to dispose of the application filed in **HC Misc. appl. Nbi. No. 45 of 2015 Joseph M Ng'ang'a & 2 others v Lawrence Muriungi Gichunge** which sought orders to file the appeal herein out of time and orders for stay of execution. That the said application was disposed of by the consent of the parties on condition that *inter alia*, the Applicant herein was paid the sum of Ksh.3,000,000/=. That despite the payment of the Ksh.3,000,000/= the Respondents' motor vehicle was attached which lead to the filing of an application for contempt of court proceedings. The Respondents' view is that it would serve the interests of justice to have said contempt of court application heard first.
4. The application was canvassed by way of written submissions which I have considered.
5. Appeals to the High Court are governed by Order 42 of the Civil Procedure Rules. Order 42 rule 35 provides as follows in regard to dismissal of Appeals for want of prosecution:

“35. (1) Unless within three months after the giving of directions under rule 13 the appeal shall have been set down for hearing by the appellant, the respondent shall be at liberty either to set down the appeal for hearing or to apply by summons for its dismissal for want of

prosecution.

(2) If, within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal. “

6. The principles governing 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. 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.”

7. No directions have been given under Section 79B Civil Procedure Act. However, this court in its exercise of discretion can dismiss an appeal that is an abuse of the process of the court even in the absence of such directions. In the case at hand, I am persuaded that the pending application is HC Misc. Appl. No. 45 of 2015 may have stood in the way of the expeditious disposal of this appeal.

8. With the foregoing, I dismiss the application on condition that the appeal is fixed for directions within 60 days from the date hereof. In the meantime the appeal to be placed before a judge in chambers for compliance with Section 79B Civil Procedure Act. Costs in cause.

Date, signed and delivered at Nairobi this 18th day of Dec., 2017

B. THURANIRA JADEN

JUDGE